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

BRIEF OF AUTHORITIES OF CERTAIN FORMER DIRECTORS OF SEARS CANADA INC. (Returnable on December 3, 2018)

November 27, 2018

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Lawyers for Certain Former Directors of Sears Canada Inc.

TO: **SERVICE LIST**

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Tab 1

2012 ONSC 6275
Ontario Superior Court of Justice [Commercial List]

Sino-Forest Corp., Re

2012 CarswellOnt 14102, 2012 ONSC 6275, 223 A.C.W.S. (3d) 309

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

In the Matter of a Plan of Compromise or Arrangement of Sino-Forest Corporation, Applicant

Morawetz J.

Heard: October 28, 2012
Judgment: November 6, 2012
Docket: CV-12-9667-00CL

Counsel: Robert Staley, Derek Bell, for Sino-Forest Corporation
Peter Griffin, Shara Roy, for Ernst & Young Inc.
Brendan O'Neill, for Ad Hoc Committee of Noteholders
Derrick Tay, Jennifer Stam, for Monitor, FTI Consulting Canada Inc.
David Bish, John Fabello, Stephanie Lafrance, for Underwriters
Edward A. Sellers, for Board of Directors of Sino-Forest Corporation
Kenneth Rosenberg, Dimitri Lascaris, Massimo Starnino, for Ad Hoc Committee of Purchasers of the Applicant's Securities
Kenneth Dekker, for BDO Limited
John Pirie, David Gadsden, for Poyry (Beijing)
James Grout, for Ontario Securities Commission
Simon Bieber, Aaron Pleet, for David Horsley
Emily Cole, Joseph Marin, for Allen Chan

Subject: Insolvency; Corporate and Commercial; Securities

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Lifting of stay

Class actions were brought against company and certain of its officers and directors, auditors and underwriters for alleged misrepresentations — Initial order stayed actions — Purchasers of company's securities including representative plaintiffs in Ontario class action brought motion to exempt auditors, underwriters, and three former directors from stay — Motion dismissed — There was little prejudice to class action plaintiffs if stay were maintained for short period of time — Upcoming appeal of interlocutory judgment could result in clarifying proceedings — Balance of convenience favoured extending stay so that auditors and underwriters could focus on issues arising from appeal and upcoming meeting of creditors to consider plan of arrangement — It was appropriate to extend stay with respect to directors so that action could ultimately proceed in more orderly fashion.

Table of Authorities

Cases considered by *Morawetz J.*:

Canwest Global Communications Corp., Re (2011), 2011 ONSC 2215, 2011 CarswellOnt 2392, 75 C.B.R. (5th) 156 (Ont. S.C.J. [Commercial List]) — referred to

Sino-Forest Corp., Re (2012), 2012 ONSC 4377, 2012 CarswellOnt 9430, 92 C.B.R. (5th) 99 (Ont. S.C.J. [Commercial List]) — referred to

Timminco Ltd., Re (2012), 2012 ONSC 2515, 2012 CarswellOnt 5390 (Ont. S.C.J. [Commercial List]) — followed

Statutes considered:

Class Proceedings Act, 1992, S.O. 1992, c. 6

Generally — referred to

Code de procédure civile, L.R.Q., c. C-25

en général — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

s. 2(1) "equity claims" — considered

Securities Act, R.S.O. 1990, c. S.5

Pt. XXIII.1 [en. 2002, c. 22, s. 185] — referred to

s. 138.3 [en. 2002, c. 22, s. 185] — referred to

Valeurs mobilières, Loi sur les, L.R.Q., c. V-1.1

en général — referred to

art. 225.4 [ad. 2007, c. 15, art. 11] — referred to

MOTION by certain creditors for order limiting stay of proceedings imposed by initial order made under *Companies' Creditors Arrangement Act*.

***Morawetz J.*:**

1 This motion was brought by the Ad Hoc Committee of Purchasers of the Applicant's Securities, including the Representative Plaintiffs in the Ontario Class Action (the "Class Action Plaintiffs") for an order limiting the scope of the stay of proceedings (the "Stay") imposed by the Initial Order dated March 30, 2012 and extended from time to time (the "Initial Order"), such that the Stay should not apply to Ernst & Young LLP, BDO Limited, the underwriters, and former directors Messrs. Allen T. Y. Chan, David Horsley and Kai Kit Poon, with respect to the following motions or petitions (the "Class Action Motions"):

(a) a motion certifying the action styled *Trustees of the Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation et al (Toronto)*, Court File No. CV-11-431153-00CP (the "Ontario Class Action") as a class proceeding under the *Class Proceedings Act, 1992* S.O. 1992, C. 6 ("CPA") (the "Ontario Certification Motion");

(b) a petition for authorization to commence a class proceeding (the "Quebec Class Action" and, together with the Ontario Class Action, the "Class Actions") under the *Quebec Code of Civil Procedure*, R.S.Q. C. c-25;

(c) a motion for leave to proceed with statutory secondary market claims in the Ontario Class Action pursuant to s. 138.3 of the *Securities Act*, R.S.O. 1990, C.S.5;

(d) a motion for leave to proceed with the statutory secondary market claims in the Quebec Class Action pursuant to Article 225.4 of the *Securities Act*, R.S.Q. C.V-1-1, to be filed; and

(e) a motion for leave to add CONDEX Wattco Inc. as a plaintiff in the Quebec Class Action and with Ilan Toledano as its representative, to be filed, and a motion to amend the pleading in the Quebec Class Action to plead the *Securities Act*, R.S.Q. C.V-1-1 and add BDO Limited as a party.

2 The original motion sought wider relief. In its restructured form, the motion was not opposed by the Applicant.

3 The relief was, however, opposed by Ernst & Young, BDO, the Underwriters and the three former directors.

4 Broadly speaking, the Class Actions allege that Sino-Forest, certain of its officers and directors, its auditors and its underwriters made material misrepresentations regarding the operations and assets of Sino-Forest. The claims seeks $9.18 billion in damages.

5 Sino-Forest obtained protection from its creditors pursuant to the Initial Order on March 30, 2012. The Class Actions have been stayed since that time.

6 A Sales Process was undertaken by the Applicant following the Initial Order but it failed to attract any significant interest.

7 Following the unsuccessful Sales Process, the Applicant and the Monitor, in cooperation with the Ad Hoc Committee of Noteholders, engaged in developing a Plan of Arrangement (the "Plan").

8 The Applicant intends to call a meeting of creditors to consider the Plan.

9 During the development of the Plan, the Applicant brought a motion to determine the status of certain claims against it, including the claims of the shareholder plaintiffs in the Ontario Class Action and the claims of the third party defendants based on indemnities arising as a result of these shareholder claims.

10 On July 27, 2012 [2012 CarswellOnt 9430 (Ont. S.C.J. [Commercial List])], I rendered a decision finding that, among other things, the shareholder claims and indemnity claims were "equity claims" as defined in section 2 of the CCAA (the "Equity Claims Decision").

11 The third party defendants have since obtained leave to appeal the Equity Claims Decision to the Court of Appeal for Ontario, which appeal I understand is scheduled to be heard in mid-November 2012.

12 The parties to the Ontario Class Action have entered into a tolling agreement in respect of the limitation period in Part XXIII.1 of the *Securities Act (Ontario)*, which suspends the operation of those limitation periods until February 28, 2013.

13 I can well understand the basis of the motion. The Class Action Plaintiffs want the Class Actions to move forward. I have no doubt that, failing resolution, the Class Actions will have to proceed. The only issue is when should the Class Actions proceed.

14 However, at this point in time, the auditors and the underwriters are active participants in the upcoming appeal of the Equity Claims Decision. It is conceivable that the decision of the Court of Appeal for Ontario will have an impact on the auditors and underwriters with respect to the upcoming meeting of creditors to consider the Plan and any potential motion to sanction the Plan.

15 It seems to me that the auditors and underwriters, in the short term, should focus their attention on the appeal and the upcoming meeting. It could very well be that, within a short period of time, the situation affecting the auditors and the underwriters will be clarified such that these groups will be in a position to focus their attention on the Class Actions.

16 As I stated in *Timminco Ltd., Re*, 2012 ONSC 2515 (Ont. S.C.J. [Commercial List]) at [17]: Courts will consider a number of factors in assessing whether it is appropriate to lift a stay, but these factors can generally be grouped under three headings: (a) the relative prejudice to parties; (b) the balance of convenience; and (c) where relevant, the merits (*i.e.* if the matter has little chance, there may not be sound reasons for lifting the stay). See *Canwest Global Communications Corp., Re*, [2011] O.J. No. 1590 (Ont. S.C.J. [Commercial List]).

17 In the circumstances of this case, I see little prejudice to the Class Action Plaintiffs if the stay were to be maintained for a short period of time which could result in clarity being brought to the proceedings. Although there is a concern that memories of key witnesses will fade with the passage of time, I have not been persuaded that maintaining the stay for a short period of time will be detrimental to the Class Action Plaintiffs on that account.

18 On the issue of the limitation period, clearly this is an issue that has to be kept in mind, but maintaining the stay for a short period of time would not appear to negatively impact the Class Action Plaintiffs.

19 On the other hand, the concerns raised by counsel on behalf of the auditors and the underwriters have persuaded me that, the balance of convenience favours these parties, and at this time, they need to focus on issues arising out of the appeal of the Equity Claims Decision as well to focus on the Plan itself.

20 Accordingly, it seems to me that, having taken into account the relative prejudice to the parties and the balance of convenience, it is reasonable and appropriate to maintain the stay at this time, on the basis that the issue can and should be re-evaluated shortly after the scheduled meeting of creditors to consider the Plan, but in any event, no later than December 10, 2012.

21 Further, although the appeal of the Equity Claims Decision and the upcoming meeting of creditors and possible sanction hearing does not have any direct impact on the three former directors, I am of the view that it is appropriate to also maintain the stay with respect to these individuals so that the Class Actions can ultimately proceed in a more organized fashion.

22 On a secondary issue, the Class Action Plaintiffs requested, if necessary, leave to amend the pleading in the Quebec Class Action to plead the Securities Act, R.S.Q. C.V.-1-1 to add BDO Limited as a party.

23 This relief was opposed by the auditors on the basis that the Quebec Class Action plaintiffs ignored the Stay as they were never given leave to seek to add parties to any class proceedings - especially without notice.

24 The Quebec Class Action plaintiffs countered with the submission that there was no intent to violate the Stay, but rather, there was a degree of confusion arising as a result of different procedures in the Quebec proceedings.

25 In keeping with the direction of the main aspect of this endorsement, it is my view that this secondary issue can be considered at the time that the main issue is being revisited in early December. However, the parties should be mindful of the comments I made at [13] above, to the effect that failing resolution, the Class Actions will have to proceed. The only issue is when.

26 In the result, the motion is dismissed, without prejudice to the right of the Class Action Plaintiffs to renew their request in accordance with the terms of this endorsement.

Motion dismissed.

End of Document

Tab 2

2010 ONSC 3530
Ontario Superior Court of Justice [Commercial List]

Canwest Global Communications Corp., Re

2010 CarswellOnt 5225, 2010 ONSC 3530, 191 A.C.W.S. (3d) 69, 85 C.C.P.B. 127

IN THE MATTER OF SECTION 11 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 CANWEST GLOBAL COMMUNICATIONS CORP. AND OTHER APPLICANTS

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST PUBLISHING INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS INC. AND CANWEST CANADA INC.

Pepall J.

Judgment: July 19, 2010
Docket: CV-09-8396-00CL, CV-10-8533-00CL

Counsel: Lyndon Barnes, Alex Cobb, T. Klinck for Applicant, CMI Entities and LP Entities
D.V. MacDonald for Administrative Agent of Senior Secured Lenders Syndicate
L. Willis for Ad Hoc Committee of CMI Entities Senior Subordinated Noteholders
Maria Konyukhova for Monitor, FTI Consulting Canada Inc.
J. Moher for CIBC Asset-Based Lending Inc.
H. Daley for Gluskin Sheff & Associates

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

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Proceedings subject to stay — Contractual rights

Media and publishing companies ("companies") established trust funds for pension plans — Companies appointed plan custodian but remained responsible for funding, overseeing, administering, and investing plans as plans' sponsors and administrators — GS Inc. was companies' investment counsel and portfolio manager on behalf of pension funds and entitled to certain fees under agreement ("IMA") — On October 6, 2009, companies obtained Companies' Creditors Arrangement Act ("CCAA") Claims Procedure Order — In December 2009, companies terminated GS Inc., alleging it was violating IMA by, among other things, mixing securities — Companies refused to pay fees and sought return of other fees — On January 8, 2010, companies obtained CCAA stay order — On January 20, 2010, GS Inc. brought action ("action") for payment for services rendered pursuant to IMA or for damages on quantum meruit basis against companies in their capacities as administrators of pension plans — In June 2010, GS Inc. brought motion for declaration that stays of proceedings in orders did not apply to action or for leave to lift stays — Motion dismissed — Stays applied to action — Stay provisions were extremely broad and were to be interpreted broadly to give debtors best possible chance of successfully restructuring while ensuring fair treatment of creditors — While capacity might be factor to consider when faced with request to lift stay, it would undermine objective of stay if one could dissect various capacities in which debtor company served — Even if one dissected companies' capacities, companies were not pension fund trustees but administrators responsible for investing and overseeing fund investments, including ability to engage investment advisors in discharge of responsibilities — Circumstances were similar to those in Federal Court of Appeal tax case where company was entitled to claim tax credits in respect of GST relating to fees paid to investment managers of assets of pension plans, in spite of fact that company entered into agreement in capacity as administrator of pension plans —

Here, custodian was trustee who held legal title to fund assets — Companies were liable for payment, not plan trusts — Companies approved payments and authorized custodian to pay, and custodian had no responsibility under IMA — Action was against or in respect of companies and affected their business, important aspect of which was administering plans — IMA did not provide for GS Inc.'s payment from fund or trustee, GS Inc. had no security interest over fund, and account had been collapsed — Even if GS Inc. could execute against defined benefit plans, companies remained responsible for deficiencies, so action might affect property.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Lifting of stay

Media and publishing companies ("companies") established trust funds for pension plans — Companies appointed plan custodian but remained responsible for funding, overseeing, administering, and investing plans as plans' sponsors and administrators — GS Inc. was companies' investment counsel and portfolio manager on behalf of pension funds and entitled to certain fees under agreement ("IMA") — On October 6, 2009, companies obtained Companies' Creditors Arrangement Act ("CCAA") Claims Procedure Order — In December 2009, companies terminated GS Inc., alleging it was violating IMA by, among other things, mixing securities — Companies refused to pay fees and sought return of other fees — On January 8, 2010, companies obtained CCAA stay order — On January 20, 2010, GS Inc. brought action ("action") for payment for services rendered pursuant to IMA or for damages on quantum meruit basis against companies in their capacities as administrators of pension plans — In June 2010, GS Inc. brought motion for declaration that stays of proceedings in orders did not apply to its action — It was determined that stays applied to action — Issue arose as to whether stay should be lifted — Stay was not to be lifted other than in relation to pre-filing performance and management fees which were debt claim for less than $30,000 — There was no statutory test governing lifting of stay — Stay provisions were discretionary and were to be applied so as to support CCAA's legislative purpose — None of situations enumerated in prevailing authorities or legal texts was present here, and balance of convenience, relative prejudice to parties, and merits of action did not favour GS Inc.'s position — Not only would objectives of CCAA not be met by lifting stay, converse was true — Allowing action to proceed would be prejudicial to restructuring and unfair to others — GS Inc. elected to commence action in face of stays and opted not to file proof of claim in either CCAA proceeding — GS Inc.'s actions were type of manoeuvring CCAA was designed to avoid — Purpose of claims procedures was to elicit and deal with claims against companies so businesses could emerge unencumbered by prior claims — It was unfair to other creditors who submitted claims which were now subject to compromise, to permit action to proceed — Claim did not specify from whom damages were sought — Action would be time consuming and distracting — It had not been established that companies did not act in good faith or with due diligence — Finally, Monitor was opposed to lifting of stay.

Pensions --- Administration of pension plans — Administrators, trustees and custodians — Fiduciary duties — Liabilities for breach

Media and publishing companies ("companies") established trust funds for pension plans — Companies appointed plan custodian but remained responsible for funding, overseeing, administering, and investing plans as plans' sponsors and administrators — GS Inc. was companies' investment counsel and portfolio manager on behalf of pension funds and entitled to certain fees under agreement ("IMA") — On October 6, 2009, companies obtained Companies' Creditors Arrangement Act ("CCAA") Claims Procedure Order — In December 2009, companies terminated GS Inc., alleging it was violating IMA by, among other things, mixing securities — Companies refused to pay fees and sought return of other fees — On January 8, 2010, companies obtained CCAA stay order — On January 20, 2010, GS Inc. brought action ("action") for payment for services rendered pursuant to IMA or for damages on quantum meruit basis against companies in their capacities as administrators of pension plans — In June 2010, GS Inc. brought motion for declaration that stays of proceedings in orders did not apply to action or for leave to lift stays — Motion dismissed — Stays applied to action — Stay provisions were extremely broad and were to be interpreted broadly to give debtors best possible chance of successfully restructuring while ensuring fair treatment of creditors — While capacity might be factor to consider when faced with request to lift stay, it would undermine objective of stay if one could dissect various capacities in which debtor company served — Even if one dissected companies' capacities, companies were not pension fund trustees but administrators responsible for investing and overseeing fund investments, including ability to engage investment advisors in discharge of responsibilities — Circumstances were similar to those in Federal Court of Appeal tax case where company was entitled to claim tax credits in respect of GST relating to fees paid to investment managers of assets of pension plans, in spite of fact that company entered into agreement in capacity as administrator of pension plans — Here, custodian was trustee who held legal title to fund assets — Companies were liable for payment, not plan trusts — Companies approved payments and authorized custodian to pay, and custodian had no responsibility under IMA — Action was against or in respect of companies and affected their business, important aspect of which was administering plans — IMA did not provide for GS Inc.'s payment from fund or trustee, GS Inc. had no security interest over fund, and account had been collapsed — Even if GS Inc. could execute against defined benefit plans, companies remained responsible for deficiencies, so action might affect property.

Table of Authorities

Cases considered by *Pepall J.*:

Canadian Airlines Corp., Re (2000), 19 C.B.R. (4th) 1, 2000 CarswellAlta 622 (Alta. Q.B.) — referred to

Canwest Global Communications Corp., Re (2009), 2009 CarswellOnt 7882 (Ont. S.C.J. [Commercial List]) — followed

General Motors of Canada Ltd. v. R. (2008), 2008 TCC 117, 67 C.C.P.B. 290, [2008] G.S.T.C. 41, 2008 G.T.C. 256 (Eng.), 2008 CarswellNat 3153, 2008 CCI 117, 2008 CarswellNat 454 (T.C.C. [General Procedure]) — referred to

General Motors of Canada Ltd. v. R. (2009), 2009 CarswellNat 880, 2009 FCA 114, (sub nom. *R. v. General Motors of Canada Limited*) 2009 G.T.C. 2071 (Eng.), 74 C.C.P.B. 1, 2009 CarswellNat 3282, (sub nom. *Minister of National Revenue v. General Motors of Canada Ltd.*) 391 N.R. 184, 2009 CAF 114, [2009] G.S.T.C. 64 (F.C.A.) — considered

ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd. (2007), 2007 SKCA 72, 2007 CarswellSask 324, [2007] 9 W.W.R. 79, (sub nom. *Bricore Land Group Ltd., Re*) 299 Sask. R. 194, (sub nom. *Bricore Land Group Ltd., Re*) 408 W.A.C. 194, 33 C.B.R. (5th) 50 (Sask. C.A.) — referred to

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — considered

Morneau Sobeco Ltd. Partnership v. Aon Consulting Inc. (2008), 2008 CarswellOnt 1427, (sub nom. *Morneau Sobeco Ltd. Partnership v. AON Consulting Inc.*) 237 O.A.C. 267, 65 C.C.L.I. (4th) 159, 2008 ONCA 196, 40 C.B.R. (5th) 172, 65 C.C.P.B. 293, (sub nom. *Slater Steel Inc. (Re)*) 2008 C.E.B. & P.G.R. 8285, 291 D.L.R. (4th) 314 (Ont. C.A.) — distinguished

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 11.2 [en. 1997, c. 12, s. 124] — considered

Pension Benefits Act, R.S.O. 1990, c. P.8

s. 22(2) — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 9.01(1) — considered

MOTION by creditor for declaration that stays of proceedings in Companies' Creditors Arrangement Act orders did not apply to its action or for leave to lift stays.

***Pepall J.*:**

Introduction

1 On October 6, 2009 and January 8, 2010, initial Companies' Creditors Arrangement Act [1] orders were granted to the CMI Entities including Canwest Media Inc. ("CMI") and the LP Entities including Canwest Publishing Inc. ("CPI") (the "Applicants") respectively. The CMI Entities, which hold interests in television stations and channels, and the LP Entities, which hold interests in newspaper publishing and digital and online media operations, are being restructured separately. As a result of the initial CCAA orders, the Applicants are protected by broad stays of proceedings which preclude the taking or maintaining of proceedings against or in respect of them or affecting their business or property.

Notice of the orders was widely disseminated. In spite of the stays, on January 20, 2010, Gluskin Sheff and Associates Inc. ("GSA"), an investment management firm, issued a statement of claim for payment for services rendered pursuant to an Investment Management Agreement ("IMA") or for damages on a quantum meruit basis against CMI and CPI in their capacities as administrators of certain registered pension plans.

2 By notice of motion dated April 20, 2010 and made returnable June 16, 2010, GSA seeks a declaration that the stays of proceedings in my October 6, 2009 and January 8, 2010 initial orders do not apply to its action. Alternatively, it asks for leave to lift the stays.

Facts

(a) The Pension Plans

3 Canwest Media Works Inc., now known as CMI, and Canwest Media Works Publications Inc., now known as CPI, (the "Canwest Parties") are the sponsors and administrators of numerous defined benefit and defined contribution pension plans. In accordance with applicable pension benefit standards legislation, a pension trust fund was established for each pension plan.

4 As administrator, the relevant CMI or CPI Entity is required to oversee all pension plan and fund administration matters. The administrator is responsible for investing the assets of the pension fund in a reasonable and prudent manner and in the manner prescribed by the applicable statute and regulations.

5 The Canwest Parties appointed RBC Dexia Investor Services Trust (the "Custodian") as the custodian of each pension fund. The Canwest Parties and the Custodian entered into a Master Trust Agreement dated August 10, 2007 to establish a trust for the purposes of co-mingling a portion of the assets of all of the plans under a consolidated investment structure. That Agreement provides that the Custodian holds title to all assets comprising the Master Trust fund but does so only in accordance with the instructions of CMI or CPI or investment managers appointed by them. Compensation of the Custodian constituted a charge upon the Master Trust Fund and was to be paid out of the Fund unless paid by the Canwest Parties.

6 As sponsor, the Applicants are responsible for funding the various plans in accordance with their terms and the relevant legislation. Fifteen of the seventeen plans in issue are defined benefit plans. The sponsor is ultimately responsible for ensuring that the defined benefit plans are fully funded.

(b) The Investment Management Agreement

7 In March, 2006, GSA entered into the Investment Management Agreement ("IMA") with Canwest Media Works Inc. "on behalf of certain pension funds listed in schedule I" and Canwest Mediaworks Publications Inc. "on behalf of certain pension funds listed in schedule II." Both companies are referred to as the Corporations and are described in the IMA as administrators of the registered pension plans listed on the aforesaid schedules. The Investment Management Agreement states that:

- The Corporations are retaining GSA to serve as investment counsel and portfolio manager in respect of the management of a portion of the plans' assets.

- The Corporations appoint GSA as investment counsel and portfolio manager for the CanWest Income Trust Account. The Account consisted of the assets of the Plans which were credited to the Account from time to time, the securities in which such assets were invested and all dividends, interest and other income earned thereon and the proceeds of disposition thereof. The Account was registered in the name of CanWest Pension Pooled Fund.

- Certain individuals are authorized by the Corporations to provide GSA with instructions.

- On seven days' notice, the Corporations may withdraw cash or other assets from the Account, subject to any fees owing to GSA in respect of the Account.

- The Corporations have executed an Agreement with RBC Dexia Investor Service Trust ("the Custodian"). The assets of the Account are held by the Custodian. The Corporations shall instruct the Custodian to accept instructions from GSA in relation to the investment of the Account.

- GSA shall provide the Corporations with quarterly financial statements, written investment management reports and compliance reports for the Account.

- GSA shall manage and invest the assets of the Account in a diversified portfolio of *income trusts*. (Emphasis added.)

- Unless instructed otherwise by the Corporations, GSA has the right to vote in respect of any securities held in the Account.

- Management fees are calculated and paid monthly based upon the asset value of the Account net of fees. The management fee per annum is 0.5% of the assets held in the Account.

- All maintenance and operating fees charged by brokers, custodians, banks or trust companies shall be borne by the Account.

- GSA is also entitled to an annual performance fee. It is to be paid as soon as practicable following the end of the fiscal year of the Account which is June 30.[2] The fee is equal to 25% of the net appreciation of the assets in the Account in excess of a specified hurdle.

- The IMA may be terminated by either party on 30 days' written notice.

(c) Services Provided by GSA

8 Commencing in March, 2006, GSA provided investment services and continued to do so both before and after the October, 2009 CMI Entities initial order. Its last invoice was dated January 7, 2010. As such, no services were rendered after the LP Entities initial order. Although not specified in the IMA, GSA's fees were always paid from the Account.

9 From April 19, 2006 up to and including January 7, 2010, GSA invoiced "Canwest Media" on a quarterly basis for the monthly management fees. Invoices were not issued to the Custodian for payment directly from the Account. Similarly, invoices for the performance fee were not issued to the Custodian for payment directly from the Account. Rather, the relevant Canwest representative would direct the Custodian to pay the management fees and the performance fees out of the Account and also directed the proportionate share of the fee that was to be charged to each plan. In contrast, and as specifically authorized by the IMA, without any prior approval by the CMI or LP Entities, brokerage fees were paid directly from the Account as were maintenance and operating fees.

10 On October 31, 2006, the Federal Government announced its intention to introduce legislation that would make income trusts less attractive. The number of available income trust securities shrank and became highly concentrated in specific economic sectors. To manage risk, GSA began to include other income oriented securities in the Account. GSA maintains that the Canwest Parties were aware of the mix of securities and took no objection. The Canwest Parties disagree with the characterization of the communications that passed between the parties.

11 The IMA was with Canwest Mediaworks Inc., a predecessor company to CMI, and with Canwest Mediaworks Publications Inc., a predecessor company to CPI. GSA states that Canwest Mediaworks Inc. was not the entity named in the initial CCAA order (although not stated, presumably GSA is referring to the October, 2009 order) but does not identify when it learnt that the party named in the IMA had been succeeded by an Applicant in the CCAA proceeding. GSA states that it had not been advised of this corporate reorganization at the time.

(d) The Dispute Between the Parties

12 On July 7, 2009, GSA issued an invoice to "Canwest Media" for its performance fee of $740,247.41 and a quarterly management fee of $30,913.28 for the quarter ended June, 2009. GSA states that the Account's performance outperformed the benchmark and that the incremental benefit to the plans was $3.5 million. The Canwest Parties advised that a performance fee was not warranted as the performance assessment was based on a portfolio that did not correspond to the approved mandate found in the IMA and the IMA did not provide for non-income trust investments. The parties had further discussions.

13 On October 8, 2009, GSA issued an invoice for management fees of $33,276.15 for the quarter ended September 30, 2009.

14 The management fees portion of the July 7, 2009 invoice was paid on October 28, 2009. The Canwest Parties directed the Custodian to pay the fees out of the account and to charge a proportionate share of the fees to each plan. GSA was told that there were no issues with the management fees invoiced for the quarter ended September 30, 2009. GSA continued to render services.

15 In December, the Canwest Parties requested a withdrawal of certain of the funds in the Account. While GSA objected, the withdrawal occurred. On December 22, 2009, GSA received a cheque for the management fees invoiced for the period ended September 30, 2009, but it was countermanded and the Canwest Parties continued to complain of GSA's failure to comply with the terms of the IMA. Consistent with their advice of December 23, 2009, they also terminated GSA's appointment effective immediately. They refused to pay any additional performance or management fees and wanted reimbursement of the fees paid for the period the Account was not compliant with the IMA. The basis for their actions was that the IMA had been breached by purchasing securities that were not income trusts.

16 The Canwest Parties then instructed GSA to redeem all the assets in the Account which it did.

17 As mentioned, the initial order in the CMI Entities' CCAA proceedings was granted on October 6, 2009. On October 14, 2009, I granted a Claims Procedure Order. Pursuant to that order, the CMI Entities called for claims against the CMI Entities and proof of claim forms were given to CMI Entitities' known creditors. GSA was not given, nor did it request, a proof of claim package. The Canwest Parties did not consider GSA to be a known creditor because they did not consider that GSA had an outstanding claim against it. GSA did not submit a proof of claim before the claims bar date or at all. The same was true with respect to the LP Entities. There the Claims Procedure Order was granted on April 12, 2010, but no proof of claim was ever filed by GSA.

(e) The Action

18 After some further discussions, GSA issued a Statement of Claim for payment of $849,648.51 representing its performance and management fees or in the alternative, damages on a quantum meruit basis. Of this sum, $777,259.78 represents a performance fee for the performance year ended June 30, 2009; $34,939.97 is for management fees for the period July to September, 2009 and which were invoiced on October 8, 2009; and $37,448.76 is for management fees for the period October 1, 2009 to December 23, 2009.

19 In the Statement of Claim, GSA denies that adding non-income trust securities to the Account amounted to a breach of fiduciary duty or entitled the Canwest Parties to terminate the IMA other than on 30 days' notice. It states that the Canwest Parties were aware of the changes made to the Account and raised no objection. Furthermore, members of the pension plans benefited from the management of the Account. GSA states that the Canwest Parties have acted in bad faith trying to take advantage of an inconsequential discrepancy between the IMA and the intent of the parties.

20 GSA states that the action will not consume the Canwest Parties' attention and resources so as to hinder the restructuring. The events are mostly decided; the amount in issue is not material and would be paid by the plans; and the relationship was handled by one senior employee. Additionally, examinations for discovery are now time limited.

21 The Canwest Parties take a different view. They state that allowing the action to continue would be disruptive. The purpose of the claims procedure was to ensure to the fullest extent possible that all claims be established and resolved before CCAA emergence, not afterwards. Much progress has been made in this regard. It would be both time consuming and distracting to have to deal with the issues raised in the Statement of Claim post-emergence particularly as the two enterprises being restructured will have gone their separate ways and will sponsor their own pension plans. Having the GSA dispute resolved outside the claims procedure would be contrary to the overall objectives of the restructurings and would mean that the GSA claim would be evaluated and possibly remedied on an entirely different basis than the claims of other creditors. Allowing the GSA action to proceed would be both prejudicial to the restructurings and unfair to other creditors.

Issues

22 The issues to consider are whether the stays are applicable and if so, whether they should be lifted.

Positions of the Parties

23 GSA takes the position that the stay is inapplicable because it is not within the stay language of the orders and its action is not against the Canwest Parties but rather against certain pension plans and their members and the assets of those plans. This is in accordance with the IMA and consistent with the Canwest Parties' acknowledgement that they were acting as plan administrators. The Canwest Parties are named solely in a representative capacity as administrator of those plans and no damages are being sought from them. Rather, fees are claimed from the assets of the plans. Naming the Canwest Parties and not the beneficiaries of the plans is authorized by Rule 9.01(1) of the Rules of Civil Procedure. Plan administrators hold the plans' assets in trust for the benefit of plan members and not for their own account or benefit and are authorized by the applicable legislation to engage agents to invest the plans' assets and to pay the agents from the plans' assets. GSA particularly relies on the Court of Appeal decision in *Morneau Sobeco Ltd. Partnership v. Aon Consulting Inc.* [3] .

24 Alternatively, GSA asks that the stay be lifted. It submits that GSA is not a creditor within the CCAA proceedings and the action, if successful, will not impose any financial or other obligations on the Canwest Parties. By analogy, the circumstances are similar to insured claims where stays have been lifted as judgment would only be enforceable against insurance proceeds and not against the debtor's assets. There is no evidence or reasonable basis to suggest that permitting the action to proceed will impair the restructurings. Lastly, GSA notes that services were provided after the October, 2009 CMI Entities' initial order.

25 The Canwest Parties state that the IMA was a contract with the Canwest Parties who were the administrators of the plans and who were alone responsible for GSA's fees. GSA had no contractual right to require that its fees be paid out of the trust funds relating to the plans and it invoiced the Canwest Parties for them. The Canwest Parties particularly rely on *General Motors of Canada Ltd. v. R.* [4] in support of its position. As to GSA's alternative request, they state that GSA is a sophisticated investment manager that is now attempting to manoeuver a better outcome for itself than it would have had under the claims processes established in the CCAA proceedings. These restructurings are now at a very advanced stage and it would be unfair to creditors and prejudicial to the two restructurings to allow GSA to pursue the action in court when other similarly situated contractual counterparties have participated in the claims processes established by the court.

26 The Ad Hoc Committee and CIBC Asset-Based Lending Inc. support the position of the Canwest Parties. The Monitor takes no position on whether the stay applies but is opposed to any lifting of the stay.

Discussion

27 In my view, the stays apply to the action brought by GSA.

28 Firstly, the wording of the stay provisions in the two orders [5] is extremely broad and encompasses GSA's action. The CMI Entities' Initial Order states:

> [40] THIS COURT ORDERS that until and including November 5, 2009, or such later date as this Court may order (the "Stay Period"), no proceeding or enforcement process in any court or tribunal (each, a "Proceeding") shall be commenced or continued against or in respect of the CMI Entities, the Monitor or the CMI CRA or affecting the CMI Business or the CMI Property, except with the written consent of the applicable CMI Entity, the Monitor and the CMI CRA (in respect of Proceedings affecting the CMI Entities, the CMI Property or the CMI Business), the CMI CRA (in respect of Proceedings affecting the CMI CRA), or with leave of this Court, and any and all Proceedings currently under way against or in respect of the CMI Entities or the CMI CRA or affecting the CMI Business or the CMI Property are hereby stayed and suspended pending further Order of this Court. In the case of the CMI CRA, no Proceeding shall be commenced against the CMI CRA or its directors and officers without prior leave of this Court on seven (7) days notice to Stonecrest Capital Inc.

The LP Entities' Initial Order states:

> [41] THIS COURT ORDERS that until and including February 5, 2010, or such later date as this Court may order (the "Stay Period"), no proceeding or enforcement process in any court or tribunal (each, a "Proceeding") shall be commenced or continued against or in respect of the LP Entities, the Monitor or the LP CRA or affecting the LP Business or the LP Property, except with the written consent of the applicable LP Entity, the Monitor and the LP CRA (in respect of proceedings affecting the LP Entities, the LP Property or the LP Business), or with leave of this Court, and any and all Proceedings currently under way against or in respect of the LP Entities, the Monitor or the LP CRA or affecting the LP Business or the LP Property are hereby stayed and suspended pending further Order of this Court. In the case of the LP CRA, no Proceeding shall be commenced against the LP CRA or its directors and officers without prior leave of this Court on seven (7) days notice to CRS Inc.

29 An action is therefore captured by the stays if it is against or in respect of an Applicant or affects the Business or Property of an Applicant. The two orders define CMI and LP Business and Property broadly. In my view, GSA's action would fall into each of these four categories.

30 Secondly, a stay imposed in a CCAA proceeding is to be interpreted broadly and in accordance with the objective of providing debtors with the best possible chance of affecting a successful restructuring and ensuring that creditors are treated fairly. As noted by Farley J. in *Lehndorff General Partner Ltd., Re* [6], the power to grant a stay extends to affect not only creditors but to non-creditors and other parties who could potentially jeopardize the success of the plan and thereby the continuance of the company. As he also noted in that decision, a key purpose of the stay is to prevent manoeuvring for position among creditors. Furthermore, the possibility that a creditor or stakeholder might be prejudiced does not affect the court's exercise of authority to grant a stay as the prejudice is offset by the benefits of facilitating the reorganization. [7]

31 Thirdly, while capacity may be a factor to consider when faced with a request to lift a stay, it would undermine the objective of a stay if one could dissect the various capacities in which a debtor company serves. In this regard, Gillese J.A.'s comments in *Morneau Sobeco Ltd. Partnership v. Aon Consulting Inc.* were obiter and the case dealt with a release and not a stay of proceedings. The Canwest Parties are the defendants in the action and the statement of claim is replete with allegations against them including that they acted in bad faith. Part of the purpose of a stay is to enable the debtor company to devote its time and attention to restructuring not to responding to allegations in pleadings.

32 Fourthly, even if one does dissect the capacities of the Canwest Parties, they were administrators who were responsible for investing and overseeing the investment of the pension funds. They were not the trustee [8]; RBC Dexia was. Furthermore, the Canwest Parties as administrators had the ability to engage investment advisors in the discharge of their responsibilities. Consistent with this fact, GSA was providing services to the Canwest Parties and invoices were sent to "Canwest Media".

33 I also accept the argument of the Canwest Parties that the *General Motors of Canada Ltd. v. R.* decision addressed this precise issue albeit in a different context. In that case, the issue was whether General Motors Canada Limited ("GMCL") was entitled to claim an input tax credit to offset goods and services tax payable on investment management fees relating to the administration and investment of its registered pension plans, or whether the input tax credit "belonged" to the pension funds from which GMCL recovered the fees. The Canada Revenue Agency asserted that the services were in essence provided to the pension funds. Both the Tax Court of Canada and the Federal Court of Appeal rejected this argument. The factual background in the GMCL case and the case before me are very similar. In the *GMCL* case, the Tax Court noted:

> The roles and respective duties of GMCL, as administrator, and Royal Trust, as the trustee, were entirely separate. While GMCL may have exercised some fiduciary duties as the plan's administrator, that does not mean that GMCL was a trustee of the trust. The only trustee of these pension plans can be Royal Trust, the Custodial Trustee, which, according to the definition of "trustee" and the evidence, holds legal title. Consequently, it was GMCL that contracted for and acquired the services of the Investment Managers....
>
> No evidence whatsoever was adduced to suggest that the Plan Trusts were a party to the Investment Management and Fee Agreements that made GMCL liable to pay, or that GMCL entered into an Investment Management Agreement as an agent on behalf of the Plan Trusts. The Fee Agreements, pursuant to which consideration was calculated with respect to the Investment Management Agreements, were solely between GMCL and the respective Investment Managers. <u>The Investment Managers issued invoices, pursuant to the Agreements, solely to GMCL. GMCL approved the amounts invoiced in accordance with the Fee Agreements and then instructed the Trust to pay the Investment Managers from the funds it had placed in the pension plans. This in no way converts or transfers the liability for payment of the invoices to the trustee.</u>
>
> Contractually, GMCL is the only party that carried the liability to pay this consideration to the Investment Managers. The Investment Management and Fee Agreements are definitive on this point. The Investment Managers invoiced only GMCL. Generally, liability crystallizes upon the issuance of an invoice. <u>If GMCL did not pay the invoice, the Managers could sue only GMCL, not the Plan Trust. Only GMCL is liable to pay these invoices. Since the trust was never vested with responsibility for managing the assets, it had no requirement for the services of Investment Managers. The Managers can look only to GMCL for payment."</u> [9]
>
> [Emphasis added]

34 The Court accordingly held that GMCL itself was entitled to claim the input tax credits in respect of the GST relating to the investment management fees paid to the managers of the assets of GMCL's registered pension plans. This was in spite of the fact that GMCL entered into the investment management agreement in its capacity as administrator of its registered pension plans.

35 It seems to me that this decision is similar to the case before me. The Custodian, RBC Dexia, is the trustee who held legal title to the assets in the fund. The Canwest Parties contracted for and acquired the services of GSA. Although by statute, the fees could be paid from the Account, the plan trusts were not liable for payment; the Canwest Parties were. The Canwest Parties approved the payments to GSA and then authorized the Custodian to pay them out of the Account. The Custodian had no responsibility or requirement for investment management services; the Canwest Parties did. The

Canwest Parties were described as contracting on behalf of the plans but this simply reflects their role as administrator. Again, as stated in the *General Motors of Canada Ltd. v. R.* decision,

> It follows from these comments that, although GMCL re-supplied the investment services to the trusts, and despite a reimbursement to GMCL by the Trust in the event that GMCL paid these fees directly, GMCL was still the person liable for the payment of the supply of these services by the Investment Managers, pursuant to the terms of the Agreements between GMCL and the Managers. The origin of the payment is irrelevant. [10]

36 GSA's action is not only against or in respect of the Canwest Parties, it also affects their Business as that term is defined in the initial orders thereby attracting the application of the stays. The effective administration of the plans and the relationship between the Canwest Parties and their employees are important aspects of the Business of the Canwest Parties. It should also be observed that by statute, if there are unfunded liabilities in the defined benefit plans, the Canwest Parties are required to make special payments to ensure that the plans are funded.

37 Lastly, the action can also be said to affect the Property of the Canwest Parties as that term is defined in the initial orders. Nowhere does it say in the IMA that GSA is to be paid by the fund or by the Trustee. Unlike the Trustee in the Master Trust Agreement, GSA has no security interest over the fund. In addition, the Account has been collapsed. Recovery of any judgment against the Canwest Parties clearly affects their Property. Even if GSA could execute against the defined benefit plans, the Canwest Parties would still be responsible for any deficiency arising in the plans. As such the Canwest Parties' Property may also be affected by GSA's action.

38 For all of these reasons, it appears abundantly clear that the statement of claim of GSA is encompassed by the stays of proceedings.

39 The second issue to consider is whether the stay should be lifted to permit the action to proceed.

40 There is no statutory test under the CCAA that governs the lifting of a stay. The stay provisions in the CCAA orders are discretionary and should be applied so as to support the CCAA's legislative purpose: *Canwest Global Communications Corp., Re*. [11]

41 In that case, I described in some detail the legal issues applicable to the granting and lifting of a stay. I wrote:

> According to Professor R.H. McLaren in his book "Canadian Commercial Reorganization: Preventing Bankruptcy" [12], an opposing party faces a very heavy onus if it wishes to apply to the court for an order lifting the stay. In determining whether to lift the stay, the court should consider whether there are sound reasons for doing so consistent with the objectives of the CCAA, including a consideration of the balance of convenience, the relative prejudice to parties, and where relevant, the merits of the proposed action: *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* [13] That decision also indicated that the judge should consider the good faith and due diligence of the debtor company. [14]
>
> Professor McLaren enumerates situations in which courts will lift a stay order. The first six were cited by Paperny J. in 2000 in *Canadian Airlines Corp., Re* [15] and Professor McLaren has added three more since then. They are:
>
> > 1. When the plan is likely to fail.
> >
> > 2. The applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor).
> >
> > 3. The applicant shows necessity for payment (where the creditors' financial problems are created by the order or where the failure to pay the creditor would cause it to close and thus jeopardize the debtor's company's existence).

> 4. The applicant would be significantly prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors.
>
> 5. It is necessary to permit the applicant to take steps to protect a right which could be lost by the passing of time.
>
> 6. After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period.
>
> 7. There is a real risk that a creditor's loan will become unsecured during the stay period.
>
> 8. It is necessary to allow the applicant to perfect a right that existed prior to the commencement of the stay period.
>
> 9. It is in the interests of justice to do so.[16]

42 None of those situations is present here and in my view, a consideration of the balance of convenience, the relative prejudice to the parties and the merits of the action do not favour GSA's position. The objectives of the CCAA would not be met by lifting the stay. Indeed the converse is true. I accept the Canwest Parties' position that allowing the action to proceed would be prejudicial to the restructuring and unfair to others. GSA elected to commence this action in the face of the court ordered stays and opted not to file a proof of claim in either CCAA proceeding. It seems to me that this is the exact type of maneuvering that the CCAA is designed to avoid. The whole purpose of the claims procedures is to elicit and deal with claims against the Canwest Parties so that their businesses may emerge unencumbered by prior claims. It is also unfair to other creditors to permit this action to proceed. Those creditors did submit claims and their claims were subject to compromise in the plans advanced in the two separate CCAA restructurings.

43 I do not accept that this case is analogous to an insured claim. As already outlined, it cannot be assumed that a judgment would or should be enforceable against the funds and in any event, the Canwest Parties would ultimately be responsible for addressing any shortfalls in the defined benefit plans.[17] The CMI Entities have not yet emerged from CCAA protection and this action would be time consuming and a distraction. The absence of good faith and due diligence on the part of the Canwest Parties has not been established. Lastly, I note that the Monitor is opposed to the lifting of the stay. In all of these circumstances, with one modest exception which I will address, the stay should not be lifted.

44 The performance fee and the management fees are pre-filing debt with respect to the LP Entities and subject to compromise. The same is true for the CMI Entities with the exception of that portion of the October 1, 2009, to December 23, 2009 management fee attributable to them which is arguably recoverable for post-filing services rendered pursuant to section 11.2 of the CCAA. I am lifting the stay for the limited purpose of permitting a claim by GSA for that amount which I estimate would be less than $30,000. This does not preclude a claim for set-off by the CMI Entities. With that limited exception, GSA's motion is dismissed.

Motion dismissed.

Footnotes

1 R.S.C. 1985, c. C-36 as amended.

2 As noted in the affidavit of GSA's Deputy Chief Executive Officer, Jeremy Freedman, the performance of the Account over the year is determined at the end of the performance year which is June 30.

3 (2008), 65 C.C.P.B. 293 (Ont. C.A.).

4 [2009] F.C.J. No. 447 (F.C.A.), aff'g [2008] T.C.J. No. 80 (T.C.C. [General Procedure]).

5 The power for the court to stay proceedings is found in section 11.2 of the CCAA. The stays in both orders were extended from time to time by the court.

6 (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) at p.33.

7 Ibid, at p.32.

8 Pursuant to section 22(b) of at least the Ontario *Pension Benefits Act*, R.S.O. 1990 c. P-8, they would not qualify to be trustees.

9 *Ibid*, at paras. 53-54.

10 Ibid, at para. 57.

11 [2009] O.J. No. 5379 (Ont. S.C.J. [Commercial List]) at paras. 27 and 28.

12 Aurora: Canada Law Book, looseleaf, at para. 3.3400.

13 (2007), 33 C.B.R. (5th) 50 (Sask. C.A.) at para. 68.

14 Ibid, at para. 68.

15 (2000), 19 C.B.R. (4th) 1 (Alta. Q.B.).

16 Ibid, at paras. 32 and 33.

17 In their factum, the Canwest Parties state: "the Statement of Claim in the Action does not say that relief is sought only against the Plans and in fact scrupulously avoids specifying from whom damages are sought." That said, in argument, counsel for GSA acknowledged that GSA would restrict its recovery to the funds.

End of Document

Tab 3

2012 ONSC 2515
Ontario Superior Court of Justice [Commercial List]

Timminco Ltd., Re

2012 CarswellOnt 5390, 2012 ONSC 2515, 216 A.C.W.S. (3d) 286

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

In the Matter of a Plan of Compromise or Arrangement of Timminco Limited and Bécancour Silicon Inc., Applicants

Morawetz J.

Heard: March 26, 2012
Judgment: April 27, 2012
Docket: CV-12-9539-00CL

Counsel: James C. Orr, N. Mizobuchi, for St. Clair Penneyfeather, Plaintiff in Class Proceeding, Penneyfeather v. Timminco Limited et al
P. O'Kelly, A. Taylor, for Applicants
P. LeVay, for Photon Defendants
A. Lockhart, for Wacker Chemie AG
K.D. Kraft, for Chubb Insurance Company of Canada
D.J. Bell, for John P. Walsh
A. Hatnay, James Harnum, for Mercer Canada, Administrator of the Timminco Haley Plan
S. Weisz, for Monitor, FTI Consulting Canada Inc.

Subject: Insolvency; Civil Practice and Procedure

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Lifting of stay

Plaintiff sought to bring class proceedings regarding insurance proceeds against company that was protected under Companies' Creditors Arrangement Act — Stay under Act was lifted for purposes of bringing leave to appeal regarding limitation period — Hearing was held regarding lifting stay generally — Stay not lifted — Stay was put in place for restructuring and sale — If plaintiff's proceedings were to continue, executive team would have to devote considerable time to proceedings — Time sensitivity was largely alleviated by lifting stay with regards to leave proceedings — Insurance proceeds were not available to other creditors.

Table of Authorities

Cases considered by *Morawetz J.*:

Algoma Steel Corp. v. Royal Bank (1992), 8 O.R. (3d) 449, 93 D.L.R. (4th) 98, 55 O.A.C. 303, 11 C.B.R. (3d) 11, 1992 CarswellOnt 163 (Ont. C.A.) — referred to

Canwest Global Communications Corp., Re (2011), 2011 ONSC 2215, 2011 CarswellOnt 2392, 75 C.B.R. (5th) 156 (Ont. S.C.J. [Commercial List]) — referred to

Carey Canada Inc., Re (2006), 29 C.B.R. (5th) 81, 2006 CarswellOnt 7748 (Ont. S.C.J. [Commercial List]) — referred to

Stelco Inc., Re (2005), 253 D.L.R. (4th) 109, 75 O.R. (3d) 5, 2 B.L.R. (4th) 238, 9 C.B.R. (5th) 135, 2005 CarswellOnt 1188, 196 O.A.C. 142 (Ont. C.A.) — referred to

Western Canadian Shopping Centres Inc. v. Dutton (2001), (sub nom. *Western Canadian Shopping Centres Inc. v. Bennett Jones Verchere)* 201 D.L.R. (4th) 385, [2002] 1 W.W.R. 1, 286 A.R. 201, 253 W.A.C. 201, 8 C.P.C. (5th)

1, 94 Alta. L.R. (3d) 1, 272 N.R. 135, 2001 SCC 46, 2001 CarswellAlta 884, 2001 CarswellAlta 885, [2001] 2 S.C.R. 534 (S.C.C.) — referred to

Statutes considered:

Class Proceedings Act, 1992, S.O. 1992, c. 6

Generally — referred to

s. 12 — referred to

s. 28 — referred to

Securities Act, R.S.O. 1990, c. S.5

Generally — referred to

s. 138.14 [en. 2002, c. 22, s. 185] — referred to

HEARING regarding lifting stay of proceedings imposed under *Companies' Creditors Arrangement Act*.

***Morawetz J.*:**

1 St. Clair Penneyfeather, the Plaintiff in the *Penneyfeather v. Timminco Limited, et al* action, Court File No. CV-09-378701-00CP (the "Class Action"), brought this motion for an order lifting the stay of proceedings, as provided by the Initial Order of January 3, 2012 and extended by court order dated January 27, 2012, and permitting Mr. Penneyfeather to continue the Class Action against Timminco Limited ("Timminco"), Dr. Heinz Schimmelbusch, Mr. Robert Dietrich, Mr. Rene Boisvert, Mr. Arthur R. Spector, Mr. Jack Messman, Mr. John C. Fox, Mr. Michael D. Winfield, Mr. Mickey M. Yaksich and Mr. John P. Walsh.

2 The Class Action was commenced on May 14, 2009 and has been case managed by Perell J. The following steps have taken place in the litigation:

(a) a carriage motion;

(b) a motion to substitute the Representative Plaintiff;

(c) a motion to force disclosure of insurance policies;

(d) a motion for leave to appeal the result of the insurance motion which was heard by the Divisional Court and dismissed;

(e) settlement discussions;

(f) when settlement discussions were terminated, Perell J. declined an expedited leave hearing and instead declared any limitation period to be stayed;

(g) a motion for particulars; and

(h) a motion served but not heard to strike portions of the Statement of Claim.

3 On February 16, 2012, the Court of Appeal for Ontario set aside the decision of Perell J. declaring that s. 28 of the *Class Proceedings Act* suspended the running of the three-year limitation period under s. 138.14 of the *Securities Act*.

4 The Plaintiffs' counsel received instructions to seek leave to appeal the decision of the Court of Appeal for Ontario to the Supreme Court of Canada. The leave materials were required to be served and filed by April 16, 2012.

5 On April 10, 2012, the following endorsement was released in respect of this motion:

> The portion of the motion dealing with lifting the stay for the Plaintiff to seek leave to appeal the recent decision of the Court of Appeal for Ontario to the Supreme Court of Canada on the limitation period issue was not opposed. This portion of the motion is granted and an order shall issue to give effect to the foregoing. The balance of the requested relief is under reserve.

6 Counsel to Mr. Penneyfeather submits that, apart from the leave to appeal issues, there are steps that may occur before Perell J. as a result of the Court of Appeal ruling. Counsel references that the Defendants may bring motions for partial judgment and the Plaintiff could seek to have the court proceed with leave and certification with any order to be granted *nunc pro tunc* pursuant to s. 12 of the *Class Proceedings Act*.

7 Counsel to Mr. Penneyfeather submits that the three principal objectives of the *Class Proceedings Act* are judicial economy, access to justice and behaviour modification. (See *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 (S.C.C.) at paras. 27-29.), and under the *Securities Act*, the deterrent represented by private plaintiffs armed with a realistic remedy is important in ensuring compliance with continuous disclosure rules.

8 Counsel submits that, in this situation, there is only one result that will not do violence to a primary legislative purpose and that is to lift the stay to permit the Class Action to proceed on the condition that any potential execution excludes Timminco's assets. Counsel further submits that, as a practical result, this would limit recovery in the Class Action to the proceeds of the insurance policies, or in the event that the insurers decline coverage because of fraud, to the personal assets of those officers and directors found responsible for the fraud.

9 Counsel to Mr. Penneyfeather takes the position that the requested outcome is consistent with the judicial principal that the CCAA is not meant as a refuge insulating insurers from providing appropriate indemnification. (See *Algoma Steel Corp. v. Royal Bank*, [1992] O.J. No. 889 (Ont. C.A.) at paras. 13-15 and *Carey Canada Inc., Re*, [2006] O.J. No. 4905 (Ont. S.C.J. [Commercial List]) at paras. 7, 16-17.)

10 In this case, counsel contends that, when examining the relative prejudice to the parties, the examination strongly favours lifting the stay in the manner proposed since the insurance proceeds are not available to other creditors and there would be no financial unfairness caused by lifting the stay.

11 The position put forward by Mr. Penneyfeather must be considered in the context of the CCAA proceedings. As stated in the affidavit of Ms. Konyukhova, the stay of proceedings was put in place in order to allow Timminco and Bécancour Silicon Inc. ("BSI" and, together with Timminco, the "Timminco Entities") to pursue a restructuring and sales process that is intended to maximize recovery for the stakeholders. The Timminco Entities continue to operate as a going concern, but with a substantially reduced management team. The Timminco Entities currently have only ten active employees, including Mr. Kalins, President, General Counsel and Corporate Secretary and three executive officers (the "Executive Team").

12 Counsel to the Timminco Entities submits that, if Mr. Penneyfeather is permitted to pursue further steps in the Class Action, key members of the Executive Team will be required to spend significant amounts of their time dealing with the Class Action in the coming months, which they contend is a key time in the CCAA proceedings. Counsel contends that the executive team is currently focussing on the CCAA proceedings and the sales process.

13 Counsel to the Timminco Entities points out that the Executive Team has been required to direct most of their time to restructuring efforts and the sales process. Currently, the "stalking horse" sales process will continue into June 2012 and I am satisfied that it will require intensive time commitments from management of the Timminco Entities.

14 It is reasonable to assume that, by late June 2012, all parties will have a much better idea as to when the sales process will be complete.

15 The stay of proceedings is one of the main tools available to achieve the purpose of the CCAA. The stay provides the Timminco Entities with a degree of time in which to attempt to arrange an acceptable restructuring plan or sale of assets in order to maximize recovery for stakeholders. The court's jurisdiction in granting a stay extends to both preserving the *status quo* and facilitating a restructuring. See *Stelco Inc., Re*, [2005] O.J. No. 1171 (Ont. C.A.) at para. 36.

16 Further, the party seeking to lift a stay bears a heavy onus as the practical effect of lifting a stay is to create a scenario where one stakeholder is placed in a better position than other stakeholders, rather than treating stakeholders equally in accordance with their priorities. See *Canwest Global Communications Corp., Re*, [2011] O.J. No. 1590 (Ont. S.C.J. [Commercial List]) at para. 27.

17 Courts will consider a number of factors in assessing whether it is appropriate to lift a stay, but those factors can generally be grouped under three headings: (a) the relative prejudice to parties; (b) the balance of convenience; and (c) where relevant, the merits (*i.e.* if the matter has little chance of success, there may not be sound reasons for lifting the stay). See *Canwest Global Communications (Re)*, *supra*, at para. 27.

18 Counsel to the Timminco Entities submits that the relative prejudice to the parties and the balance of convenience clearly favours keeping the stay in place, rather than to allow the Plaintiff to proceed with the SCC leave application. As noted above, leave has been granted to allow the Plaintiff to proceed with the SCC leave application. Counsel to the Timminco Entities further submits that, while the merits are vigorously disputed by the Defendants in the context of a Class Action, the Timminco Entities will not ask this court to make any determinations based on the merits of the Plaintiff's claim.

19 I can well recognize why Mr. Penneyfeather wishes to proceed. The objective of the Plaintiff in the Class Action is to access insurance proceeds that are not available to other creditors. However, the reality of the situation is that the operating side of Timminco is but a shadow of its former self. I accept the argument put forth by counsel to the Applicant that, if the Executive Team is required to spend significant amounts of time dealing with the Class Action in the coming months, it will detract from the ability of the Executive Team to focus on the sales process in the CCAA proceeding to the potential detriment of the Timminco Entities' other stakeholders. These are two competing interests. It seems to me, however, that the primary focus has to be on the sales process at this time. It is important that the Executive Team devote its energy to ensuring that the sales process is conducted in accordance with the timelines previously approved. A delay in the sales process may very well have a negative impact on the creditors of Timminco. Conversely, the time sensitivity of the Class Action has been, to a large extent, alleviated by the lifting of the stay so as to permit the leave application to the Supreme Court of Canada.

20 It is also significant to recognize the submission of counsel on behalf of Mr. Walsh. Counsel to Mr. Walsh takes the position that Mr. Penneyfeather has nothing more than an "equity claim" as defined in the CCAA and, as such, his claim (both against the company and its directors who, in turn, would have an equity claim based on indemnity rights) would be subordinated to any creditor claims. Counsel further submits that of all the potential claims to require adjudication, presumably, equity claims would be the least pressing to be adjudicated and do not become relevant until all secured and unsecured claims have been paid in full.

21 In my view, it is not necessary for me to comment on this submission, other than to observe that to the extent that the claim of Mr. Penneyfeather is intended to access certain insurance proceeds, it seems to me that the prosecution of such claim can be put on hold, for a period of time, so as to permit the Executive Team to concentrate on the sales process.

22 Having considered the relative prejudice to the parties and the balance of convenience, I have concluded that it is premature to lift the stay at this time, with respect to the Timminco Entities, other than with respect to the leave application to the Supreme Court of Canada. It also follows, in my view, that the stay should be left in place with respect to the claim as against the directors and officers. Certain members of this group are involved in the Executive Team and, for the reasons stated above, I am satisfied that it is not appropriate to lift the stay as against them.

23 With respect to the claim against Photon, as pointed out by their counsel, it makes no sense to lift the stay only as against Photon and leave it in place with respect to the Timminco Entities. As counsel submits, the Timminco Entities have an interest in both the legal issues and the factual issues that may be advanced if Mr. Penneyfeather proceeds as against Photon, as any such issues as are determined in Timminco's absence may cause unfairness to Timminco, particularly, if Mr. Penneyfeather later seeks to rely on those findings as against Timminco. I am in agreement with counsel's submission that to make such an order would be prejudicial to Timminco's business and property. In addition, I accept the submission that it would also be unfair to Photon to require it to answer Mr. Penneyfeather's allegations in the absence of Timminco as counsel has indicated that Photon will necessarily rely on documents and information produced by Timminco as part of its own defence.

24 I am also in agreement with the submission that it would be wasteful of judicial resources to permit the class proceedings to proceed as against Photon but not Timminco as, in addition to the duplicative use of court time, there would be the possibility of inconsistent findings on similar or identical factual issues and legal issues. For these reasons, I have concluded that it is not appropriate to lift the stay as against Photon.

25 In the result, the motion dealing with issues not covered by the April 10, 2012 endorsement is dismissed without prejudice to the rights of the Plaintiff to renew his request no sooner than 75 days after today's date.

Order accordingly.

End of Document

Tab 4

2009 CarswellOnt 7882
Ontario Superior Court of Justice [Commercial List]

Canwest Global Communications Corp., Re

2009 CarswellOnt 7882, [2009] O.J. No. 5379, 183 A.C.W.S. (3d) 634, 61 C.B.R. (5th) 200

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

Pepall J.

Heard: December 8, 2009
Judgment: December 15, 2009
Docket: CV-09-8241-OOCL

Counsel: Lyndon Barnes, Alex Cobb, Shawn Irving for CMI Entities
Alan Mark, Alan Merskey for Special Committee of the Board of Directors of Canwest
David Byers, Maria Konyukhova for Monitor, FTI Consulting Canada Inc.
Benjamin Zarnett, Robert Chadwick for Ad Hoc Committee of Noteholders
K. McElcheran, G. Gray for GS Parties
Hugh O'Reilly, Amanda Darrach for Canwest Retirees and the Canadian Media Guild
Hilary Clarke for Senior Secured Lenders to LP Entities
Steve Weisz for CIT Business Credit Canada Inc.

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

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Proceedings subject to stay — Contractual rights

Business was acquired through acquisition company, C Co. — C Co. was jointly owned by moving parties and 441 Inc., wholly owned subsidiary of insolvent entities — Moving parties, 441 Inc., insolvent entities and C Co. entered into shareholders agreement providing that in event of insolvency of insolvent entities, moving parties could effect sale of their interest in C Co. and require sale of insolvent entities' interest — Shareholders agreement also provided that 441 Inc. could transfer its C Co. shares to insolvent entities at any time — 441 Inc. subsequently transferred shares of C Co. to insolvent entities and was dissolved — Insolvent entities obtained initial order under Companies' Creditors Arrangement Act including stay of proceedings — Moving parties brought motion seeking to set aside transfer of shares to insolvent entities or, in alternative, requiring insolvent entities to perform and not disclaim shareholders agreement as if shares had not been transferred — Insolvent entities brought motion for order that motion of moving parties was stayed — Moving parties brought cross-motion for leave to proceed with their motion — Motion of insolvent entities granted; motion and cross-motion of moving parties dismissed — Substance and subject matter of moving parties' motion were encompassed by stay — Substance of moving parties' motion was "proceeding" that was subject to stay under initial order which prohibited commencement of all proceedings against or in respect of insolvent entities or affecting business or property of insolvent entities — Relief sought would involve exercise of any right or remedy affecting business or property of insolvent entities which was stayed under initial order.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Lifting of stay

Business was acquired through acquisition company, C Co. — C Co. was jointly owned by moving parties and 441 Inc., wholly owned subsidiary of insolvent entities — Moving parties, 441 Inc., insolvent entities and C Co. entered into shareholders agreement providing that in event of insolvency of insolvent entities, moving parties could effect sale of their interest in C Co. and require sale of insolvent entities' interest — Shareholders agreement also provided that 441 Inc. could transfer its C Co. shares to insolvent entities at any time — 441 Inc. subsequently transferred shares of C Co. to insolvent entities and was dissolved — Insolvent entities obtained initial order under Companies' Creditors Arrangement Act including stay of proceedings — Moving parties brought motion seeking to set aside transfer of shares from 441 Inc. to insolvent entities or, in alternative, requiring insolvent entities to perform and not disclaim shareholders agreement as if shares had not been transferred — Insolvent entities brought motion for order that motion of moving parties was stayed — Moving parties brought cross-motion for leave to proceed with their motion — Motion of insolvent entities granted; motion and cross-motion of moving parties dismissed — Stay of proceedings not lifted — Balance of convenience, assessment of relative prejudice and relevant merits favoured position of insolvent entities — There was good arguable case that shareholders agreement, which would inform reasonable expectations of parties, permitted transfer and dissolution of 441 Inc. — Moving parties were in no worse position than any other stakeholder who was precluded from relying on rights that arose upon insolvency default — If stay were lifted, prejudice to insolvent entities would be great and proceedings contemplated by moving parties would be extraordinarily disruptive — Litigating subject matter of motion would undermine objective of protecting insolvent entities while they attempted to restructure — It was premature to address issue of whether insolvent entities could disclaim agreement — Issues surrounding any attempt at disclaimer should be canvassed on basis mandated in s. 32 of Act — Discretion to lift stay on basis of lack of good faith not exercised.

Table of Authorities

Cases considered by *Pepall J.*:

Campeau v. Olympia & York Developments Ltd. (1992), 14 C.B.R. (3d) 303, 14 C.P.C. (3d) 339, 1992 CarswellOnt 185 (Ont. Gen. Div.) — considered

Canadian Airlines Corp., Re (2000), 19 C.B.R. (4th) 1, 2000 CarswellAlta 622 (Alta. Q.B.) — considered

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 51 B.C.L.R. (2d) 84, 1990 CarswellBC 394, 4 C.B.R. (3d) 311, (sub nom. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada)* [1991] 2 W.W.R. 136 (B.C. C.A.) — considered

ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd. (2007), 2007 SKCA 72, 2007 CarswellSask 324, [2007] 9 W.W.R. 79, (sub nom. *Bricore Land Group Ltd., Re)* 299 Sask. R. 194, (sub nom. *Bricore Land Group Ltd., Re)* 408 W.A.C. 194, 33 C.B.R. (5th) 50 (Sask. C.A.) — referred to

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — referred to

Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 92 A.R. 81, 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361, 1988 CarswellAlta 318 (Alta. Q.B.) — considered

San Francisco Gifts Ltd., Re (2004), 5 C.B.R. (5th) 92, 42 Alta. L.R. (4th) 352, 2004 ABQB 705, 2004 CarswellAlta 1241, 359 A.R. 71 (Alta. Q.B.) — considered

Stelco Inc., Re (2005), 253 D.L.R. (4th) 109, 75 O.R. (3d) 5, 2 B.L.R. (4th) 238, 9 C.B.R. (5th) 135, 2005 CarswellOnt 1188, 196 O.A.C. 142 (Ont. C.A.) — referred to

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 8 — referred to

s. 11 — referred to

s. 11.02(1) [en. 2005, c. 47, s. 128] — considered

s. 11.02(2) [en. 2005, c. 47, s. 128] — considered

s. 32 — considered

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 106 — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 25.11(b) — referred to

R. 25.11(c) — referred to

MOTION by moving party to set aside transfer of shares to insolvent entities or, in alternative, requiring insolvent entities to perform and not disclaim shareholders agreement; MOTION by insolvent entities for order that motion by moving party was stayed; CROSS-MOTION by moving party for leave to proceed with its motion.

***Pepall J.*:**

Relief Requested

1 The CCAA applicants and partnerships (the "CMI Entities") request an order declaring that the relief sought by GS Capital Partners VI Fund L.P., GSCP VI AA One Holding S.ar.1 and GS VI AA One Parallel Holding S.ar.1 (the "GS Parties") is subject to the stay of proceedings granted in my Initial Order dated October 6, 2009. The GS Parties bring a cross-motion for an order that the stay be lifted so that they may pursue their motion which, among other things, challenges pre-filing conduct of the CMI Entities. The Ad Hoc Committee of Noteholders and the Special Committee of the Board of Directors support the position of the CMI Entities. All of these stakeholders are highly sophisticated. Put differently, no one is a commercial novice. Such is the context of this dispute.

Background Facts

2 Canwest's television broadcast business consists of the CTLP TV business which is comprised of 12 free-to-air television stations and a portfolio of subscription based specialty television channels on the one hand and the Specialty TV Business on the other. The latter consists of 13 specialty television channels that are operated by CMI for the account of CW Investments Co. and its subsidiaries and 4 other specialty television channels in which the CW Investments Co. ownership interest is less than 50%.

3 The Specialty TV Business was acquired jointly with Goldman Sachs from Alliance Atlantis in August, 2007. In January of that year, CMI and Goldman Sachs agreed to acquire the business of Alliance Atlantis through a jointly owned acquisition company which later became CW Investments Co. It is a Nova Scotia Unlimited Liability Corporation ("NSULC").

4 CMI held its shares in CW Investments Co. through its wholly owned subsidiary, 4414616 Canada Inc. ("441"). According to the CMI Entities, the sole purpose of 441 was to insulate CMI from any liabilities of CW Investments Co. As a NSULC, its shareholders may face exposure if the NSULC is liquidated or becomes bankrupt. As such, 441 served as a "blocker" to potential liability. The CMI Entities state that similarly the GS parties served as "blockers" for Goldman Sachs' part of the transaction.

5 According to the GS Parties, the essential elements of the deal were as follows:

(i) GS would acquire at its own expense and at its own risk, the slower growth businesses;

(ii) CW Investments Co. would acquire the Specialty TV Business and that company would be owned by 441 and the GS Parties under the terms of a Shareholders Agreement;

(iii) GS would assist CW Investments Co. in obtaining separate financing for the Specialty TV Business;

(iv) Eventually Canwest would contribute its conventional TV business on a debt free basis to CW Investments Co. in return for an increased ownership stake in CW Investments Co.

6 The GS Parties also state that but for this arrangement, Canwest had no chance of acquiring control of the Specialty TV Business. That business is subject to regulation by the CRTC. Consistent with policy objectives, the CRTC had to satisfy itself that CW Investments Co. was not controlled either at law or in fact by a non-Canadian.

7 A Shareholders Agreement was entered into by the GS parties, CMI, 441, and CW Investments Co. The GS Parties state that 441 was a critical party to this Agreement. The Agreement reflects the share ownership of each of the parties to it: 64.67% held by the GS Parties and 35.33% held by 441. It also provides for control of CW Investments Co. by distribution of voting shares: 33.33% held by the GS Parties and 66.67% held by 441. The Agreement limits certain activities of CW Investments Co. without the affirmative vote of a director nominated to its Board by the GS Parties. The Agreement provides for call and put options that are designed to allow the GS parties to exit from the investment in CW Investments Co. in 2011, 2012, and 2013. Furthermore, in the event of an insolvency of CMI, the GS parties have the ability to effect a sale of their interest in CW Investments Co. and require as well a sale of CMI's interest. This is referred to as the drag-along provision. Specifically, Article 6.10(a) of the Shareholders Agreement states:

> Notwithstanding the other provisions of this Article 6, if an Insolvency Event occurs in respect of CanWest and is continuing, the GS Parties shall be entitled to sell all of their Shares to any *bona fide* Arm's Length third party or parties at a price and on other terms and conditions negotiated by GSCP in its discretion provided that such third party or parties acquires all of the Shares held by the CanWest Parties at the same price and on the same terms and conditions, and in such event, the CanWest Parties shall sell their Shares to such third party or parties at such price and on such terms and conditions. The Corporation and the CanWest Parties each agree to cooperate with and assist GSCP with the sale process (including by providing protected purchasers designated by GSCP with confidential information regarding the Corporation (subject to a customary confidentiality agreement) and with access to management).

8 The Agreement also provided that 441 as shareholder could transfer its CW Investments Co. shares to its parent, CMI, at any time, by gift, assignment or otherwise, whether or not for value. While another specified entity could not be dissolved, no prohibition was placed on the dissolution of 441. 441 had certain voting obligations that were to be carried out at the direction of CMI. Furthermore, CMI was responsible for ensuring the performance by 441 of its obligations under the Shareholders Agreement.

9 On October 5, 2009, pursuant to a Dissolution Agreement between 441 and CMI and as part of the winding-up and distribution of its property, 441 transferred all of its property, namely its 352,986 Class A shares and 666 Class B preferred shares of CW Investments Co., to CMI. CMI undertook to pay and discharge all of 441's liabilities and obligations. The material obligations were those contained in the Shareholders Agreement. At the time, 441 and CW Investments Co. were both solvent and CMI was insolvent. 441 was subsequently dissolved.

10 For the purposes of these two motions only, the parties have agreed that the court should assume that the transfer and dissolution of 441 was intended by CMI to provide it with the benefit of all the provisions of the CCAA proceedings in relation to contractual obligations pertaining to those shares. This would presumably include both the stay provisions found in section 11 of the CCAA and the disclaimer provisions in section 32 .

11 The CMI Entities state that CMI's interest in the Specialty TV Business is critical to the restructuring and recapitalization prospects of the CMI Entities and that if the GS parties were able to effect a sale of CW Investments Co. at this time, and on terms that suit them, it would be disastrous to the CMI Entities and their stakeholders. Even the overhanging threat of such a sale is adversely affecting the negotiation of a successful restructuring or recapitalization of the CMI Entities.

12 On October 6, 2009, I granted an Initial Order in these proceedings. CW Investments Co. was not an applicant. The CMI Entities requested a stay of proceedings to allow them to proceed to develop a plan of arrangement or compromise to implement a consensual "pre-packaged" recapitalization transaction. The CMI Entities and the Ad Hoc Committee

of 8% Noteholders had agreed on terms of such a transaction that were reflected in a support agreement and term sheet. Those noteholders who support the term sheet have agreed to vote in favour of the plan subject to certain conditions one of which is a requirement that the Shareholders Agreement be amended.

13 The Initial Order included the typical stay of proceedings provisions that are found in the standard form order promulgated by the Commercial List Users Committee. Specifically, the order stated:

> 15. THIS COURT ORDERS that until and including November 5, 2009, or such later date as this Court may order (the "Stay Period"), no proceeding or enforcement process in any court or tribunal (each, a "Proceeding") shall be commenced or continued against or in respect of the CMI Entities, the Monitor or the CMI CRA or affecting the CMI Business or the CMI Property, except with the written consent of the applicable CMI Entity, the Monitor and the CMI CRA (in respect of Proceedings affecting the CMI Entities, the CMI Property or the CMI Business), the CMI CRA (in respect of Proceedings affecting the CMI Entities, the CMI property or the CMI Business), the CMI CRA (in respect of Proceedings affecting the CMI CRA), or with leave of this Court, and any and all Proceedings currently under way against or in respect of the CMI Entities or the CMI CRA or affecting the CMI Business or the CMI Property are hereby stayed and suspended pending further Order of this Court. In the case of the CMI CRA, no Proceeding shall be commenced against the CMI CRA or its directors and officers without prior leave of this Court on seven (7) days notice to Stonecrest Capital Inc.
>
> 16. THIS COURT ORDERS that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "Persons" and each being a "Person") against or in respect of the CMI Entities, the Monitor and/or the CMI CRA, or affecting the CMI Business or the CMI Property, are hereby stayed and suspended except with the written consent of the applicable CMI Entity, the Monitor and the CMI CRA (in respect of rights and remedies affecting the CMI Entities, the CMI Property or the CMI Business), the CMI CRA (in respect of rights or remedies affecting the CMI CRA), or leave of this Court, provided that nothing in this Order shall (i) empower the CMI Entities to carry on any business which the CMI Entities are not lawfully entitled to carry on, (ii) exempt the CMI Entities from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

14 The GS parties were not given notice of the CCAA application. On November 2, 2009, they brought a motion that, among other things, seeks to set aside the transfer of the shares from 441 to CMI or, in the alternative, require CMI to perform and not disclaim the Shareholders Agreement as if the shares had not been transferred. On November 10, 2009 the GS parties purported to revive 441 by filing Articles of Revival with the Director of the CBCA. The CMI Entities were not notified nor was any leave of the court sought in this regard. In an amended notice of motion dated November 19, 2009 (the "main motion"), the GS Parties request an order:

> (a) Setting aside and declaring void the transfer of the shares from 441 to CMI;
>
> (b) declaring that the rights and remedies of the GS Parties in respect of the obligations of 441 under the Shareholders Agreement are not affected by these CCAA proceedings in any way whatsoever;
>
> (c) in the alternative to (a) and (b), an order directing CMI to perform all of the obligations that bound 441 immediately prior to the transfer;
>
> (d) in the alternative to (a) and (b), an order declaring that the obligations that bound 441 immediately prior to the transfer, may not be disclaimed by CMI pursuant to section 32 of the CCAA or otherwise; and
>
> (e) if necessary, a trial of the issues arising from the foregoing.

15 They also requested an order amending paragraph 59 of the Initial Order but that issue has now been resolved and I am satisfied with the amendment proposed.

16 The CMI Entities then brought a motion on November 24, 2009 for an order that the GS motion is stayed. As in a game of chess, on December 3, 2009, the GS Parties served a cross-motion in which, if required, they seek leave to proceed with their motion.

17 In furtherance of their main motion, the GS Parties have expressed a desire to examine 4 of the 5 members of the Special Committee of the Board of Directors of Canwest. That Committee was constituted, among other things, to oversee the restructuring. The GS Parties have also demanded an extensive list of documentary production. They also seek to impose significant discovery demands upon the senior management of CanWest.

Issues

18 The issues to be determined on these motions are whether the relief requested by the GS Parties in their main motion is stayed based on the Initial Order and if so, whether the stay should be lifted. In addition, should the relief sought in paragraph 1(e) of the main motion be struck.

Positions of Parties

19 In brief, the parties' positions are as follows. The CMI Entities submit that the GS Parties' motion is a "proceeding" that is subject to the stay under paragraph 15 of the Initial Order. In addition, the relief sought by them involves "the exercise of any right or remedy affecting the CMI Business or the CMI Property" which is stayed under paragraph 16 of the Initial Order. The stay is consistent with the purpose of the CCAA. They submit that the subject matter of the motion should be caught so as to prevent the GS parties from gaining an unfair advantage over other stakeholders of the CMI Entities and to ensure that the resources of the CMI Entities are devoted to developing a viable restructuring plan for the benefit of all stakeholders. They also state that CMI's interest in CW Investments Co. is a significant portion of its enterprise value. They state further that their actions were not in breach of the Shareholders Agreement and in any event, debtor companies are able to organize their affairs in order to benefit from the CCAA stay. Furthermore, any loss suffered by the GS Parties can be quantified.

20 In paragraph 1(e) of the main motion, the GS parties seek to prevent CMI from disclaiming the obligations of 441 that existed immediately prior to the transfer of the shares to CMI. If this relief is not stayed, the CMI Entities submit that it should be struck out pursuant to Rule 25.11(b) and (c) as premature and improper. They also argue that section 32 of the CCAA provides a procedure for disclaimer of agreements which the GS Parties improperly seek to circumvent.

21 Lastly, the CMI Entities state that the bases on which a CCAA stay should be lifted are very limited. Most of the grounds set forth in *Canadian Airlines Corp., Re* [1] which support the lifting of a stay are manifestly inapplicable. As to prejudice, the GS parties are in no worse position than any other stakeholder who is precluded from relying on rights that arise on an insolvency default. In contrast, the prejudice to the CMI Entities would be debilitating and their resources need to be devoted to their restructuring. The GS Parties' rights would not be lost by the passage of time. The GS Parties' motion is all about leverage and a desire to improve the GS Parties' negotiating position submits counsel for the CMI Entities.

22 The Ad Hoc Committee of Noteholders, as mentioned, supports the CMI Entities' position. In examining the context of the dispute, they submit that the Shareholders Agreement permitted and did not prohibit the transfer of 441's shares. Furthermore, the operative obligations in that agreement are obligations of CMI, not 441. It is the substance of the GS Parties' claims and not the form that should govern their ability to pursue them and it is clearly encompassed by the stay. The Committee relies on *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* [2] in support of their position on timing.

23 The Special Committee also supports the CMI Entities. It submits that the primary relief sought by the GS parties is a declaration that their contracts to and with CW Investments cannot or should not be disclaimed. The debate as to whether 441 could properly be assimilated into CMI is no more than an alternate argument as to why such disclaimer can or cannot occur. They state that the subject matter of the GS Parties' motion is premature.

24 The GS Parties submit that the stay does not prevent parties affected by the CCAA proceedings from bringing motions within the CCAA proceedings themselves. The use of CCAA powers and the scope of the stay provided in the Initial Order and whether it applies to the GS Parties' motion are proper questions for the court charged with supervising the CCAA process. They also argue that the motion would facilitate negotiation between key parties, raises the important preliminary issue of the proper scope and application of section 32 of the CCAA, and avoids putting the Monitor in the impossible position of having to draw legal conclusions as to the scope of CMI's power to disclaim. The court should be concerned with pre-filing conduct including the reason for the share transfer, the timing, and CMI's intentions.

25 Even if the stay is applicable, the GS parties submit that it should be lifted. In this regard, the court should consider the balance of convenience, the relative prejudice to parties, and where relevant, the merits of the proposed action. The court should also consider whether the debtor company has acted and is acting in good faith. The GS Parties were the medium by which the Specialty TV Business became part of Canwest. Here, all that is being sought is a reversal of the false and highly prejudicial start to these restructuring proceedings. It is necessary to take steps now to protect a right that could be lost by the passage of time. The transfer of the shares exhibited bad faith on the part of Canwest. 441 insulated CW Investments Co. and the Specialty TV Business from the insolvency of CMI and thereby protected the contractual rights of the GS Parties. The manifest harm to the GS Parties that invited the motion should be given weight in the court's balancing of prejudices. Concerns as to disruption of the restructuring process could be met by imposing conditions on the lifting of a stay as, for example, the establishment of a timetable.

Discussion

(a) Legal Principles

26 First I will address the legal principles applicable to the granting and lifting of a CCAA stay.

27 The stay provisions in the CCAA are discretionary and are extraordinarily broad. Section 11.02 (1) and (2) states:

> 11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,
>
> > (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;
> >
> > (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
> >
> > (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.
>
> (2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,
>
> > (a) staying until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

28 The underlying purpose of the court's power to stay proceedings has frequently been described in the case law. It is the engine that drives the broad and flexible statutory scheme of the CCAA: *Stelco Inc., Re* [3] and the key element of the CCAA process: *Canadian Airlines Corp., Re* [4] The power to grant the stay is to be interpreted broadly in order to permit the CCAA to accomplish its legislative purpose. As noted in *Lehndorff General Partner Ltd., Re* [5] , the power to grant a stay extends to effect the position of a company's secured and unsecured creditors as well as other parties who could potentially jeopardize the success of the restructuring plan and the continuance of the company. As stated by Farley J. in that case,

> "It has been held that the intention of the CCAA is to prevent any manoeuvres for positioning among the creditors during the period required to develop a plan and obtain approval of creditors. Such manoeuvres could give an aggressive creditor an advantage to the prejudice of others who are less aggressive and would undermine the company's financial position making it even less likely that the plan will succeed....The possibility that one or more creditors may be prejudiced should not affect the court's exercise of its authority to grant a stay of proceedings under the CCAA because this affect is offset by the benefit to all creditors and to the company of facilitating a reorganization. The court's primary concerns under the CCAA must be for the debtor and *all* of the creditors." [6] (Citations omitted)

29 The all encompassing scope of the CCAA is underscored by section 8 of the Act which precludes parties from contracting out of the statute. See *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* [7] in this regard.

30 Two cases dealing with stays merit specific attention. *Campeau v. Olympia & York Developments Ltd.* [8] was a decision granted in the early stages of the evolution of the CCAA. In that case, the plaintiffs brought an action for damages including the loss of share value and loss of opportunity both against a company under CCAA protection and a bank. The statement of claim had been served before the company's CCAA filing. The plaintiff sought to lift the stay to proceed with its action. The bank sought an order staying the action against it pending the disposition of the CCAA proceedings. Blair J. examined the stay power described in the CCAA, section 106 of the Courts of Justice Act [9] and the court's inherent jurisdiction. He refused to lift the stay and granted the stay in favour of the bank until the expiration of the CCAA stay period. Blair J. stated that the plaintiff's claims may be addressed more expeditiously in the CCAA proceeding itself. [10] Presumably this meant through a claims process and a compromise of claims. The CCAA stay precludes the litigating of claims comparable to the plaintiff's in *Campeau*. If it were otherwise, the stay would have no meaningful impact.

31 The decision of *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* is also germane to the case before me. There, the Bank demanded payment from the debtor company and thereafter the debtor company issued instant trust deeds to qualify for protection under the CCAA. The bank commenced proceedings on debenture security and the next day the company sought relief under the CCAA. The court stayed the bank's enforcement proceedings. The bank appealed the order and asked the appellate court to set aside the stay order insofar as it restrained the bank from exercising its rights under its security. The B.C. Court of Appeal refused to do so having regard to the broad public policy objectives of the CCAA.

32 As with the imposition of a stay, the lifting of a stay is discretionary. There are no statutory guidelines contained in the Act. According to Professor R.H. McLaren in his book "Canadian Commercial Reorganization: Preventing

Bankruptcy" [11], an opposing party faces a very heavy onus if it wishes to apply to the court for an order lifting the stay. In determining whether to lift the stay, the court should consider whether there are sound reasons for doing so consistent with the objectives of the CCAA, including a consideration of the balance of convenience, the relative prejudice to parties, and where relevant, the merits of the proposed action: *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* [12]. That decision also indicated that the judge should consider the good faith and due diligence of the debtor company. [13]

33 Professor McLaren enumerates situations in which courts will lift a stay order. The first six were cited by Paperny J. in 2000 in *Canadian Airlines Corp., Re* [14] and Professor McLaren has added three more since then. They are:

1. When the plan is likely to fail.

2. The applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor).

3. The applicant shows necessity for payment (where the creditors' financial problems are created by the order or where the failure to pay the creditor would cause it to close and thus jeopardize the debtor's company's existence).

4. The applicant would be significantly prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors.

5. It is necessary to permit the applicant to take steps to protect a right which could be lost by the passing of time.

6. After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period.

7. There is a real risk that a creditor's loan will become unsecured during the stay period.

8. It is necessary to allow the applicant to perfect a right that existed prior to the commencement of the stay period.

9. It is in the interests of justice to do so.

(b) Application

34 Turning then to an application of all of these legal principles to the facts of the case before me, I will first consider whether the subject matter of the main motion of the GS Parties is captured by the stay and then will address whether the stay should be lifted.

35 In analyzing the applicability of the stay, I must examine the substance of the main motion of the GS Parties and the language of the stay found in paragraphs 15 and 16 of my Initial Order.

36 In essence, the GS Parties' motion seeks to:

(i) undo the transfer of the CW Investments Co. shares from 441 to CMI or

(ii) require CMI to perform and not disclaim the Shareholders Agreement as though the shares had not been transferred.

37 It seems to me that the first issue is caught by the stay of proceedings and the second issue is properly addressed if and when CMI seeks to disclaim the Shareholders Agreement.

38 The substance of the GS Parties' motion is a "proceeding" that is subject to the stay under paragraph 15 of the Initial Order which prohibits the commencement of all proceedings against or in respect of the CMI Entities, or affecting the CMI Business or the CMI Property. The relief sought would also involve "the exercise of any right or remedy affecting the CMI Business or the CMI Property" which is stayed under paragraph 16 of the Initial Order.

39 When one examines the relief requested in detail, the application of the stay is clear. The GS Parties ask first for an order setting aside and declaring void the transfer of the shares from 441. As the shares have been transferred to the CMI Entities presumably pursuant to section 6.5(a) of the Shareholders Agreement, this is relief "affecting the CMI Property". Secondly, the GS Parties ask for a declaration that the rights and remedies of the GS Parties in respect of the obligations of 441 are not affected by the CCAA proceedings. This relief would permit the GS Parties to require CMI to tender the shares for sale pursuant to section 6.10 of the Shareholders Agreement. This too is relief affecting the CMI Entities and the CMI Property. Thirdly, they ask for an order directing CMI to perform all of the obligations that bound 441 prior to the transfer. This represents the exercise of a right or remedy against CMI and would affect the CMI Business and CMI Property in violation of paragraph 16 of the Initial Order. This is also stayed by virtue of paragraph 15. Fourthly, the GS Parties seek an order declaring that the obligations that bound 441 prior to the transfer may not be disclaimed. This both violates paragraph 16 of the Initial Order and also seeks to avoid the express provisions contained in the recent amendments to the CCAA that address disclaimer.

40 Accordingly, the substance and subject matter of the GS Parties' motion are certainly encompassed by the stay. As Mr. Barnes for the CMI Entities submitted, had CMI taken the steps it did six months ago and the GS Parties commenced a lawsuit, the action would have been stayed. Certainly to the extent that the GS Parties are seeking the freedom to exercise their drag along rights, these rights should be captured by the stay.

41 The real question, it seems to me, is whether the stay should be lifted in this case. In considering the request to lift the stay, it is helpful to consider the context and the provisions of the Shareholders Agreement. In his affidavit sworn November 24, 2009, Mr. Strike, the President of Corporate Development & Strategy Implementation of Canwest Global and its Recapitalization Officer, states that the joint acquisition from Alliance Atlantis was intensely and very carefully negotiated by the parties and that the negotiation was extremely complex and difficult. "Every aspect of the deal was carefully scrutinized, including the form, substance and precise terms of the Initial Shareholders Agreement." The Shareholders Agreement was finalized following the CRTC approval hearing. Among other things:

- Article 2.2 (b) provides that CMI is responsible for ensuring the performance by 441 of its obligations under the Shareholders Agreement.
- Article 6.1 contains a restriction on the transfer of shares.
- Article 6.5 addresses permitted transfers. Subsection (a) expressly permits each shareholder to transfer shares to a parent of the shareholder. CMI was the parent of the shareholder, 441.
- Article 6.10 provides that notwithstanding the other provisions of Article 6, if an insolvency event occurs (which includes the commencement of a CCAA proceeding), the GS Parties may sell their shares and cause the Canwest parties to sell their shares on the same terms. This is the drag along provision.
- Article 6.13 prohibits the liquidation or dissolution of another company [15] without the prior written consent of one of the GS Parties [16].

42 The recital of these provisions and the absence of any prohibition against the dissolution of 441 indicate that there is a good arguable case that the Shareholders Agreement, which would inform the reasonable expectations of the parties, permitted the transfer and dissolution.

43 The GS Parties are in no worse position than any other stakeholder who is precluded from relying on rights that arise upon an insolvency default. As stated in *San Francisco Gifts Ltd., Re* [17] :

"The Initial Order enjoined all of San Francisco's landlords from enforcing contractual insolvency clauses. This is a common prohibition designed, at least in part, to avoid a creditor frustrating the restructuring by relying on a contractual breach occasioned by the very insolvency that gave rise to proceedings in the first place." [18]

44 Similarly, in *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* [19] , one of the debtor's joint venture partners in certain petroleum operations was unable to rely on an insolvency clause in an agreement that provided for the immediate replacement of the operator if it became bankrupt or insolvent.

45 If the stay were lifted, the prejudice to CMI would be great and the proceedings contemplated by the GS Parties would be extraordinarily disruptive. The GS Parties have asked to examine 4 of the 5 members of the Special Committee. The Special Committee is a committee of the Board of Directors of Canwest. Its mandate includes, among other things, responsibility for overseeing the implementation of a restructuring with respect to all, or part of the business and/or capital structure of Canwest. The GS Parties have also requested an extensive list of documentary production including all documents considered by the Special Committee and any member of that Committee relating to the matters at issue; all documents considered by the Board of Directors and any member of the Board of Directors relating to the matters at issue; all documents evidencing the deliberations, discussions and decisions of the Special Committee and the Board of Directors relating to the matters at issue; all documents relating to the matters at issue sent to or received by Leonard Asper, Derek Burney, David Drybrough, David Kerr, Richard Leipsic, John Maguire, Margot Micillef, Thomas Strike, and Hap Stephen, the Chief Restructuring Advisor appointed by the court. As stated by Mr. Strike in his affidavit sworn November 24, 2009,

The witnesses that the GS Parties propose to examine include the most senior executives of the CMI Entities; those who are most intensely involved in the enormously complex process of achieving a successful going concern restructuring or recapitalization of the CMI Entities. Myself, Mr. Stephen, Mr. Maguire and the others are all working flat out on trying to achieve a successful restructuring or recapitalization of the CMI Entities. Frankly, the last thing we should be doing at this point is preparing for a forensic examination, in minute detail, over events that have taken place over the past several months. At this point in the restructuring/recapitalization process, the proposed examination would be an enormous distraction and would significantly prejudice the CMI Entities' restructuring and recapitalization efforts.

46 While Mr. McElcheran for the GS Parties submits that the examinations and the scope of the examinations could be managed, in my view, the litigating of the subject matter of the motion would undermine the objective of protecting the CMI Entities while they attempt to restructure. The GS Parties continue to own their shares in CW Investments Co. as does CMI. CMI continues to operate the Specialty TV Business. Furthermore, CMI cannot sell the shares without the involvement of the Monitor and the court. None of these facts have changed. The drag along rights are stayed (although as Mr. McElcheran said, it is the cancellation of those rights that the GS Parties are concerned about.)

47 A key issue will be whether the CMI Parties can then disclaim that Agreement or whether they should be required to perform the obligations which previously bound 441. This issue will no doubt arise if and when the CMI Entities seek to disclaim the Shareholders Agreement. It is premature to address that issue now. Furthermore, section 32 of the CCAA now provides a detailed process for disclaimer. It states:

32.(1) Subject to subsections (2) and (3), a debtor company may — on notice given in the prescribed form and manner to the other parties to the agreement and the monitor — disclaim or resiliate any agreement to which the company is a party on the day on which proceedings commence under this Act. The company may not give notice unless the monitor approves the proposed disclaimer or resiliation.

(2) Within 15 days after the day on which the company gives notice under subsection (1), a party to the agreement may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement is not to be disclaimed or resiliated.

(3) If the monitor does not approve the proposed disclaimer or resiliation, the company may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement be disclaimed or resiliated.

(4) In deciding whether to make the order, the court is to consider, among other things,

(a) whether the monitor approved the proposed disclaimer or resiliation;

(b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and

(c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

48 Section 32, therefore, provides the scheme and machinery for the disclaimer of an agreement. If the monitor approves the disclaimer, another party may contest it. If the monitor does not approve the disclaimer, permission of the court must be obtained. It seems to me that the issues surrounding any attempt at disclaimer in this case should be canvassed on the basis mandated by Parliament in section 32 of the amended Act.

49 In my view, the balance of convenience, the assessment of relative prejudice and the relevant merits favour the position of the CMI Entities on this lift stay motion. As to the issue of good faith, the question is whether, absent more, one can infer a lack of good faith based on the facts outlined in the materials filed including the agreed upon admission by the CMI Entities. The onus to lift the stay is on the moving party. I decline to exercise my discretion to lift the stay on this basis.

50 Turning then to the factors listed by Professor McLaren, again I am not persuaded that based on the current state of affairs, any of the factors are such that the stay should be lifted. In light of this determination, there is no need to address the motion to strike paragraph 1(e) of the GS Parties' main motion.

51 The stay of proceedings in this case is performing the essential function of keeping stakeholders at bay in order to give the CMI Entities a reasonable opportunity to develop a restructuring plan. The motions of the GS Parties are dismissed (with the exception of that portion dealing with paragraph 59 of the Initial Order which is on consent) and the motion of the CMI Entities is granted with the exception of the strike portion which is moot.

52 The Monitor, reasonably in my view, did not take a position on these motions. Its counsel, Mr. Byers, advised the court that the Monitor was of the view that a commercial resolution was the best way to resolve the GS Parties' issues. It is difficult to disagree with that assessment.

Insolvent entities' motion granted; motion and cross-motion of moving party dismissed.

Footnotes

1 (2000), 19 C.B.R. (4th) 1 (Alta. Q.B.).

2 (B.C. C.A.) at p. 4.

3 (2005), 75 O.R. (3d) 5 (Ont. C.A.) at para. 36.

4 (2000), 19 C.B.R. (4th) 1 (Alta. Q.B.).

5 (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]).

6 Ibid, at p. 32.

7 Supra, note 2

8 (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.).

9 R.S.O. 1990, c.C.43.

10 Supra, note 6 at paras. 24 and 25.

11 (Aurora: Canada Law Book, looseleaf) at para. 3.3400.

12 (2007), 33 C.B.R. (5th) 50 (Sask. C.A.) at para. 68.

13 Ibid, at para. 68.

14 Supra, note 3.

15 This was 4414641 Canada Inc. but not 4414616 Canada Inc., the company in issue before me.

16 Specifically, GS Capital Partners VI Fund, L.P.

17 (2004), 5 C.B.R. (5th) 92 (Alta. Q.B.) at para.37.

18 Ibid, at para. 37.

19 (1988), 72 C.B.R. (N.S.) 1 (Alta. Q.B.).

End of Document

Tab 5

2006 CarswellOnt 8025
Ontario Superior Court of Justice

Ivaco Inc., Re

2006 CarswellOnt 8025, [2006] O.J. No. 5029

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 OR PLANS OF COMPROMISE OR ARRANGEMENT OF IVACO INC. AND THE APPLICANTS LISTED IN SCHEDULE "A" HERETO

Ground J.

Heard: November 7,10, 2006
Judgment: December 15, 2006
Docket: 03-CL-5145

Counsel: Peter F.C. Howard, Alexander D. Rose, Marie Isabelle Palacios-Hardy for Applicants / Monitor
William J. Burden, John N. Birch, David S. Ward for Heico Companies
Fred Myers for Superintendent of Financial Services
Dan MacDonald for Bank of Nova Scotia
Robert Staley, Evangelia Krians for Informal Committee of Noteholders
Richard B.Swan for National Bank of Canada
Andrew Hatnay for Pension Committee
Geoff R. Hall for QIT

Subject: Insolvency; Civil Practice and Procedure
Headnote
Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — Stay of proceedings
Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues
Table of Authorities
Cases considered by *Ground J.*:

Atkins Nutritionals Inc., Re (2005), 2005 CarswellOnt 4371, 14 C.B.R. (5th) 157 (Ont. S.C.J. [Commercial List]) — considered

***Ground J.*:**

1 There are two motions before this court in the above proceeding. The first is a motion brought by III Canada Acquisition Company, Sivaco Wire Group 2004 L.P., Ifastgroupe 2004 L.P., Ivaco Rolling Mills 2004 L.P., Heico Holding Inc. and the Heico Companies L.L.C. (collectively "Heico") raising a number of issues with respect to privilege claimed by Ivaco relating to specific documents (the "Heico Documents") and the appointment of an Examiner to examine such documents, which issues have been substantially resolved by a consent order issued November 10, 2006.

2 The Supplementary Notice of Motion of Heico seeks an order lifting the stay in these proceedings and granting leave for Heico to commence an action against Ivaco seeking $75,000,000 in damages for negligent and/or fraudulent misrepresentation, breach of contract and breach of duty to act in good faith and seeking certain declaratory relief with respect to the interpretation of the three asset purchase agreements dated August 6, 2004 (the "APAs") entered into between Ivaco and Heico and the Reasons of Farley, J. for his order dated August 4, 2005 or, in the alternative, directing

a trial of an issue with respect to the interpretation of the APAs and giving directions for the completion of the working capital adjustment process in accordance with the APAs.

3 Ivaco Inc. and the other Applicants (collectively "Ivaco") have brought a cross-motion, in the event that this court lifts the stay and grants leave for Heico to commence the proposed action, for orders:

(i) directing KPMG LLP ("KPMG") as expert to include in its report on the working capital adjustment, a calculation of such adjustment determined pursuant to the approach specified in each of the initial written submissions of Ivaco and Heico and to indicate in its report which approach it accepts and the reasons on an accounting basis for such acceptance and the reasons on accounting basis as to why the other approach is not accepted;

(ii) directing Heico to provide to the Monitor on a confidential basis financial information with respect to transfers of assets, if any, since December 1, 2004 and to permit the Monitor to determine whether Heico has the ability to pay any amount determined to be owing as a working capital adjustment;

(iii) directing Heico to pay into court the amount of the working capital adjustment;

(iv) in the alternative, directing Heico to pay into court $65,258,000.08 plus interest calculated from December 23, 2004;

(v) directing Heico to pay into court $2,000,000 as security for costs;

(vi) fixing a timetable for the proposed action; and

(vii) precluding Cassels Brock and Blackwell LLP from acting as solicitors of record in respect of the Proposed Action.

4 The court was advised that Ivaco is not proceeding with the relief sought in clause (vii) above.

Background

5 Ivaco and Heico entered into the APAs dated August 2004, and subsequently amended and restated in November 2004, subject to court approval. Court approval was obtained on or about August 18, 2004 and the closing of the asset purchases took place on December 1, 2004.

6 The purchase price to be paid by Heico under each of the APAs was subject to an adjustment based on a number of factors, including the difference between the Working Capital (as defined therein) of the businesses as of the date of closing of the transaction (to be set forth at Exhibit "C" to the APAs) compared to "Estimated Working Capital" as of September 30, 2004 (set forth at Exhibit "B" to the APAs).

7 On January 11, 2005, Heico purported to dispute not only the Exhibit Cs prepared by Ivaco but also the preparation of the Exhibit Bs. It became clear that, totalling the three APAs, the parties were some $50,000,000 apart. Heico conceded at that time that it owed IRM $3,305,000 and Ifastgroupe $14,719,000 for a total of more than $18,000,000 and claimed that Ivaco Inc. owed it $1,541,000.

8 After further discussion failed to resolve matters, KPMG was appointed as the "Expert" to calculate the Adjustments within the meaning of the APAs and provide its report. KPMG did not begin work because Heico had taken the position, disputed by Ivaco, that KPMG was performing an arbitral role.

9 Heico applied to Farley, J. for a declaration that KPMG was performing a judicial, adjudicative and/or arbitral function. Heico's application was dismissed on June 2, 2005 by Farley, J. who concluded that KPMG was performing a non-arbitral role.

10 In addition, Ivaco and Heico did not agree on the process to be followed under the APAs for resolving the working capital dispute. The Monitor made a parallel application to Farley, J. seeking guidance on the scope of KPMG's authority and sought a declaration that, pursuant to the APAs, the Expert is neither authorized nor directed to make adjustments to Exhibit B. The Monitor proposed that KPMG would adjust Exhibit C and then section 2.11 of the APAs would apply to make any corresponding adjustments to Exhibit B.

11 The Monitor's application was dismissed on August 4, 2005. Farley, J's Reasons contained certain directions to KPMG as Expert as follows:

> In my view therefore the Expert "acting as an expert and not as an arbitrator" would consider the APAs, as a whole. In that regard the KPMG Partner would consider the financial records of the Sellers with the appropriate provisions of Canadian GAAP in a professional manner (including the views of the CICA). Since either party can invoke the Expert dispute resolution process, then it would appear that both sides would be able to make known to the Expert the value of the dispute(s) and their positions in respect thereof. The Expert then would decide those matters in dispute and provide a final and binding report thereon. That report would also provide any revisions to the Adjustments.
>
> The Adjustments as defined in Article 2.11 require a comparison of Exhibits C and B. To the extent that the Expert determines that Exhibit C is to be changed, then similarly Exhibit B "shall be deemed to be amended so as to reflect an identical basis for calculation as Exhibit C". Thus is (sic) appears reasonable that the Expert must deal with Exhibit B so that methodology is consistent. In that regard apples are to be compared with apples (although perhaps a better analogy would be that like colours be compared with each other — namely "green" to "green" while recognizing that "green" may be the result of a mixture of "blue" and "yellow").
>
> In the end results as set out in Article 2.12, the Expert is to decide what the Adjustments are to be — and this determination becomes the "final Adjustments". Therefore it would not in my view be a sensible interpretation that the Expert only consider revisions to Exhibit C, leaving revisions to Exhibit B to be worked out mechanically employing the deeming provision. Certainly, the Expert is in the best position to ensure consistency.

12 The parties were thereafter unable to agree on a protocol and timeline governing the Expert's work without the intervention of Farley, J. The parties returned to Farley, J. on three occasions to resolve a Protocol, which was not approved by Farley, J. until November 6, 2005.

13 Pursuant to the Protocol, the parties made their Initial Written Submissions to KPMG on February 17, 2006. A major disagreement between the parties relates to the correct interpretation of Sections 2.11 and 2.12 of the APAs as well as the interpretation of the Reasons for the August 4, 2005 decision of Farley, J. [*Atkins Nutritionals Inc., Re*, 2005 CarswellOnt 4371 (Ont. S.C.J. [Commercial List])]. The issue may be broadly described as whether the Expert is to do a free-standing review of both Exhibits B and C and revise and prepare final Exhibits B and C (as Heico contends) or whether the Expert is to finalize Exhibit C and then, to the extent Exhibit C is changed and the accounting policies used in Exhibit C are different, the Expert may consider whether a concomitant change to Exhibit B is warranted (as Ivaco contends).

14 This dispute remains unresolved and the cross-motion now brought by Ivaco before this court seeks in part to work toward a resolution of this issue by directing KPMG to prepare in its report calculations of the working capital adjustment determined pursuant to the approaches specified in each of the Initial Written Submissions of Ivaco and Heico.

15 With respect to the balance of Ivaco's motion, I have indicated that I will not deal with motion for security for costs as, in my view, that is an issue to be determined if leave is granted for the action to proceed and to be determined on the basis of the usual criteria applied to a motion for security for costs in an ongoing action. The parties have advised the court that they will work out the details of the financial information relating to Heico to be provided to the Monitor.

Issues

16 Accordingly, it appears to me that the following issues are before this court.

1. Whether KPMG should be directed to prepare a calculation of the working capital adjustments determined pursuant to the approach specified in each of the Initial Written Submissions of Ivaco and Heico or whether a trial of an issue should be directed in this proceeding with respect to the interpretation of the APAs and the Reasons of Farley, J. for his order of August 4, 2005.

2. Whether the stay should be lifted and leave granted to Heico to commence the proposed action.

3. The terms upon which such leave should be granted.

17 In my view, the issue of the directions to KPMG with respect to the calculation of the working capital adjustments must be kept separate and distinct from the issues relating to a lifting of the CCAA stay to permit Heico to bring the proposed action against Ivaco based upon negligent and/or fraudulent misrepresentations, breach of contract and breach of duty to act in good faith. There is clearly a live dispute between the parties as to the method of calculating the working capital adjustments and as to the interpretation of sections 2.11 and 2.12 of the APAs and of the Reasons of Farley J. for his order of August 4, 2005, which are relevant to the method of calculation.

18 It appears to me that, for practical purposes, the first step to get over this impasse is to direct KPMG to do a calculation of the working capital adjustments pursuant to the approaches set out in the Initial Written Submissions of Ivaco and Heico to determine the extent of the differences between the calculations based upon the Ivaco approach and upon the Heico approach. It may well be that the issues relating to the calculation of the working capital adjustments could be settled or resolved once the extent of the discrepancies between the calculations based on the two approaches is determined.

19 If the issues relating to the proper approach to the calculations are not settled or resolved at that time, I accept the submission of counsel for Heico that the stay should be lifted and a trial of issues directed limited strictly to the interpretation of sections 2.11 and 2.12 of the APAs and whether the Reasons of Farley J. for his order dated August 4, 2005 are *res judicata* in this regard and if so, to what extent.

20 It appears to me that the criteria which the court must consider in determining whether to lift a stay, being whether the proposed cause of action is tenable, the balancing of interests as between the parties, the relative prejudice to the parties, and whether the proposed action would be oppressive or vexatious or an abuse of the court process, would all be met with respect to a trial of issues to resolve interpretation of the APAs with respect to the calculation of the working capital adjustments.

21 Accordingly, an order will issue that:

1. KPMG include in its report a calculation of working capital adjustments under each of the APAs pursuant to the approaches specified in the Initial Written Submissions of Ivaco and in the Initial Written Submissions of Heico; and

2. if the parties do not, within 60 days after receipt of the report of KPMG, resolve the issues with respect to the calculation of the net working capital adjustments, a trial of issues proceed limited to the interpretation of sections 2.11 and 2.12 of the APAs and whether the Reasons of Farley J. for his order of August 4, 2005 are *res judicata* in this regard and, if so, to what extent.

Lifting of Stay

22 The lifting of the CCAA stay to permit the proposed action by Heico against Ivaco to proceed is considerably more problematic. The Statement of Claim for the proposed action is, aside from relief sought with respect to the working

capital adjustments, essentially a claim for damages in the amount of $75 million for "misrepresentation including negligent, reckless or alternatively deliberate misrepresentation, breach of contract and breach of the duty to act in good faith". There are entirely new causes of action distinct from the claims relating to the correct method of calculating the net working capital adjustments based upon the terms of the APAs and the information available to the Expert for purposes of such calculations.

23 A number of submissions were made by counsel for the various parties with respect to factors to be considered by this court in determining whether the stay should be lifted and as to any conditions to be attached to the lifting of the stay. More significantly, in my view, were the submissions made by counsel, and in particular, counsel for QIT-Fer et Titane Inc. ("QIT"), to the effect that the Statement of Claim does not disclose a reasonable cause of action with respect to misrepresentation, breach of contract or breach of the duty to act in good faith (collectively the "New Claim").

24 To the extent that the New Claim encompasses the torts of negligent misrepresentation and fraudulent misrepresentation, I fail to see how Heico could establish any damages flowing from the commission of such torts which would be different from the compensation to which Heico would be entitled as a result of adjustments to the estimated working capital to determine the actual working capital as at the closing date. In addition, it appears to be acknowledged by Heico that there are no representations in the APAs other than those contained in Article 3, none of which relate to the estimated working capital.

25 To the extent that the New Claim is based upon breach of contract, I am uncertain as to the contract provision which is alleged to have been breached. The New Claim alleges that misleading or inaccurate information was provided or used in the preparation of the estimated net working capital. There is not, so far as I can determine, any provision in the APAs specifying how the estimated working capital is to be determined, but simply a reference to Exhibit B setting out the components of the estimated working capital and the total estimated working capital. Again, even if misleading or inadequate information was used for the purposes of the estimated working capital, it would appear to me that any damages resulting from the use of such misleading or inadequate information would be incorporated into the compensation to which Heico would be entitled as a result of the adjustment of the estimated working capital to the actual working capital as of the closing date.

26 To the extent that the New Claim is based upon a breach of a duty to act in good faith, I am not satisfied that the law of this province recognizes any duty of good faith owed between parties negotiating a commercial contract beyond what is contained in the contract. Once again, however, it would appear to me that if such duty could be found to exist, and has been breached, any damages which Heico might have incurred as a result of such breach, would be incorporated into the compensation to which it would be entitled as a result of the adjustment of the estimated working capital to the actual working capital as at the closing date.

27 I must, accordingly, conclude that Heico would be unable to establish any damages as a result of the misrepresentation, breach of contract and breach of duty to act in good faith constituting the New Claim in the proposed action.

28 The balance of the claims and the relief sought in the Statement of Claim for the proposed action appear to me to relate solely to issues surrounding the manner of calculating the working capital adjustment and the interpretation of the contractual provisions and the Reasons of Farley J. relevant thereto and will either be resolved as between the parties upon the receipt of the KPMG report or resolved pursuant to a directed trial of issues as outlined above.

29 Accordingly, in my view, the Statement of Claim for the proposed action does not set forth a reasonable, or even tenable, cause of action and I am not prepared to lift the stay in order to permit such action to proceed.

30 Even if the Statement of Claim did disclose a tenable or reasonable cause of action, there are a number of other factors which this court must consider which militate against the lifting of the stay in the circumstances of this case. The institution of the Proposed Action, even if a tight timetable is imposed, would inevitably result in considerable delay

and complication with respect to the full distribution of the estate to the detriment of many small trade creditors and individual creditors as well as to pension claimants. In addition, it would appear from the evidence before this court that Heico has been aware of most of the matters alleged in the Statement of Claim for approximately 2 years and there does not appear to be any valid reason given for the delay in commencing the application to lift the stay.

31 The motion of Heico for an order lifting the stay and granting leave to commence the proposed action against Ivaco is dismissed.

32 Although the question is now moot in view of the dismissal of the motion to lift the stay, I do accept the submissions of counsel for Ivaco that this court does have jurisdiction to impose conditions on the lifting of the stay in a CCAA proceeding. With respect to the specific conditions sought to be imposed by Ivaco, I have indicated above that I would not have imposed a condition of the payment of security for costs at this time. In view of the rather tortuous history of this proceeding, the further delay that would be encountered if the proposed action were allowed to proceed and the impact of such delay upon the distribution of the estate, I would have imposed a condition of payment into court by Heico of an amount equal to the lowest amount determined by KPMG for the total net working capital adjustments. I would also have imposed a condition fixing a very tight timetable for the action to proceed and limitations on document and oral discovery.

33 Counsel may make brief written submissions to me with respect to the costs of these motions on or before January 15, 2007.

Schedule A

Applicants Filing for CCAA

1. Ivaco Inc.
2. Ivaco Rolling Mills Inc.
3. Ifastgroupe Inc.
4. IFC (Fasteners) Inc.
5. Ifastgroupe Realty Inc.
6. Docap (1985) Corporation
7. Florida Sub One Holdings Inc.
8. 3632610 Canada Inc.

Tab 6

2018 ONSC 5886
Ontario Superior Court of Justice

1523428 Ontario Inc. / JB&M Walker Ltd. v. TDL Group

2018 CarswellOnt 17498, 2018 ONSC 5886, 297 A.C.W.S. (3d) 898

1523428 Ontario Inc. (Plaintiff) and The TDL Group Corp., Tim Hortons Advertising and Promotion Fund (Canada) Inc., Restaurant Brands International Inc., Daniel Schwartz, Elias Diaz Sese, Andrea John and Jon Domanko (Defendants)

JB & M Walker Ltd. and 1128419 Alberta Ltd. (Plaintiffs) and The TDL Group Corp., Tim Hortons Advertising and Promotion Fund (Canada) Inc., Restaurant Brands International Inc., Daniel Schwartz, Elias Diaz Sese, Andrea John and Jon Domanko (Defendants)

E.M. Morgan J.

Heard: October 3, 2018
Judgment: October 22, 2018
Docket: CV-17-577371, CV-17-584058-00CP

Counsel: Richard Quance, Tom Arndt, for Plaintiffs
Mark Gelowitz, Jennifer Dolman, Geoff Hunnisett, for Defendants

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Estates and Trusts; Torts
Headnote
Estates and trusts --- Trusts — General principles — Miscellaneous
Plaintiff franchisees were owners of Tim Hortons franchised donut shops, and they brought two actions framed as potential class action — Corporate defendants were franchisor, parent of franchisor and related advertising company that managed advertising fund, and individual defendants were CEO, president and directors of companies — First action alleged that franchisor used advertising fund in impermissible way contrary to franchise agreement, it claimed conversion, breach of Canada Business Corporations Act (CBCA), unjust enrichment, breach of fiduciary duties and breach of trust — Second action related to franchisees' right of association, and alleged breach of contract, breach of Arthur Wishart Act (Franchise Disclosure), 2000, breach of implied duties of good faith and honest performance of franchise agreement, breach of fiduciary duties and oppression remedy — Franchisor brought motion pursuant to Rule 21.01(1)(b) of Rules of Civil Procedure to strike most of claims against it, and other defendants sought to have all claims dismissed in their entirety against them — Motion granted — Claim of breach of trust must be accompanied by material facts on which claim was based — Statement of claim in first action did little more than announce that advertising company and franchisee were in trust relationship but it did not explain basis of that relationship except to speculate that there might be contracts in existence between advertising company and franchisor about which franchisee knew nothing — Pleading contained no particulars of any breach of trust, and nothing in statement of claim explained why individual defendants were sued in capacity as directors of advertising company.
Torts --- Negligence — Duty and standard of care — Fiduciary duty
Plaintiff franchisees were owners of Tim Hortons franchised donut shops, and they brought two actions framed as potential class action — Corporate defendants were franchisor, parent of franchisor and related advertising company that managed advertising fund, and individual defendants were CEO, president and directors of companies — First action alleged that franchisor used advertising fund in impermissible way contrary to franchise agreement, it claimed conversion, breach of Canada Business Corporations Act (CBCA), unjust enrichment, breach of fiduciary duties and breach of trust — Second action related to franchisees' right of association, and alleged breach of contract, breach of

Arthur Wishart Act (Franchise Disclosure), 2000, breach of implied duties of good faith and honest performance of franchise agreement, breach of fiduciary duties and oppression remedy — Franchisor brought motion pursuant to Rule 21.01(1)(b) of Rules of Civil Procedure to strike most of claims against it, and other defendants sought to have all claims dismissed in their entirety against them — Motion granted — There was lack of material facts in first action respecting plea of breach of fiduciary duties — Essential elements of fiduciary relationship were not set out as required — Statement of claim failed to explain what fiduciary duties entailed and how they were breached.

Business associations **---** Specific matters of corporate organization — Shareholders — Shareholders' remedies — Relief from oppression — General principles

Plaintiff franchisees were owners of Tim Hortons franchised donut shops, and they brought two actions framed as potential class action — Corporate defendants were franchisor, parent of franchisor and related advertising company that managed advertising fund, and individual defendants were CEO, president and directors of companies — First action alleged that franchisor used advertising fund in impermissible way contrary to franchise agreement, it claimed conversion, breach of Canada Business Corporations Act (CBCA), unjust enrichment, breach of fiduciary duties and breach of trust — Second action related to franchisees' right of association, and alleged breach of contract, breach of Arthur Wishart Act (Franchise Disclosure), 2000, breach of implied duties of good faith and honest performance of franchise agreement, breach of fiduciary duties and oppression remedy — Franchisor brought motion pursuant to Rule 21.01(1)(b) of Rules of Civil Procedure to strike most of claims against it, and other defendants sought to have all claims dismissed in their entirety against them — Motion granted — First action did not allege that actions of companies were oppressive or unfairly prejudicial to or unfairly disregards interests of security holder, it was not clear how facts that were pleaded could rise to level of corporate oppression within meaning of s. 241 of CBCA, and it was clear that oppression remedy claim could not succeed — Real target of oppression claim in second action was franchisor, and non-franchisor corporate defendants were not alleged to have done anything in particular to oppress plaintiff — Plaintiff did not fit within meaning of creditor under s. 241 of CBCA — Franchisor was British Columbia corporation and CBCA did not apply to it, Ontario court had no jurisdiction to impose oppression remedy under British Columbia Business Corporations Act, and oppression claim could not succeed against any of defendants.

Torts **---** Conversion — Practice and procedure — Pleadings — Miscellaneous

Plaintiff franchisees were owners of Tim Hortons franchised donut shops, and they brought two actions framed as potential class action — Corporate defendants were franchisor, parent of franchisor and related advertising company that managed advertising fund, and individual defendants were CEO, president and directors of companies — First action alleged that franchisor used advertising fund in impermissible way contrary to franchise agreement, it claimed conversion, breach of Canada Business Corporations Act (CBCA), unjust enrichment, breach of fiduciary duties and breach of trust — Second action related to franchisees' right of association, and alleged breach of contract, breach of Arthur Wishart Act (Franchise Disclosure), 2000, breach of implied duties of good faith and honest performance of franchise agreement, breach of fiduciary duties and oppression remedy — Franchisor brought motion pursuant to Rule 21.01(1)(b) of Rules of Civil Procedure to strike most of claims against it, and other defendants sought to have all claims dismissed in their entirety against them — Motion granted — In first action plaintiff sought to transform claim of debt under contract to claim of conversion of property, but there were no material facts that could support that transformation — Plaintiff had contractual rights for which it could seek enforcement, but it did not own advertising funds that it claimed to have been converted away from it, and conversion claim could not succeed.

Contracts **---** Franchising contracts — Performance or breach — Duty of franchisor — Good faith and fair dealing

Plaintiff franchisees were owners of Tim Hortons franchised donut shops, and they brought two actions framed as potential class action — Corporate defendants were franchisor, parent of franchisor and related advertising company that managed advertising fund, and individual defendants were CEO, president and directors of companies — First action alleged that franchisor used advertising fund in impermissible way contrary to franchise agreement, it claimed conversion, breach of Canada Business Corporations Act (CBCA), unjust enrichment, breach of fiduciary duties and breach of trust — Second action related to franchisees' right of association, and alleged breach of contract, breach of Arthur Wishart Act (Franchise Disclosure), 2000, breach of implied duties of good faith and honest performance of franchise agreement, breach of fiduciary duties and oppression remedy — Franchisor brought motion pursuant to Rule 21.01(1)(b) of Rules of Civil Procedure to strike most of claims against it, and other defendants sought to have all claims dismissed in their entirety against them — Motion granted — In second action claim for breach of contract must also include claim that franchisor violated implied duty of good faith, but action lacked particulars as to which contractual obligations franchisor failed to fulfill and as to precisely how franchisor acted in bad faith, and particulars must be provided — It was not possible for breach of contract claim against parent to succeed because it was not party to franchise agreement and plaintiff provided no theory of how it could be contractually liable — Wishart Act did not impose duty of fair dealing in contract performance on non-parties to contract, and in absence of privity of contract, claim of breach of duty of fair dealing under s. 3 of Wishart Act was not viable against non-franchisor defendants — Claim under s. 3 against franchisor held out possibility of surviving challenge, but particulars needed to be set out that amounted to material facts capable of anchoring alleged breach of s. 3 to specific obligations of franchisor under franchise agreement — Section 4 of Wishart Act set out right of association but claim could not be sustained against any of defendants except franchisor as there was lack of material facts that could establish serious level of control.

Civil practice and procedure --- Pleadings — Statement of claim — Striking out for absence of reasonable cause of action — General principles

Plaintiff franchisees were owners of Tim Hortons franchised donut shops, and they brought two actions framed as potential class action — Corporate defendants were franchisor, parent of franchisor and related advertising company that managed advertising fund, and individual defendants were CEO, president and directors of companies — First action alleged that franchisor used advertising fund in impermissible way contrary to franchise agreement, it claimed conversion, breach of Canada Business Corporations Act (CBCA), unjust enrichment, breach of fiduciary duties and breach of trust — Second action related to franchisees' right of association, and alleged breach of contract, breach of Arthur Wishart Act (Franchise Disclosure), 2000, breach of implied duties of good faith and honest performance of franchise agreement, breach of fiduciary duties and oppression remedy — Franchisor brought motion pursuant to Rule 21.01(1)(b) of Rules of Civil Procedure to strike most of claims against it, and other defendants sought to have all claims dismissed in their entirety against them — Motion granted — Plaintiffs had ample time to amend pleadings to add material facts to support claims but had not done so — Claims against all non-franchisor defendants were struck out in both actions without leave to amend, as it was plain and obvious that claims could not succeed — In first action all causes of action against franchisor except for breach of contract were struck out without leave to amend — No amount of particulars could salvage non-contractual causes of action against franchisor — Claim in second action of breach of s. 4 of Wishart Act could remain — In second action claims of breach of contract, including breach of implied contractual duty of good faith, and breach of s. 3 of Wishart Act were struck out with leave to amend to add necessary particulars.

Table of Authorities

Cases considered by *E.M. Morgan J.*:

Addison Chevrolet Buick GMC Ltd. v. General Motors of Canada Ltd. (2016), 2016 ONCA 324, 2016 CarswellOnt 6795, 130 O.R. (3d) 161, 348 O.A.C. 281, 58 B.L.R. (5th) 281 (Ont. C.A.) — considered

Admassu v. Macri (2010), 2010 ONCA 99, 2010 CarswellOnt 572 (Ont. C.A.) — referred to

BCE Inc., Re (2008), 2008 CarswellQue 12595, 2008 CarswellQue 12596, 71 C.P.R. (4th) 303, 52 B.L.R. (4th) 1, (sub nom. *Aegon Capital Management Inc. v. BCE Inc.*) 383 N.R. 119, (sub nom. *Aegon Capital Management Inc. v. BCE Inc.*) 301 D.L.R. (4th) 80, 2008 SCC 69, (sub nom. *BCE Inc. v. 1976 Debentureholders*) [2008] 3 S.C.R. 560 (S.C.C.) — considered

Balanyk v. University of Toronto (1999), 1999 CarswellOnt 1786, 1 C.P.R. (4th) 300 (Ont. S.C.J.) — considered

Bhasin v. Hrynew (2014), 2014 SCC 71, 2014 CSC 71, 2014 CarswellAlta 2046, 2014 CarswellAlta 2047, [2014] 11 W.W.R. 641, 27 B.L.R. (5th) 1, 464 N.R. 254, 379 D.L.R. (4th) 385, 20 C.C.E.L. (4th) 1, [2014] 3 S.C.R. 494, 584 A.R. 6, 623 W.A.C. 6, 4 Alta. L.R. (6th) 219 (S.C.C.) — referred to

CIT Financial Ltd./Services Financiers CIT Ltée v. Sharpless (2006), 2006 CarswellOnt 3325 (Ont. S.C.J. [Commercial List]) — referred to

Ernst & Young Inc. v. Xinduo (2017), 2017 ONSC 5911, 2017 CarswellOnt 15376 (Ont. S.C.J.) — followed

Fairview Donut Inc. v. TDL Group Corp. (2012), 2012 ONSC 1252, 2012 CarswellOnt 2223 (Ont. S.C.J.) — considered

Fairview Donut Inc. v. TDL Group Corp. (2012), 2012 ONCA 867, 2012 CarswellOnt 15496 (Ont. C.A.) — referred to

Gaur v. Datta (2015), 2015 ONCA 151, 2015 CarswellOnt 3221 (Ont. C.A.) — referred to

Gould v. Western Coal Corp. (2012), 2012 ONSC 5184, 2012 CarswellOnt 11306, 7 B.L.R. (5th) 19 (Ont. S.C.J.) — considered

Hugh W. Simmons Ltd. v. Foster (1955), [1955] S.C.R. 324, [1955] 2 D.L.R. 433, 1955 CarswellNfld 18 (S.C.C.) — referred to

Hunt v. T & N plc (1990), 4 C.C.L.T. (2d) 1, 43 C.P.C. (2d) 105, 117 N.R. 321, 4 C.O.H.S.C. 173 (headnote only), (sub nom. *Hunt v. Carey Canada Inc.*) [1990] 6 W.W.R. 385, 49 B.C.L.R. (2d) 273, (sub nom. *Hunt v. Carey Canada Inc.*) 74 D.L.R. (4th) 321, [1990] 2 S.C.R. 959, 1990 CarswellBC 759, 1990 CarswellBC 216 (S.C.C.) — referred to

Kourtessis v. Minister of National Revenue (1993), 93 D.T.C. 5137, 153 N.R. 1, [1993] 2 S.C.R. 53, 102 D.L.R. (4th) 456, 81 C.C.C. (3d) 286, 78 B.C.L.R. (2d) 257, 14 C.R.R. (2d) 193, 27 B.C.A.C. 81, 45 W.A.C. 81, [1993] 4 W.W.R. 225, 20 C.R. (4th) 104, 1993 CarswellBC 1213, [1993] 1 C.T.C. 301, 1993 CarswellBC 1259 (S.C.C.) — referred to

MacLeod v. White (1955), 37 M.P.R. 341, 1955 CarswellNB 20 (N.B. S.C.) — considered

McConnell v. Rabin (1986), 13 C.P.C. (2d) 184, 1986 CarswellOnt 461 (Ont. H.C.) — referred to

Mennillo v. Intramodal inc. (2016), 2016 SCC 51, 2016 CSC 51, 2016 CarswellQue 10615, 2016 CarswellQue 10616, 403 D.L.R. (4th) 214, 57 B.L.R. (5th) 173, [2016] 2 S.C.R. 438 (S.C.C.) — considered

Mitchell v. Lewis (2015), 2015 ONSC 4614, 2015 CarswellOnt 11558 (Ont. S.C.J.) — referred to

PIPSC v. Canada (Attorney General) (2012), 2012 SCC 71, 2012 CarswellOnt 15718, 2012 CarswellOnt 15719, D.T.E. 2012T-892, 352 D.L.R. (4th) 491, (sub nom. *Professional Institute of the Public Service of Canada v. Canada (Attorney General)*) 438 N.R. 1, (sub nom. *Prof. Inst. of the Public Service of Canada v. Canada (Attorney General)*) 2012 C.E.B. & P.G.R. 8017 (headnote only), (sub nom. *Professional Institute of the Public Service of Canada v. Canada (Attorney General)*) 300 O.A.C. 202, (sub nom. *Professional Institute of the Public Service of Canada v. Canada (Attorney General)*) 274 C.R.R. (2d) 30, (sub nom. *Professional Institute of the Public Service Alliance of Canada v. Canada (Attorney General)*) [2012] 3 S.C.R. 660, (sub nom. *Professional Institute of the Public Service of Canada v. Canada (Attorney General)*) 119 O.R. (3d) 80 (note), 1 C.C.P.B. (2nd) 1 (S.C.C.) — referred to

*Re*Collections Inc. v. Toronto Dominion Bank* (2010), 2010 ONSC 6560, 2010 CarswellOnt 9950, 5 C.P.C. (7th) 214 (Ont. S.C.J.) — referred to

Sheridan v. Ontario (2015), 2015 ONCA 303, 2015 CarswellOnt 6475 (Ont. C.A.) — considered

Spina v. Shoppers Drug Mart Inc. (2012), 2012 ONSC 5563, 2012 CarswellOnt 12295 (Ont. S.C.J.) — referred to

2336574 Ontario Inc. v. 1559586 Ontario Inc. (2016), 2016 ONSC 2467, 2016 CarswellOnt 5580, 130 O.R. (3d) 355, 57 B.L.R. (5th) 127, 77 R.P.R. (5th) 137 (Ont. S.C.J.) — referred to

Statutes considered:

Arthur Wishart Act (Franchise Disclosure), 2000, S.O. 2000, c. 3

Generally — referred to

s. 3 — considered

s. 3(1) — considered

s. 3(2) — considered

s. 4 — considered

s. 4(1) — considered

s. 4(2) — considered

s. 4(5) — considered

Business Corporations Act, S.B.C. 2002, c. 57

Generally — referred to

Canada Business Corporations Act, R.S.C. 1985, c. C-44

Generally — referred to

s. 241 — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 21 — considered

R. 21.01(1)(b) — considered

R. 25.06(8) — considered

MOTION by defendants to strike out claims.

***E.M. Morgan J.*:**

I. The franchise dispute

1 This is a franchise dispute raising a number of different statutory and common law causes of action. The Plaintiffs in both of these actions are owners of Tim Hortons franchised donut shops. The actions are framed as a potential class action, and counsel for the Plaintiffs indicates that the class could number some 3,500 franchisees. The Defendant, The TDL Group Corp. ("TDL"), is the franchisor of the Tim Hortons system. TDL moves in both actions under Rule 21.01(1)(b) of the *Rules of Civil Procedure*, RRO 1990, Reg 194, to strike all but certain of the claims against it.

2 The other Defendants (collectively, the "Non-TDL Defendants") seek to have the claims in both actions dismissed in their entirety as against them. The Defendant, Restaurant Brands International Inc. ("RBI"), is the parent of TDL and the Defendant, Tim Hortons Advertising and Promotion Fund (Canada) Inc. ("THAPF"), is a related company that holds and manages the Tim Hortons advertising fund. The Defendant, Daniel Schwartz, is the CEO of RBI, the Defendant, Sam Siddiqui, is the president of RBI, and the Defendants, Elias Dias Sese, Andrea John and Jon Domanko are directors of TDL and THAPF (collectively, the "Individual Defendants"). The Non-TDL Defendants submit that there are no material facts to support any viable cause of action against them.

3 The dispute styled 1523428 Ontario Inc. v. The TDL Group Corp. et al., Court File No. CV-17-577371 (the "152 Action") relates to the advertising fund that is funded primarily from Tim Hortons donut shop revenue. The dispute styled JB & M Walker Ltd. and 1128419 Alberta Ltd. v. The TDL Group Corp., Court File No. CV-17-584058-00CP (the "Walker Action"), relates to the formation by certain Tim Hortons franchisees of the Great White North Franchise Association (the "GWNFA") and the franchisees' right of association. Each of the actions will be addressed here in turn.

4 The 152 Action concerns a license agreement dated 1999 and the Walker Action concerns a license agreement dated 2002. Although there are some differences between the two agreements, each of the actions are premised on the fact that the agreements at issue are versions of the standard form of franchise agreement that all Tim Hortons franchisees (i.e. all potential class members) enter with TDL and that sets out the terms of the franchise operation. Except where a specific difference between the two agreements is relevant, the two agreements will be discussed here as the "Franchise Agreement".

II. The two actions and their pleadings

a) The 152 Action

5 In the pleading for the 152 Action, the Plaintiff states that the Franchise Agreement requires each franchisee (i.e. each potential class member) to contribute a percentage of its sales to an Ad Fund controlled and operated by TDL. The claim goes on to allege that TDL has used the Ad Fund in impermissible ways contrary to the Franchise Agreement.

6 The Statement of Claim further claims against TDL for conversion, breach of the *Canada Business Corporations Act*, RSC 1985, c. C-44 ("CBCA"), unjust enrichment, breach of fiduciary duties, and seeks declaratory relief as well as

compensatory, punitive, exemplary and/or aggravated damages. TDL seeks all of these claims, with the exception of the breach of contract claim, struck out as disclosing no viable cause of action.

7 Under the Franchise Agreement, the franchisees pay their Ad Fund contributions as directed by TDL. Those contributions have been directed by TDL to THAPF, which in turn pays all expenses related to the Ad Fund and contracts for advertising and other promotional activities. In the 152 Action, the Plaintiff alleges that THAPF has engaged in breach of trust and breach of fiduciary duties owed to the Plaintiff and other franchisees.

8 The Plaintiff also claims breach of the CBCA and breach of fiduciary duties by the corporate Defendants, as well as claims of breach of trust and breach of fiduciary duties by the Individual Defendants. There is no breach of contract claim against RBI or the Individual Defendants, as they are not parties to the Franchise Agreement. The claims against all of the Non-TDL Defendants are largely unparticularized.

i) Breach of trust and breach of fiduciary duties

9 The Court of Appeal has indicated that a claim of breach of trust must be accompanied by material facts on which the claim is based: *Admassu v. Macri*, 2010 ONCA 99 (Ont. C.A.), at para 37. The pleading of this cause of action cannot be a bare one. "The full particulars of allegations of fraud, breach of trust or misrepresentation required by rule 25.06(8) must set out precisely what each allegation of such wrongful act is, and the when, what, by whom and to whom of the relevant circumstances": *Balanyk v. University of Toronto* [1999 CarswellOnt 1786 (Ont. S.C.J.)], 1999 CanLII 14918, at para 28.

10 The Statement of Claim in the 152 Action describes the Ad Fund arrangement under the Franchise Agreement and explains the role of THAPF as the company that collects and spends the funds at the direction of TDL. Beyond that, it does little more than announce that THAPF and the Plaintiff are in a trust relationship. It nowhere explains the basis of that relationship, except to speculate that there may be contracts in existence between THAPF and TDL about which the Plaintiff knows nothing.

11 The description of its role and speculation about unknown arrangements, however, does not satisfy the requirement that a specific contract containing language that actually establishes a trust be pleaded: *Mitchell v. Lewis*, 2015 ONSC 4614 (Ont. S.C.J.), at para 27. In addition, as counsel for the Defendants points out, simply asserting that TDL has directed funds to be paid to THAPF does not establish a trust relationship. The payment of funds *simpliciter* is not a material fact on which a trust or its breach can be based.

12 Furthermore, the pleading contains no particulars of any breach of trust. The Defendants submit that the Ad Fund has made improper payments not permitted pursuant to the Franchise Agreement. Accepting those allegations as true, they could amount to a breach of the Franchise Agreement. But a cause of action of this nature needs to establish both that a trust relationship exists and that there has been some wrongdoing that amounts to a breach of the obligations embedded in that relationship. In the absence of contractual language establishing a trust, a breach of the contract is not in itself a breach of trust.

13 Finally, there is nothing in the Statement of Claim that explains why the Individual Defendants are sued in their capacity as THAPF directors. There is a dearth of material facts with respect to the claim against THAPF; there is absolutely nothing with respect to its directors. The Individual Defendants are apparently included for no reason other than that they hold corporate positions.

14 The same lack of material facts applies to the plea of breach of fiduciary duties. The Statement of Claim in the 152 Action extends a claim for damages on this basis beyond THAPF and its directors to also include RBI and its CEO. However, it fails to explain what the fiduciary duties entailed and how they were breached. RBI appears to have been included in this claim for no reason other than that it is the parent of TDL and therefore must have something to do with TDL's conduct, and the CEO of RBI has been included for no reason other than that he holds a high corporate position with RBI. All of the material facts pleaded and all of the acts complained of, however, are those of TDL.

15 As for the pleading of breach of fiduciary duties by THAPF and its directors, the Plaintiff's assertions regarding the existence of fiduciary duties are conclusory, and the alleged breach of duty is stated only vaguely and in a way that lacks all particulars. A claim that fiduciary duties exist and have been breached must set out the essential elements of a fiduciary relationship: that the defendant undertook to act in the best interest of the plaintiff and to elevate the plaintiff's interest above all others, that the defendant had some discretionary power over a vulnerable plaintiff, and that the plaintiff had some legal or vital practical interest at stake: *PIPSC v. Canada (Attorney General)*, [2012] 3 S.C.R. 660 (S.C.C.), paras 124-128, 138.

16 Even where the existence of fiduciary duties is established, a pleading of this nature is required to set out particulars of the duty owed and how the duty was breached: *CIT Financial Ltd./Services Financiers CIT Ltée v. Sharpless* [2006 CarswellOnt 3325 (Ont. S.C.J. [Commercial List])], 2006 CanLII 18190, at par 36. No such particulars are contained in the present Statement of Claim, beyond the assertion that, "By permitting TDL to make improper charges to the Ad Fund, THAPF and the THAPF Directors have breached their trust and fiduciary obligations to the plaintiff and the franchisees."

17 This statement, unsupported by any other material facts, does not suffice to establish the breach of trust and breach of fiduciary duties causes of action. Again, THAPF is included in this claim because of its position as agent for TDL, and the directors of THAPF are included because they hold corporate positions. All of the material facts pleaded and all of the acts complained of in the 152 Action, however, are those of TDL.

18 Finally, Defendants' counsel submits that a claim of breach of fiduciary duties cannot succeed against TDL as franchisor. They point out that the Plaintiff has contracted itself out of that possibility by signing the Franchise Agreement.

19 Specifically, the Franchise Agreement contains a 'no fiduciary' clause which expressly excludes the possibility that TDL has undertaken fiduciary obligations to the Plaintiff. There is no reason that this clause should not be enforceable as against the Plaintiff and other putative class members. The parties were all sophisticated business people who knew what they were signing.

20 Counsel for the Plaintiff characterizes the terms of the Franchise Agreement as having been presented to the Plaintiff and other franchisees as "non-negotiable". Accepting that that may be the case, it nevertheless does not mean that the terms were incomprehensible. If TDL is alleged to have violated the Plaintiff's rights by directing the Ad Fund to THAPF or by misusing the fund in some way, the wrong was done in breach of contract. However, the Franchise Agreement by its very term did not establish a fiduciary relationship between TDL and the Plaintiff. There are no grounds for any further protection of the Plaintiff and other franchisees in equity: *Spina v. Shoppers Drug Mart Inc.*, 2012 ONSC 5563 (Ont. S.C.J.), at para 195.

ii) Oppression remedy

21 There are three corporate Defendants in the 152 Action. The Statement of Claim alleges breach of the oppression remedy under the CBCA. It is not easy to discern which of the companies this cause of action is directed towards, since they are not specifically identified in the Statement of Claim and there are no particulars accompanying this pleading.

22 To seek relief under s. 241 of the CBCA — the oppression remedy provision — the claim must somewhere allege that the actions of the company are "oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer". There is nothing in the Statement of Claim for the 152 Action that makes this allegation.

23 Moreover, it is not clear how the facts that are pleaded could rise to the level of corporate oppression within the meaning of s. 241 of the CBCA. Turning first to the Individual Defendants, something more would have to be said of them other than to recite their status as corporate officers and directors in order for them to fall within the statutory

cause of action. The Supreme Court of Canada observed in *BCE Inc., Re*, [2008] 3 S.C.R. 560 (S.C.C.), at para 66, that directors do not owe duties of this nature to those outside the corporate structure:

> . . . the directors owe a fiduciary duty to the corporation, and only to the corporation. People sometimes speak in terms of directors owing a duty to both the corporation and to stakeholders. Usually this is harmless, since the reasonable expectations of the stakeholder in a particular outcome often coincide with what is in the best interests of the corporation. However, cases (such as these appeals) may arise where these interests do not coincide. In such cases, it is important to be clear that the directors owe their duty to the corporation, not to stakeholders, and that the reasonable expectation of stakeholders is simply that the directors act in the best interests of the corporation.

24 The same may be said about the corporate Non-TDL Defendants. The way the 152 Action is pleaded, the Plaintiff alleges surprise that the Ad Fund was moved to THAPF. It is TDL, and not THAPF (or TDL's parent, RBI), that is claimed to have made improper charges against the funds collected from franchisees and held by THAPF at TDL's direction. The pleading in the 152 Action essentially assumes that since THAPF acts at TDL's direction as a holding company for the Ad Fund, and since TDL is itself owned by RBI, that TDL's conduct impugns their conduct. However, there is nothing in the claim as against the Non-TDL Defendants that meets the type of culpability or breach of reasonable expectations that would qualify under s. 241 of the CBCA.

25 Again, as the Supreme Court put it in *BCE Inc.*, at para 67:

> [N]ot every unmet expectation gives rise to claim under s. 241. The section requires that the conduct complained of amount to 'oppression', 'unfair prejudice' or 'unfair disregard' of relevant interests. 'Oppression' carries the sense of conduct that is coercive and abusive, and suggests bad faith. 'Unfair prejudice' may admit of a less culpable state of mind, that nevertheless has unfair consequences. Finally, 'unfair disregard of interests extends the remedy to ignoring an interest as being of no importance, contrary to the stakeholders' reasonable expectations. The phrases describe, in adjectival terms, ways in which corporate actors may fail to meet the reasonable expectations of stakeholders. [citations omitted]

26 Accordingly, as against the Non-TDL Defendants, there are no material facts on which the Plaintiff can fit an oppression remedy claim. That claim is all about unfairness to a claimant in the sense of a breach of reasonable expectations. The Supreme Court reiterated that definition in *Mennillo v. Intramodal inc.*, [2016] 2 S.C.R. 438 (S.C.C.), at para 9:

> There are two elements of an oppression claim. The claimant must first 'identify the expectations that he or she claims have been violated . . . and establish that the expectations were reasonably held': *BCE*, at para. 70. Then the claimant must show that those reasonable expectations were violated by conduct falling within the statutory terms, that is, conduct that was oppressive, unfairly prejudicial to or unfairly disregarding of the interests of any security holder.

27 On any reading of the Plaintiff's claim, it is only TDL that is alleged to have unfairly disregarded the Plaintiff's interest in the oppression remedy sense. The Non-TDL Defendants simply do not stand in the kind of relationship with the franchisees that could support such a claim.

28 As for any claim under the CBCA against TDL, there is a short but definitive answer: TDL is not a CBCA corporation. It is a British Columbia corporation.

29 Strathy J (as he then was) addressed a similar situation in *Gould v. Western Coal Corp.*, 2012 ONSC 5184 (Ont. S.C.J.), at para 339, and concluded that the oppression remedy is statute and jurisdiction-specific. If a corporate oppression claim it is brought under the wrong statute or in the wrong jurisdiction, it must be struck out:

> The oppression remedy applicable to this dispute is a creation of a British Columbia statute. The statute confers the remedy and describes the manner in which it is to be enforced. I have no jurisdiction to rant the remedy because

> the statute expressly grants jurisdiction to the British Columbia Superior Court. It is irrelevant that the defendants may be otherwise subject to this court's jurisdiction, or may have attorned to the jurisdiction. I have no jurisdiction over the subject matter. The oppression claim should therefore be struck.

30 It is readily apparent that the oppression remedy claim contained in the 152 Action cannot succeed against TDL.

iii) Conversion

31 The Statement of Claim alleges that TDL has converted funds collected from franchisees for the Ad Fund. The tort of conversion is an old one, but has recently been outlined by the court in *Ernst & Young Inc. v. Xinduo*, 2017 ONSC 5911 (Ont. S.C.J.), at para 31, as follows:

> Conversion requires the wrongful taking, using or destroying of goods inconsistent with the title of the owner. There must be a voluntary act in respect of another's goods that amounts to a usurpation of the owner's proprietary or possessory rights. The constituent elements of the tort are: a wrongful act, involving a chattel, consisting of handling, disposing or destruction of the chattel, with the intent or effect of denying the title of another person.

32 Counsel for the Defendants submits that the pleading in issue is analogous to that in *Mitchell v. Lewis*, *supra*, were the court struck out the claim for conversion on the grounds that the Plaintiff had no proprietary interest in the funds held by the Defendant. I have already indicated above that the Statement of Claim does not plead material facts to support a claim of breach of trust. Without a trustee-beneficiary relationship being established, the Plaintiff has no proprietary interest in the Ad Funds collected pursuant to the Franchise Agreement. The funds were paid over to TDHF pursuant to TDL's direction, as agreed upon by the Plaintiff and TDL in the Franchise Agreement.

33 The Plaintiff, as already indicated, claims that the Ad Fund monies have been misused. Accepting that allegation as true, that establishes a claim of breach of contract as against TDL. It is TDL that is the Plaintiff's counter-party in the Franchise Agreement. The breach of contract, however, is immaterial to a claim of conversion. The court in *Mitchell*, at para 34, came to the identical conclusion. A claim of conversion cannot survive on the basis pleaded:

> [T]he plaintiffs have failed to plead the material facts necessary to establish a cause of action for conversion, as I have struck the trust claim relating to monies owing to the plaintiff, it is plain and obvious that the claim for conversion cannot succeed. Any monies owing to the plaintiffs pursuant to the Agreement are a debt.

34 The Plaintiff seeks to transform a claim of debt under a contract to a claim of conversion of property, but there are no material facts which can support this transformation. The Plaintiff had contractual rights for which it can seek enforcement, but it did not own the funds which it claims to have been converted away from it. The conversion claim in the 152 Action cannot succeed.

iv) Conclusion re the 152 Action

35 There is no valid cause of action pleaded in the 152 Action as against the Non-TDL Defendants. Moreover, the material facts are such that it appears to me to be impossible to improve the pleading in order to bring in the Non-TDL Defendants. The claims against the Non-TDL Defendants are to be struck without leave to amend.

36 As for the portions of the 152 Action directed against TDL, the cause of action in breach of trust, breach of fiduciary duties, oppression remedy under the CBCA, and conversion, are all improperly pleaded and unsalvageable. Those claims against TDL are likewise to be struck without leave to amend.

37 What remains of the 152 Action is a claim of breach of contract as against TDL. The Plaintiff has rights and TDL has obligations to the Plaintiff under the Franchise Agreement, and it is those contractual rights and obligations that are properly at issue in the 152 Action. That is the only cause of action which the facts as pleaded can support. The Statement of Claim must be amended so that it is limited to the contractual claim against TDL and facts that support that cause of action.

b) The Walker Action

38 In the pleading for the Walker Action, the Plaintiffs state that they are members of the GWNFA, which was formed on March 9, 2017 for the purpose of protecting the interests of all Tim Hortons franchisees. They further allege that the Defendants have interfered with, penalized, and threatened franchisees from exercising their right to associate in the GWNFA and otherwise.

39 As against TDL, the Plaintiffs in the Walker Action assert both contractual and statutory causes of action. They plead that TDL has breached sections 3 and 4 of the *Arthur Wishart Act (Franchise Disclosure), 2000*, SO 2000, c. 3 (the "Wishart Act") and similar legislation in other provinces. The Plaintiffs also plead that TDL has breached its implied duties of good faith and honest performance under the Franchise Agreement.

40 In addition, the Walker Action alleges that TDL has breached fiduciary duties purportedly owed to the Plaintiffs. And, finally, the Plaintiffs make an oppression remedy claim against TDL for breach of the CBCA as well as breach of the British Columbia *Business Corporations Act*, SBC 2002, c. 57 ("BCBCA").

i) Breach of contract

41 Counsel for the Defendants concede that TDL and the Plaintiff, JB & M Walker Ltd. ("Walker"), are parties to a Franchise Agreement, and that allegations that TDL has not lived up to its obligations under that agreement amount to a cause of action in breach of contract. The Defendants contest the facts and legal conclusion, of course, but for the purposes of this motion under Rule 21.01(1)(b) they accept that a cause of action in breach of contract has been properly pleaded as against TDL.

42 In my view, this must also include the claim that TDL has violated the implied duty of good faith. This is so despite the fact that counsel for the Defendants accurately observes that the breach of good faith claim is pleaded rather sparsely in the Statement of Claim.

43 The Supreme Court of Canada has recognized that performance of contractual obligations in good faith is a fundamental principle of common law and that parties are under a duty to act honestly in carrying out their contractual obligations: *Bhasin v. Hrynew*, [2014] 3 S.C.R. 494 (S.C.C.). An allegation of breach of contract, especially in the context of a long-term relational contract such as a Franchise Agreement, can certainly carry with it an allegation of breach of the duty of good faith: see *2336574 Ontario Inc. v. 1559586 Ontario Inc.* (2016), 130 O.R. (3d) 355 (Ont. S.C.J.), at para 23.

44 That said, the Walker Action lacks particulars as to which contractual obligations TDL failed to fulfill. It also lacks particulars as to how, precisely, TDL acted in bad faith, although it is clear from the overall context of the claim that this has to do with TDL's treatment of the franchisees in the GWNFA.

45 While this breach of contract claim, including a breach of duty of good faith claim, can potentially survive a challenge at this stage, it can only do so once particulars are provided. These must include some identification of the contractual terms that have been breached, the manner in which those terms were breached, and the damages that flow from the breach: *Re*Collections Inc. v. Toronto Dominion Bank*, 2010 ONSC 6560 (Ont. S.C.J.), para 108.

46 The Statement of Claim in the Walker Action also alleges breach of contract against RBI. Again, there are no particulars of the breach; here, however, it is impossible to imagine what particulars could possibly fill this gap. RBI is not a party to the Franchise Agreement. Nothing in the Plaintiffs' pleading provides any theory of how contractual liability could attach to this non-party.

47 The Statement of Claim in the Walker Action identifies RBI as TDL's parent company. But it does not, and could not, contend that RBI is a party to the Franchise Agreement or that it is somehow legally indistinguishable from TDL and has therefore assumed all of TDL's obligations under the Franchise Agreement. It is not possible for the claim against RBI to succeed and it should be eliminated from the Walker Action.

ii) Statutory duty of fair dealing

48 The Walker Action asserts that the Defendants have breached the duty of fair dealing contained in s. 3 of the Wishart Act. That section provides:

> 3(1) Every franchise agreement imposes on each party a duty of fair dealing in its performance and enforcement.
>
> (2) A party to a franchise agreement has a right of action for damages against another party to the franchise agreement who breaches the duty of fair dealing in the performance or enforcement of the franchise agreement.

49 To the extent that this claim is meant to apply to the Non-TDL Defendants, it is lacking in a number of essential ingredients. Foremost among these is the fact that s. 3 of the Wishart Act augments the duties contained in franchise contracts, but is premised on there being a contract between the parties. The Wishart Act does not impose a duty of fair dealing in contract performance on non-parties to a contract.

50 Among the Defendants, only TDL is a party to the Franchise Agreement at issue in the Walker Action. In the absence of privity of contract, the claim of breach of the duty of fair dealing under s. 3 of the Wishart Act is not viable as against the Non-TDL Defendants.

51 As for the claim under s. 3 against TDL, the claim holds out the possibility of surviving a challenge, but like the implied contractual term of good faith, some particulars need to be set out in the pleading. The court made it clear in *Fairview Donut Inc. v. TDL Group Corp.*, 2012 ONSC 1252 (Ont. S.C.J.), at para 516, aff'd 2012 ONCA 867 (Ont. C.A.), that the statutory duty of good faith arises with respect to a contract and the performance of obligations thereunder:

> The duty of good faith and fair dealing is in relation to the performance of the contract that the parties made. The court's responsibility is to give effect to that contract and to require the parties to discharge their contractual obligations fairly, and in good faith and in a commercially reasonable manner.

52 The Walker Action alleges in a general way that s. 3 has been offended, but provides no particulars of which provisions of the contract or obligations of TDL thereunder are alleged to have been carried out contrary to the duty to fair dealing. What the claim suggests is that the very terms of the Franchise Agreement somehow amount to a breach of the duty of fair dealing under s. 3 of the Wishart Act. However, this is not a claim that can be sustained. The statutory duty does not replace or amend the contract, but rather it reinforces the performance of the contract terms: *Fairview Donut*, at para 500.

53 Where the Statement of Claim does attempt to particularize the alleged wrongdoing, it refers primarily to the franchisees' right of association in the face of TDL's resistance. This, of course, relates to the right of association under s. 4(5) of the Wishart Act, and is the subject of a separate claim put forward in the Walker Action. Defendants' counsel correctly points out that the two statutory provisions — sections 3 and 4 of the Wishart Act, respectively — represent two distinct statutory causes of action. Intermingling the statutory references in the way that the Plaintiffs appear to have done in the Walker Action does not satisfy the need for material facts to be pleaded to satisfy the s. 3 claim.

54 Accordingly, for the claim under s. 3 of the Wishart Act to be sustained it must be limited to TDL, and it must be supplemented with particulars. These particulars must amount to material facts capable of anchoring the alleged breach of s. 3 to specific obligations of TDL under the Franchise Agreement.

iii) Breach of the right of association

55 The Walker Action alleges that all of the Defendants have interfered with the Plaintiffs' and all franchisees' right of association, as guaranteed in s. 4 of the Wishart Act.

56 The Wishart Act first sets out the right of association in s. 4(1), and then in s. 4(2) specifically restricts a franchisor from interfering with it:

> A franchisor and a franchisor's associate shall not interfere with, prohibit or restrict, by contract or otherwise, a franchisee from forming or joining an organization of franchisees or from associating with other franchisees.

57 Section 4(5) of the Wishart Act goes on to provide a right of action in the event of a breach of s. 4(1):

> If a franchisor or franchisor's associate contravenes this section, the franchisee has a right of action for damages against the franchisor or franchisor's associate, as the case may be.

58 Counsel for the Defendants observes that while the Statement of Claim in the Walker Action pleads that TDL is the franchisor of Tim Hortons, nowhere does it plead that the Non-TDL Defendants are associates of the franchisor within the meaning of the Wishart Act. It is the Defendants' further position that there are no material facts set out in the Walker Action pleading that could support such an assertion.

59 The Defendants' reading of the Statement of Claim is correct. No matter how generously one reads that pleading, it is difficult to see how a claim under s. 4 of the Wishart Act could be sustained as against any of the Defendants except TDL.

60 In order to be an associate of TDL's for the purposes of s. 4 of the Wishart Act, there must be material facts that could establish a serious level of control by the alleged associate. Although the Plaintiffs in the Walker Action assert that RBI, as the parent and holding company for TDL, asserted control over it, there are no material facts pleaded to support that assertion. A parent company is not an "associate" for these purposes merely by virtue of being a parent company.

61 The Court of Appeal has held that a parent company or other alleged associate must be found to "direct and control the composition and structure of the [franchise] network], the products that will be distributed by [it] in Canada, the pricing of those products, and marketing initiatives and spending": *Addison Chevrolet Buick GMC Ltd. v. General Motors of Canada Ltd.*, 2016 ONCA 324 (Ont. C.A.), para 43. There is nothing of that nature contained in the Statement of Claim in the Walker Action.

62 Counsel for the Plaintiffs has attempted to remedy the shortcomings of the pleading in this respect by referencing in its factum that the Plaintiffs are obliged under a schedule to the Franchise Agreement to use RBI's computer system and pay a fee for this use. To this, counsel for the Defendants complains that a factum cannot fill in material facts missing from a pleading, although counsel for the Plaintiffs responds that the Franchise Agreement is specifically referenced in the Statement of Claim and so therefore all of its terms must be considered to have been incorporated into the pleading by reference.

63 Even if one considers the entire Franchise Agreement, with all of its detailed schedules, to be incorporated into the Statement of Claim, the Plaintiffs' point seems to miss the point. In the first place, it is not at all clear to me that the reference to RBI's computer system really does exist in the Franchise Agreement or schedules thereto. At the hearing of the motion, counsel for the Plaintiffs had difficulty in identifying the clause they had in mind.

64 But even if such an obligation does exist, payment of a license fee for use of a computer system is hardly the kind of direct control of the franchise system described by the Court of Appeal in *Addison Chevrolet*. There is nothing in the Franchise Agreement or otherwise in the Statement of Claim that could suggest that it is RBI, and not TDL, that really runs the Tim Hortons franchise business and that directs and controls the pricing, marketing, and other initiatives of the business.

65 None of the Non-TDL Defendants have anything to do with the rights of the Plaintiff under s. 4 of the Wishart Act except for TDL. The Walker Action alleges that TDL, as franchisor, has taken aim at the Plaintiffs and the other members of the GWNFA, in violation of their rights of association contained in s. 4. That claim is directed toward the

acts of TDL; the mere fact that it has corporate officers and directors, or that it has a parent company with officers and directors does not suffice to bring those Non-TDL Defendants within the terms of s. 4.

66 The Plaintiffs' claim under s. 4 of the Wishart Act cannot be sustained as against any of the Defendants except TDL.

iv) Oppression remedy

67 The Walker Action alleges breach of the oppression provisions of both the CBCA and the BCBCA. This claim, however, suffers from all of the shortcomings discussed above with respect to the oppression remedy pleaded in the 152 Action.

68 The real target of the oppression claim in the Walker Action is TDL; the non-TDL corporate Defendants are not alleged to have done anything in particular to oppress the Plaintiffs, and the Plaintiffs are not alleged to have been oppressed in any capacity that fits within the categories of claimants specified under s. 241 of the CBCA.

69 More specifically, the Plaintiffs in the Walker Action are not corporate insiders such as shareholders, and there is nothing in the Walker Action pleading which would bring the Plaintiffs within the meaning of a "creditor" under s. 241 of the CBCA, even given the extended meaning of "creditor" that the courts have applied to that term in the context of the oppression remedy. The Plaintiffs are not alleged to have not been denied any payment or other rights by the corporate acts of RBI. All of the wrongdoing alleged in the Statement of Claim in the Walker Action is that of TDL. RBI appears to have been included in the claim of corporate oppression as if for good measure, and for no reason other than for the fact of its status as parent company of TDL.

70 As for TDL, it is a British Columbia corporation. The CBCA does not apply to it. The Ontario courts have no jurisdiction to impose an oppression remedy under the BCBCA: see *Gould*, *supra*, at para 339.

71 It is evident that the oppression claim cannot succeed against any of the Defendants.

v) Conclusion re the Walker Action

72 The breach of contract claim, including breach of the contractual duty of good faith, can only be continued as against TDL, not RBI or any other Defendant. As against TDL, particulars must be provided in order to sustain the contractual claim. The same is the case with the claim of breach of s. 3 of the Wishart Act; TDL is a proper target of that claim (and the only proper target of that claim), but sufficient particulars are lacking in the Statement of Claim for the Walker Action.

73 The claim of breach of s. 4 of the Wishart Act can survive as against TDL, but not as against any of the Non-TDL Defendants. As for the claim of corporate oppression, it cannot survive as against any of the Defendants and is to be removed from the Walker Action altogether.

III. Rule 21.01(1)(b) disposition

74 This matter has been outstanding for some time. The motion to strike was first raised with counsel for the Plaintiff in the 152 Action in December 2017. In February 2018, the Notice of Motion was served. In response, the Plaintiff amended the Statement of Claim in the Walker Action in May 2018. The Statement of Claim in the 152 Action has never been amended.

75 In *Sheridan v. Ontario*, 2015 ONCA 303 (Ont. C.A.), the Court of Appeal upheld the judgment of Mew J. striking out a claim with no leave to amend where the plaintiff had had several months to contemplate the Rule 21 motion but had failed to amend. At para 29, the Court observed:

> [29] The motion judge refused the appellant leave to amend those parts of the pleading he struck out. He reasoned as follows:

> First, the OPP defendants delivered their motion materials at the end of February. There has been more than ample opportunity for amendments to be made. Second, if a 38 page pleading is as bereft of substantive material facts supporting the causes of action pleaded as this one is, it is, I find it unrealistic to expect that there are facts which could be pleaded which would cure the present deficiencies.

> [30] We note that although the motion materials were delivered in February, the motion was not argued until June 24. We see no error in the motion judge's exercise of his discretion on these facts to refuse leave to amend.

76 The test for striking out a claim under Rule 21.01(1)(b) on the ground that it discloses no reasonable cause of action is whether it is "plain and obvious" that the claim has no reasonable prospect of success: *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.), at para 33. While the facts as pleaded are taken as proved, "facts must be pleaded so that the causes of action are clearly identifiable and are supported by the facts material to the establishment of those causes": *CIT Financial Ltd./Services Financiers CIT Ltée v. Sharpless*, 2006 CanLII 18190, at para 7. In addition, the Statement of Claim "must adequately identify the roles allegedly played by the various defendants in relation to each cause of action, and must also state both how the individual defendants have harmed the plaintiff, and what the nature of that harm is": *Ibid*.

77 I am conscious of the admonition of the Court of Appeal that in a Rule 21 motion a pleading must be read generously: *Gaur v. Datta*, 2015 ONCA 151 (Ont. C.A.). As outlined above, I have concluded that the claims against the Non-TDL Defendants in both the 152 Action and the Walker Action are not viable. Even with the most generous of readings, it is plain and obvious that they cannot succeed.

78 The Defendants have had ample time to amend their pleadings in order to add material facts to support the claims against the Non-TDL Defendants, but have not done so. It is not difficult to conclude that the reason for this is that there are no such material facts that could be pleaded. Accordingly, claims against all of the Non-TDL Defendants are struck out of both the 152 action and the Walker action, without leave to amend.

79 In the 152 Action, all of the causes of action against TDL except for the breach of contract claim are also struck out without leave to amend. Again, the Plaintiff has had substantial time to amend its pleading, but has never done so. In my view, and on a generous reading of the Statement of Claim, no amount of particulars could possibly salvage the various non-contractual causes of action leveled against TDL in the 152 Action, and it is plain and obvious that they cannot succeed.

80 Only the breach of contact claim against TDL remains alive in the 152 Action. I am reluctant to strike out specific paragraphs of the Statement of Claim and leave other paragraphs to remain, as the strike outs would be so extensive that it might leave the parties with a barely readable pleading. The Plaintiff shall therefore serve an amended Statement of Claim that eliminates all of the causes of action that have been struck out and is re-drafted in a way that is limited to the breach of contract claim against TDL.

81 In the Walker Action, all claims against the Non-TDL Defendants are struck out without leave to amend. It is plain and obvious that those causes of action cannot succeed, and no amount of generosity in reading or addition of particulars can salvage those claims.

82 The claim of breach of s. 4 of the Wishart Act can remain in the Walker Action as against TDL.

83 The claims of breach of contract, including breach of the implied contractual duty of good faith, as well as breach of s. 3 of the Wishart Act, can potentially be salvaged as against TDL if additional material facts are added to the Statement of Claim. Those claims are therefore struck out with leave to amend to add necessary particulars as discussed in sections II(b)(i) and (ii) above.

84 In order for the Plaintiffs to end up with a coherent pleading, I am again reluctant to strike out specific paragraphs of the Statement of Claim in the Walker Action. Rather, the Plaintiff shall serve an amended Statement of Claim that

eliminates all of the causes of action that have been eliminated and that adds the necessary material facts to support the causes of action that remain or that can be salvaged.

85 Given the passage of time, I am exercising my discretion to limit the time for amending the pleadings to 30 days. If the Plaintiffs do not serve amended Statements of Claim in the 152 Action and in the Walker Action within 30 days of the date of this endorsement, those pleadings shall be struck out in their entirety, without further leave to amend.

IV. Declaratory relief

86 Counsel for the Defendants has also submitted that the request for declaratory relief in both actions be struck out.

87 They contend that the Plaintiffs seek, among other things, declarations that the Defendants have breached their rights, and that this form of relief bumps up against a long line of cases holding that a declaration must serve a practical purpose and help to resolve the dispute between the parties: *Hugh W. Simmons Ltd. v. Foster*, [1955] S.C.R. 324 (S.C.C.), at para 25. Defendants' counsel therefore submits that there are other, more effective ways to bring the issues before the courts, *Kourtessis v. Minister of National Revenue*, [1993] 2 S.C.R. 53 (S.C.C.), at para 49, and that the requests for declaratory relief should therefore be struck.

88 I am not inclined to address the declaration issue at this time.

89 To be clear, I am aware of the cases that discourage declaratory relief in all but rather limited circumstances. I certainly accept that private parties generally have no right "asking the Courts for declarations to the effect that provisions of statutes have been breached simply on the basis that they assert an interest in having the declaration made": *McConnell v. Rabin*, [1986] O.J. No. 1119 (Ont. H.C.), at para 11. I also agree that some declarations can be little more than legal opinions, and that "It is not in the business of this Court to give opinions on questions of fact or points of law which may be puzzling the [parties]": *MacLeod v. White* (1955), 37 M.P.R. 341 (N.B. S.C.), at para 100.

90 With all of that in mind, I am of the view that the question of whether declaratory relief is warranted in the circumstances is one for final judgment, and not one to be contemplated at the pleadings stage. If, following trial or summary judgment motion, facts are found which establish some of the admittedly limited circumstances where a declaration is the appropriate remedy, then the trial or motion judge will issue the declaration at that time. And if facts are not found which can appropriately ground declaratory relief, then the trial or motion judge will decline to issue the declaration at that time.

91 It is premature to consider that possibility now. In amending the pleadings, the Plaintiffs may include a request for declaratory relief or not include such a request, as they and their counsel deem appropriate.

V. Costs

92 Counsel may make written submissions addressing costs. I would ask that these include a Costs Outline and brief submissions of no more than 3 pages. Counsel for the Defendants is requested to send their submissions by email to my assistant within 2 weeks of today, and counsel for the Plaintiff is requested to send their responding submissions within 1 week thereafter.

Motion granted.

Tab 7

2011 ONSC 178
Ontario Superior Court of Justice [Commercial List]

Fracassi v. Cascioli

2011 CarswellOnt 3951, 2011 ONSC 178, [2011] O.J. No. 2425, 204 A.C.W.S. (3d) 65

Allen Fracassi and Granvin Investments Inc., Plaintiffs and Teresa Cascioli, Roseto Inc. and Casc Corp., Defendants

Pepall J.

Judgment: May 30, 2011
Docket: CV-08-7730-00CL

Counsel: Robert J. Brush, Bruce O'Toole, Clarke Tedesco, for Plaintiffs
John L. Finnigan, Deborah E. Palter, for Defendants

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

Headnote

Torts --- Fraud and misrepresentation — Fraudulent misrepresentation — Particular relationships — Sale of business — Miscellaneous

Defendant worked for plaintiff and later was involved in various businesses with him — Parties became involved in operation of discount brewery — Plaintiff wished to divest himself of interest in brewery and parties agreed he would be bought out for $9 million — Plaintiff eventually received $9,319,250 for purchase of his interest in brewery consisting of $5,369,000 for his interest in parent company of brewery, $10,000 for his shares in that company and $3,940,250 for repayment of loans dividends and fees owing to plaintiff and companies he owned — Brewery later became extremely successful and was subject to takeover from large competitor brewery and going public plan — Plaintiff claimed that defendant made misleading statements about finances of brewery — Plaintiff brought action for damages for fraudulent misrepresentation and other causes of action — Action dismissed — Defendant did not make misrepresentation hiding value of business — Market was volatile and competitive, and increase of market share and sales volume, which shaped performance of business, could not be expected — Reports by defendant did not induce plaintiff to act — Plaintiff named price before forecasts and valuation were completed — Defendant did not withhold information or engage in deception — Both parties were impeached on certain issues, although plaintiff gave contradictory evidence on more important matters.

Civil practice and procedure --- Limitation of actions — Principles — Statutory limitation periods — Interpretation

Defendant worked for plaintiff and later was involved in various businesses with him — Parties became involved in operation of discount brewery — Plaintiff wished to divest himself of interest in brewery and parties agreed he would be bought out for $9 million — Plaintiff eventually received $9,319,250 for purchase of his interest in brewery consisting of $5,369,000 for his interest in parent company of brewery, $10,000 for his shares in that company and $3,940,250 for repayment of loans dividends and fees owing to plaintiff and companies he owned — Brewery later became extremely successful and was subject to takeover from large competitor brewery and going public plan — Plaintiff claimed that defendant made misleading statements about finances of brewery — Plaintiff brought action for damages for fraudulent misrepresentation and other causes of action — Action dismissed — Limitation period to bring action had not expired with regards to claims for breach of fiduciary duty, oppression and insider trading — Two year limitation period was applicable — Aside from fraudulent misrepresentation, all causes of action were based on information not available to plaintiff before lawsuit was commenced — To extent arguments relied on assertion by plaintiff that he was not aware that defendant had purchased his interest and had plans for taking brewery public claims were barred, as this information was clear to plaintiff.

Contracts --- Performance or breach — Miscellaneous

Terms of release — Defendant worked for plaintiff and later was involved in various businesses with him — Parties became involved in operation of discount brewery — Plaintiff wished to divest himself of interest in brewery and parties agreed he would be bought out for $9 million — Plaintiff eventually received $9,319,250 for purchase of his interest in brewery consisting of $5,369,000 for his interest in parent company of brewery, $10,000 for his shares in that company and $3,940,250 for repayment of loans dividends and fees owing to plaintiff and companies he owned — Brewery later became extremely successful and was subject to takeover from large competitor brewery and going public plan — Plaintiff claimed that defendant made misleading statements about finances of brewery — Plaintiff brought action for damages for fraudulent misrepresentation and other causes of action — Action dismissed — Terms of release barred claims for breach of fiduciary duty, insider trading and oppression — Language of contact should be respected, and plaintiff was experienced businessman with counsel.

Table of Authorities

Cases considered by *Pepall J.*:

Arthur v. Signum Communications Ltd. (1991), 1991 CarswellOnt 3126 (Ont. Gen. Div.) — considered

Arthur v. Signum Communications Ltd. (1993), 1993 CarswellOnt 4271 (Ont. Div. Ct.) — referred to

Ballard v. Stavro (1997), 1997 CarswellOnt 3424, 38 O.T.C. 321 (Ont. Gen. Div. [Commercial List]) — considered

BCE Inc., Re (2008), (sub nom. *Aegon Capital Management Inc. v. BCE Inc.*) 383 N.R. 119, 71 C.P.R. (4th) 303, 52 B.L.R. (4th) 1, (sub nom. *Aegon Capital Management Inc. v. BCE Inc.*) 301 D.L.R. (4th) 80, 2008 SCC 69, (sub nom. *BCE Inc. v. 1976 Debentureholders*) [2008] 3 S.C.R. 560, 2008 CarswellQue 12595, 2008 CarswellQue 12596 (S.C.C.) — considered

C. (R.) v. McDougall (2008), [2008] 11 W.W.R. 414, 83 B.C.L.R. (4th) 1, (sub nom. *F.H. v. McDougall*) [2008] 3 S.C.R. 41, 2008 CarswellBC 2041, 2008 CarswellBC 2042, 2008 SCC 53, 60 C.C.L.T. (3d) 1, (sub nom. *H. (F.) v. McDougall*) 297 D.L.R. (4th) 193, 61 C.P.C. (6th) 1, 61 C.R. (6th) 1, (sub nom. *F.H. v. McDougall*) 380 N.R. 82, (sub nom. *F.H. v. McDougall*) 439 W.A.C. 74, (sub nom. *F.H. v. McDougall*) 260 B.C.A.C. 74 (S.C.C.) — considered

Dusik v. Newton (1985), 1985 CarswellBC 86, 62 B.C.L.R. 1 (B.C. C.A.) — referred to

Fiorillo v. Krispy Kreme Doughnuts Inc. (2009), 98 O.R. (3d) 103, 2009 CarswellOnt 3344, 60 B.L.R. (4th) 113 (Ont. S.C.J. [Commercial List]) — referred to

Ford Motor Co. of Canada v. Ontario (Municipal Employees Retirement Board) (2006), 12 B.L.R. (4th) 189, 79 O.R. (3d) 81, 263 D.L.R. (4th) 450, 2006 CarswellOnt 13, 206 O.A.C. 61 (Ont. C.A.) — considered

Francis v. Dingman (1983), 43 O.R. (2d) 641, 23 B.L.R. 234, 2 D.L.R. (4th) 244, 1983 CarswellOnt 143 (Ont. C.A.) — referred to

Hodgkinson v. Simms (1994), 57 C.P.R. (3d) 1, 5 E.T.R. (2d) 1, [1994] 3 S.C.R. 377, 95 D.T.C. 5135, 97 B.C.L.R. (2d) 1, 117 D.L.R. (4th) 161, 171 N.R. 245, 1994 CarswellBC 438, 1994 CarswellBC 1245, [1994] 9 W.W.R. 609, 49 B.C.A.C. 1, 80 W.A.C. 1, 22 C.C.L.T. (2d) 1, 16 B.L.R. (2d) 1, 6 C.C.L.S. 1 (S.C.C.) — considered

Joseph v. Paramount Canada's Wonderland (2008), 2008 CarswellOnt 3495, 2008 ONCA 469, 90 O.R. (3d) 401, 294 D.L.R. (4th) 141, 56 C.P.C. (6th) 14, 241 O.A.C. 29 (Ont. C.A.) — considered

Motkoski Holdings Ltd. v. Yellowhead (County) (2010), 89 R.P.R. (4th) 159, 66 B.L.R. (4th) 161, 474 A.R. 367, 479 W.A.C. 367, 20 Alta. L.R. (5th) 1, 49 C.E.L.R. (3d) 1, 2010 ABCA 72, 2010 CarswellAlta 403, [2010] 5 W.W.R. 603, 74 C.C.L.T. (3d) 71 (Alta. C.A.) — considered

Multiple Access Ltd. v. McCutcheon (1982), 1982 CarswellOnt 128, [1982] 2 S.C.R. 161, 138 D.L.R. (3d) 1, 44 N.R. 181, 18 B.L.R. 138, 1982 CarswellOnt 738 (S.C.C.) — referred to

Panapers Inc. v. 1260539 Ontario Ltd. (2004), 2004 CarswellOnt 5466 (Ont. S.C.J.) — referred to

Panapers Inc. v. 1260539 Ontario Ltd. (2007), 2007 CarswellOnt 282, 219 O.A.C. 338, 2007 ONCA 3 (Ont. C.A.) — referred to

Paragon Development Corp. v. Sonka Properties Inc. (2009), 2009 CarswellOnt 1654, 96 O.R. (3d) 574, 59 B.L.R. (4th) 79 (Ont. S.C.J.) — considered

Parna v. G. & S. Properties Ltd. (1970), [1971] S.C.R. 306, 1970 CarswellOnt 208, 1970 CarswellOnt 208F, 15 D.L.R. (3d) 336 (S.C.C.) — considered

Perez v. Galambos (2009), 97 B.C.L.R. (4th) 1, [2009] 12 W.W.R. 193, (sub nom. *Galambos v. Perez*) [2009] 3 S.C.R. 247, 394 N.R. 209, 70 C.C.L.T. (3d) 167, 312 D.L.R. (4th) 220, 276 B.C.A.C. 272, 468 W.A.C. 272, 2009 CarswellBC 2787, 2009 CarswellBC 2788, 2009 SCC 48 (S.C.C.) — considered
R. v. Pressley (1948), 7 C.R. 342, [1949] 1 W.W.R. 692, 94 C.C.C. 29, 1948 CarswellBC 123 (B.C. C.A.) — considered
Tongue v. Vencap Equities Alberta Ltd. (1994), 1994 CarswellAlta 35, 17 Alta. L.R. (3d) 103, 5 C.C.L.S. 141, [1994] 5 W.W.R. 674, 14 B.L.R. (2d) 50, 148 A.R. 321 (Alta. Q.B.) — referred to
Tongue v. Vencap Equities Alberta Ltd. (1996), 39 Alta. L.R. (3d) 29, [1996] 6 W.W.R. 761, 184 A.R. 368, 122 W.A.C. 368, 1996 CarswellAlta 384 (Alta. C.A.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

Business Corporations Act, R.S.O. 1990, c. B.16
Generally — referred to

s. 138 — considered

s. 138(5) — considered

s. 248 — considered

Canada Business Corporations Act, R.S.C. 1985, c. C-44
Generally — referred to

Pt. XI — referred to

s. 131 — considered

s. 131(4) — considered

s. 131(10) — considered

s. 239 — considered

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

Limitations Act, 2002, S.O. 2002, c. 24, Sched. B
Generally — referred to

s. 4 — considered

s. 5(1) — considered

s. 5(2) — considered

s. 16 — considered

Securities Act, R.S.O. 1990, c. S.5
Generally — referred to

ACTION by plaintiff for fraudulent misrepresentation arising out of sale of interest in business.

***Pepall J.*:**

Introduction

1 This case is about a former industrialist, Allen Fracassi, and his protégé, Teresa Cascioli, who once were business colleagues and close friends. Ms. Cascioli achieved great success and financial reward and in the process, their friendship

disintegrated. Now Mr. Fracassi wants a share of Ms. Cascioli's reward and, relying on various causes of action, he has brought this lawsuit to achieve that objective.

The Early Years

2 In 1991, Allen Fracassi was the President and CEO of Philip Environmental. It became a public company and eventually became Philip Services Corporation ("PSC") of which Mr. Fracassi was also President and CEO. By 1997, PSC's earnings were in the $1.7 billion range. Having been in senior management for many years, Mr. Fracassi was a very experienced and sophisticated businessman. He was instrumental in transforming the company from a small regional recycler into a company whose shares traded on the Toronto and New York Stock Exchanges.

3 In 1998, PSC was required to restate its financial statements. There were issues surrounding the taking of a write down of goodwill on acquired business plus inventory shortages totalling $300 million. This was a major news story. Credibility issues surrounded the company and in early 1998, Mr. Fracassi resigned as President and CEO although he remained on the board of directors and was executive vice-chairman. From December 1998 until late 1999 or early 2000, he served as interim CEO. In 2000, the Ontario Securities Commission launched an investigation into PSC. In August 2000, they asserted numerous allegations against PSC, Mr. Fracassi and others. Ultimately, a settlement was reached in 2006 and, amongst other things, Mr. Fracassi agreed to pay a $100,000 fine. He was also banned from serving as a corporate officer or director in Canada for 12 years.

Meeting of the Parties

4 Mr. Fracassi met the Defendant, Teresa Cascioli, in the late fall of 1994 or early 1995. Ms. Cascioli was in her early 30s, had a Bachelor of Commerce degree from McMaster University and worked for the Regional Municipality of Hamilton-Wentworth. There she was Manager of Finance and Administration. PSC had been awarded an outsourcing contract for the Regional Municipality's sewer and potable water systems and Ms. Cascioli was on the negotiating team.

5 Mr. Fracassi and Ms. Cascioli met at a closing dinner. Mr. Fracassi subsequently called her to encourage her to move to PSC. She initially refused but ultimately agreed. He told her that he needed someone to be his "right arm". She came to work at PSC in April 1995. She was an executive assistant to the senior executive committee and reported to Mr. Fracassi. She earned approximately $85,000 per year. When she met Mr. Fracassi, she had no experience with business acquisitions, mergers and acquisitions, or public offerings.

6 Mr. Fracassi got to know Ms. Cascioli better as a result of certain special projects at PSC in which he was involved. By 1996, Ms. Cascioli worked very closely with Mr. Fracassi. They both testified that she indeed became his "right arm". She helped with his personal matters from "soup to nuts" to use Ms. Cascioli's terminology. She was entrusted with personal papers such as his will. She administered his bank accounts, his corporate credit card and his insurance. On a limited basis, she used his signature stamp. She had many other responsibilities. Mr. Fracassi was developing Ms. Cascioli as his protégé. He testified that by late 1997, she knew everything about his life and was making decisions for him. I accept that she made some decisions for him, but she was far from being his substitute nor did not she make any particularly material decisions for him. She dealt with investors, auditors and senior managers. Her title ultimately was VP of Investor Relations. In March 1998, she earned $110,000 annually. Although in a business plan subsequently developed by the parties [1] , Ms. Cascioli is described as having extensive knowledge of the initial public offering process, publicly traded disclosure requirements, stock market intelligence and communication expertise, she testified and I accept that her role in investor relations was limited.

7 Mr. Fracassi described Ms. Cascioli as conservative, prudent, careful, meticulous, committed, hard-working, and honest. He had a lot more experience in dealing with acquisitions and capital market participants. While she gained a substantial amount of experience over a number of years, she did not have the same depth and breadth of experience in acquisitions and dealing with capital market participants that he had.

8 Mr. Fracassi and Ms. Cascioli also became very good friends. They socialized continuously and spoke to one another regularly each day. Their relationship was always a platonic one.

Do 4 U Services Corporation

9 In April 1998, Ms. Cascioli's employment at PSC ended. The only calls she was receiving were people screaming about the drop in value of their PSC shares. She was no longer needed to serve as a liaison between PSC and analysts. She had no role in the events that led to PSC's collapse.

10 Ultimately, she and Mr. Fracassi decided to go into business together. They became partners to use Ms. Cascioli's characterization. In August, 1998, Mr. Fracassi and Ms. Cascioli created Do 4 U Services Corporation ("Do 4 U"), a company incorporated under the *Canada Business Corporations Act* (the "*CBCA*").[2] The intended plan was for the company to invest in service companies that offered back office administration and support services.

11 For a short time, Mr. Fracassi's brother-in-law was a shareholder but soon after the incorporation, only Mr. Fracassi and Ms. Cascioli were shareholders. Mr. Fracassi held 75% of the common shares and 100% of the preferred shares and Ms. Cascioli held the remaining 25% of the common shares of Do 4 U. Mr. Fracassi advanced all of the capital starting with approximately $1 million. Ms. Cascioli did not invest any money into the company. She was to contribute labour. As Mr. Fracassi was still involved with PSC, Ms. Cascioli would run the company.

12 Mr. Fracassi, Ms. Cascioli and Do 4 U Services[3] entered into a Shareholders' Agreement dated August 31, 1998. Ms. Cascioli was to be the President and CEO of the company and Mr. Fracassi was to be Chairman of the Board of Directors. Through the appointment of directors, Mr. Fracassi controlled the Board of Directors. If a shareholder wished to sell his or her common shares, the selling shareholder was to give written notice to the company setting out the number of shares and "the cash price he wishes to receive". The notice was to be accompanied by the share certificates and a draw along notice. The purchase price was to be the fair market value of the shares, which was to be determined by an appraiser as described in the Agreement.

13 Ms. Cascioli earned a base salary of $110,000 per year and had a bonus entitlement. She reported to Mr. Fracassi.

Acquisitions: Lakeport and Newcastle

14 In March 1999, AlphaCorp. Holdings Ltd. ("AlphaCorp") was incorporated pursuant to the provisions of the Ontario *Business Corporations Act* (the "*OBCA*").[4] Both Mr. Fracassi and Ms. Cascioli were officers and directors. AlphaCorp. was continued pursuant to the *CBCA* on June 10, 1999 and was a wholly owned subsidiary of Do 4 U.

15 Mr. Fracassi had met Carl Icahn and liked his business model — invest in high risk entities, fix them up and then exit. In 1999, AlphaCorp. acquired Lakeport Brewing Corporation ("Lakeport"), an *OBCA* company located in Hamilton, Ontario. Lakeport was a beverage services company that produced alcoholic and non-alcoholic beer and alternative alcoholic and non-alcoholic beverages. It was a leading co-packager of alternative alcoholic beverages and also had eleven proprietary beer brands. Lakeport had been under *Companies Creditors' Arrangement Act* ("*CCAA*") protection since the fall of 1998. Mr. Fracassi received a telephone call advising him of the purchase opportunity. Ms. Cascioli was a little apprehensive. Mr. Fracassi had said that his net worth was in his shares of PSC. Mr. Fracassi thought that Lakeport was an opportunity and he persuaded Ms. Cascioli of its merits. The time horizon for the purchase was 18 to 36 months but according to Mr. Fracassi, this was flexible. Mr. Fracassi, through Do 4 U and AlphaCorp., invested $3.3 million in Lakeport. When Mr. Fracassi invested $3.3 million into Lakeport, it became his most significant asset. Mr. Fracassi accrued preferred dividend interest on the $3.3 million investment. The funds were injected by Mr. Fracassi on the basis that he and his companies would be repaid before any common share distribution. Mr. Fracassi continued to be involved with PSC. Ms. Cascioli did not invest any capital.

16 The purpose of acquiring Lakeport was to re-establish the company as a profitable business entity and ultimately to sell it to outside investors or to take it public through an offering. Lakeport's lender was GE Capital Canada Equipment Financing Inc. ("GE Capital"), an asset based lender. GE Capital had been Lakeport's lender when it sought *CCAA* protection in 1998 and even though Lakeport had been purchased, the loans continued to be managed by GE Capital's work out group located in Stamford, Connecticut, USA. GE Capital received regular reports from Lakeport and had input into Lakeport's marketing strategy. GE Capital held warrants representing 30% of the common shares of Lakeport. On a fully diluted basis, Mr. Fracassi indirectly held 52.5% of the remaining common shares, and Ms. Cascioli indirectly held 17.5% of the common shares. Ms. Cascioli was appointed as President and CEO of Lakeport in November 1999 and became its sole director.

17 In October 1999, Do 4 U acquired all of the shares of Newcastle Logistics Corporation ("Newcastle"). Newcastle was a transportation warehousing and logistics company. It provided warehousing and shipping services to Lakeport amongst others. Ms. Cascioli became the sole director and CEO of Newcastle but her role was very limited. Mr. Fracassi invested $1 million into Newcastle. Newcastle became the primary shipper and warehouse facility for Lakeport. Lakeport and Newcastle were AlphaCorp.'s most significant investments.

18 Mr. Fracassi and Ms. Cascioli moved into Lakeport's premises. Mr. Fracassi was on the floor interacting with the employees and dealing with the mechanics of the business and Ms. Cascioli looked after administration and the office. As part of her responsibilities at Lakeport, she would continue to provide administrative support functions for Mr. Fracassi. Prior to her involvement with Lakeport, Ms. Cascioli had no experience in distressed investing or the brewing/bottling industry.

19 In November 1999, Ms. Cascioli shut the plant down so that she could figure things out. She cut costs, placed controls on the employees, and started to track positive earnings before interest, taxes, depreciation and amortization ("EBITDA").

Lakeport's Refinancing Efforts

20 From late 1999 to 2004, Ms. Cascioli met with scores of potential lenders and prospective equity and strategic brewing industry investors in an effort to refinance Lakeport's business. In April 2000, Lakeport engaged NewPoint Capital Partners Inc. ("NewPoint") to obtain senior debt financing to replace GE Capital, obtain financing for capital acquisitions, and funding for the growth of the business. As noted in its Confidential Investment Memorandum, Lakeport desired "a more normalized banking relationship rather than dealing with GE Capital's work out group." Mr. Fracassi described the GE Capital covenants and ratios as constituting "a short leash". Ms. Cascioli described GE Capital as being impatient, strict and sceptical about her ability as CEO. She found GE Capital to be very, very strict and unwilling to give her more money.

21 Ms. Cascioli and Mr. Fracassi met a representative of Brick Brewing Co. ("Brick Brewing") through NewPoint in 2000. Nothing materialized but the door was left open. [5]

22 Lakeport's year-end was January 31. In the actual 2000 Financial Summary, EBITDA was a $2,952,000 loss. During most of 1999, Lakeport was under *CCAA* protection. The estimated EBITDA for 2001 was $3,721,000.

23 The refinancing efforts with NewPoint were unsuccessful. Ms. Cascioli felt that she had received a 25% interest in a house that was falling apart. GE Capital, the landlord, was giving her no money. Mr. Fracassi had put in money but the OSC proceedings resulted in a house with a ghost in it. The house was haunted because of the perception of Mr. Fracassi and his abilities to manage a business. In response to NewPoint's efforts, 40 lenders had advised that they had no interest in refinancing Lakeport. As mentioned, in August 2000, Mr. Fracassi and others were charged with violations of the Ontario *Securities Act*.

24 Bay Street was not Ms. Cascioli's friend. The OSC charges against Mr. Fracassi hurt his ability to conduct business. Ultimately, Mr. Fracassi removed himself as an officer and director of Do 4 U and AlphaCorp. and Ms. Cascioli was made the sole officer and director.

Mr. Fracassi's Desire to Exit Lakeport in 2002

25 Mr. Fracassi expressed a desire to see if he could be taken out of Lakeport.

26 Stikeman Elliott LLP were Lakeport's lawyers. Roderick Barrett, who was called to the Ontario Bar in 1977, was the partner in charge of the Lakeport relationship. He had known Mr. Fracassi since the early 1990s and had acted for some of his companies including PSC and Newcastle. In early 2002, Mr. Fracassi began discussing with Mr. Barrett an exit from Lakeport. In early 2002, he said to Mr. Barrett that he wanted "to get out of this fucking business". According to Mr. Barrett, Mr. Fracassi was in "the penalty box" with Canadian bankers because of his involvement with PSC and Canadian bankers were refusing to deal with him. Mr. Fracassi did not recall the discussion testified to by Mr. Barrett wherein in 2002 Mr. Fracassi had said he wanted out of the Lakeport business. It could have happened according to Mr. Fracassi's account but it was not his recollection that it did. I accept Mr. Barrett's evidence in this regard. He was a forthright witness called by the Plaintiffs.

27 In the early 2000s, Lakeport had three main lines of business: co-packaging or co-pack for short, non-alcoholic beer, and beer. Co-pack involved the outsourcing of production of a third party's proprietary product to Lakeport. Lakeport would manufacture the liquid and mix ingredients based on the owner's recipe. Lakeport had a blending facility. Lakeport could increase volume but the margins on co-pack products were lower than for beer. Lakeport also did private label non-alcoholised beer for grocers such as Loblaws, Sobeys and A&P's no-name brands. Lastly, Lakeport had its proprietary beer. This represented any brand that was 100% owned and marketed by Lakeport. There were several brands.

28 Mr. Fracassi and Ms. Cascioli differed on the strategic direction for Lakeport. Mr. Fracassi wanted to concentrate on the co-pack side of the business and Ms. Cascioli wanted to focus on increasing the proprietary beer business. Ms. Cascioli was of the view that she and Mr. Fracassi could not both run the business. In July or August of 2002, she told Mr. Fracassi that she would leave and give her shares back to him. He could run the business. He refused and indicated that he would not know how to run a lemonade stand. Instead, he would run Newcastle. Accordingly, Ms. Cascioli gave her Newcastle shares to Mr. Fracassi for no consideration and in the summer of 2002, Mr. Fracassi left Lakeport.

29 Mr. Fracassi continued to have access to his Lakeport office. Ms. Cascioli continued to look after his personal matters for a while. On July 8, 2002, she wrote to the appropriate paralegal services asking that the necessary documents be processed to remove her as a director and officer of Newcastle. She also advised bankers and others that she would no longer be handling Mr. Fracassi's personal affairs. By July 2002, Ms. Cascioli ceased handling Mr. Fracassi's personal affairs and focused all of her efforts on running Lakeport. By the summer of 2002, Mr. Fracassi was no longer at Lakeport.

Regular Information Received by Mr. Fracassi

30 Mr. Fracassi and Ms. Cascioli continued to speak regularly and she provided him with regular information on Lakeport. Lakeport maintained detailed monthly reports and Management Discussion and Analysis packages (MD&As), which were printed in the second or third week of the following month. The monthly reports contained information concerning the business and affairs of Lakeport including an income statement, balance sheet, changes in financial position, debt balances as well as its financial performance compared to budget and compared to the prior year. Such reporting specifically included EBITDA and comparisons of actual results to budget as well as any changes to budget. The MD&As included profit and loss statements by product line and discussions of major initiatives being undertaken by the company. Mr. Fracassi was on the monthly distribution list and received the monthly reporting package including the MD&As which he received monthly. He testified that he knew what was going on so he rarely read them or words to that effect. A special folder was set up at Lakeport for information for Mr. Fracassi along with cheques

payable to Newcastle. Regular pick up for Mr. Fracassi was arranged. As Newcastle was a supplier for Lakeport, Mr. Fracassi had available to him information on Lakeport's beer volumes. He testified and I accept that it was usual for him to receive Lakeport's audited financial statements.

31 The focus of Lakeport's business shifted in fiscal 2002 to 2003 from co-pack to proprietary beer. Consistent with Ms. Cascioli's strategy, on July 29, 2002, Lakeport launched Lakeport Honey Lager. A case of 24 bottles of beer sold for $24 including deposit. Lakeport was the first to launch a "24 for $24" promotion and began to chip away at the marketplace. In essence, the "discount" beer segment was created. Ms. Cascioli both conceived and implemented the new discount beer strategy. Mr. Fracassi knew that Lakeport's core strategy was to sell its proprietary beer in a segment of the beer market known as the "discount category".

Renewed Refinancing Efforts

32 As mentioned, in fiscal 2000, Lakeport had negative EBITDA of $2.9 million but rebounded to EBITDA of $5 million in fiscal 2001. In fiscal 2002, it fell to $750,000. That year Lakeport lost a Smirnoff Ice co-packaging contract. In August 2002, Lakeport's auditor, KPMG LLP, provided a preliminary indication as to the fair market value of the common shares of Lakeport as at June 29, 2002. A formal valuation report was not requested. KPMG's conclusion was that the value of the common shares on a preliminary basis was in the range of $11 million to $13 million and that the enterprise value was in the range of $29.4 million to $31.7 million. Mr. Fracassi was aware of this. In 2002, GE Capital provided Lakeport with additional funding having seen the positive EBITDA in fiscal 2001.

33 The business risks changed with the move to proprietary beer. There was greater focus on marketing, volume efficiency and attention to pricing. Ms. Cascioli routinely issued press releases to the media in the hopes of gaining attention for the Lakeport brands.

34 Between 2002 and May 2004, Ms. Cascioli made extensive efforts to secure refinancing and a buyer of Mr. Fracassi's shares. This included efforts with Yorkton Securities Inc. in May 2002, Schroder and Associates in May 2002, Orenda Corporate Finance in November 2002 and July 2003, and Imperial Capital Corporation in May 2004. In addition, Lakeport explored the possibility of merging with a public company. Ms. Cascioli had discussions with Brick Brewing and with Big Rock Brewery. Ms. Cascioli estimated that between 2000 and May 2004 she approached approximately 140 parties. Mr. Fracassi was also an active participant in many of these overtures. None of these efforts was successful however.

35 In 2003, Mr. Barrett received a financial package from Ms. Cascioli which he sent to two private equity firms so as to assist Lakeport in finding investors and raising money. One package came back from one firm unopened and the other firm indicated that they did not wish to deal with Mr. Fracassi.

36 In February 2004, Lakeport reported actual year-end results for the year ended January 31, 2004. EBITDA was $5.3 million.

Newcastle's Problems

37 Meanwhile, Mr. Fracassi's company, Newcastle, was not faring very well. In February 2004, Newcastle filed a notice of intention to make a proposal pursuant to the provisions of the *Bankruptcy and Insolvency Act*. Assets of $3,757,260 and liabilities of $8,888,178, of which $6,608,148.96 were unsecured, were declared. In general terms, the proposal filed on July 21, 2004, proposed payments of 20 cents on the dollar for a period of five years for most unsecured creditors. This amounted to payments totalling $245,000 a year. In addition, $600,000 would have to be paid within 6 months of the court approval date on account of unremitted CRA source deductions and other things. The court approval date was January 27, 2005. Mr. Fracassi also had personal obligations.

38 In his examination-in-chief, Mr. Fracassi testified that Lakeport was not the only source of money available to him to fund Newcastle. He reiterated in cross-examination that he did not need to exit his Lakeport investment in

order to meet his obligations at Newcastle. This is in contrast to his pleading in which he stated that he was especially vulnerable at this time because he had to liquidate his other business assets to fund the Newcastle proposal. Similarly, in his examination for discovery in an action he brought in 2008 against Stikeman Elliott LLP and Mr. Barrett (the "Stikeman's Action"), he testified that he was dependant on the Lakeport investment to meet whatever obligations he had with Newcastle.

39 I conclude that, consistent with the evidence from the Stikeman's Action, he needed the money from Lakeport to meet his Newcastle requirements. I do not find, however, that he was vulnerable as a result of his financial requirements.

Molson Offer

40 On June 10, 2004, Molson Canada ("Molson"), a competitor, offered to purchase Lakeport's assets for $28 million. Ms. Cascioli "jumped up and down" to use her terminology. Someone was interested in Lakeport. She called Mr. Fracassi and sent the offer to Ron Ferguson, Mr. Barrett's partner at Stikeman Elliott LLP. Mr. Ferguson reviewed the offer with Mr. Fracassi and Ms. Cascioli. Mr. Fracassi's reaction was for Ms. Cascioli to see if she could get the deal done. She was to find out what it meant; it was not a slam dunk. She and Karen Trudell, Lakeport's Chief Financial Officer, worked on an analysis. The offer provided for the purchase of assets but liabilities including the lease and employee obligations for 180 employees would have to be satisfied by Lakeport. According to Mr. Barrett, the liabilities possibly exceeded the purchase price and therefore there would be no money for equity holders. Lakeport's internal analysis estimated that $2.3 million would be available for equity holders after deduction of liabilities. The offer was declined in the 3rd or 4th week of July 2004. Mr. Fracassi thought that the deal could have been negotiated and that the failure to do so reflected upon Ms. Cascioli's lack of experience.

41 In mid-August, Ms. Cascioli spoke with Mr. O'Neil of Molson. He told her that she should not have any hard feelings. Molson still believed in the discount category but they had a Plan B. Ms. Cascioli was very concerned. Molson had received Lakeport's financials and marketing information as part of their due diligence. To quote her, she thought she was dead.

42 Ms. Cascioli thought she should launch 24 for $24 in the Lakeport family. She already had Lakeport Honey Lager and Lakeport Pilsener at that price and she decided to also launch Lakeport Lite at 24 for $24 including deposit. After the Molson interruption, Ms. Cascioli commenced discussions with Mr. Berchtold of Brick Brewing again in August 2004.

Materials for GE Capital

43 At the beginning of August 2004, Lakeport prepared a budget update package that was sent to GE Capital. The EBITDA update entitled "Reforecast F2005 as at July 2004" used June 2004 actuals. The budgeted EBITDA had been anticipated to be $5,122,000 for the year ended January 31, 2005. Using June actuals, it was reforecast at $9,072,000. The reason for the increase was two-fold. The major driver was the growth in market share or volume of proprietary beer sales of $4.2 million and a one-time tax credit of approximately $1 million.

44 Lakeport did not describe the $9 million EBITDA as continuing in fiscal 2006 in the August 2004 package of materials sent to GE Capital. It showed a Preliminary F2006 Macro Forecast in which EBITDA for that year was estimated to be $5,024,000. This reflected substantially higher taxes as a result of assuming large brewer manufacturing tax status in fiscal 2006. If a brewer crosses a production volume threshold, it is subject to a large brewer tax and a higher tax rate applies. Any brewer that had more than 150,000 hectolitres on a five-year average was considered a large brewer. The basis for the annual calculation ran from April to March as this reflected the Alcohol and Gaming Commission's March year-end. The large brewer tax was a topic of much discussion at Lakeport in 2004. Ms. Cascioli hired a lobbyist to see if the government would change the rules relating to the tax. She thought it was more likely than not that she would be successful. Obviously, however, there was no guarantee. The annual cost to Lakeport was estimated to be $2,475,000. Additionally, Lakeport would lose its one-time tax credit of approximately $1 million. There were also other additional anticipated costs. Ms. Cascioli gave Mr. Fracassi this document and they discussed it. She told him there would be a tax

increase and that Lakeport would lose the one-time tax credit. They discussed the extraordinary $9 million figure and that they did not think it would continue in the future. The thought was that pricing of a case of 24 would go to $26.95 in the next year to accommodate the large brewer tax.

Mr. Fracassi's Valuation Discussions

45 Mr. Fracassi received the MD&As for the months of June through October of 2004, and he acknowledged that, had he read the October 2004 month-end financial results for nine months, he would know that the business was forecasting to make $2.6 million more in EBITDA than the prior year. He agreed that the fact that the business was doing much better than forecast was not kept from him. Mr. Fracassi received the MD&As, the financial reports, the financial statements, annual budgets, marketing materials and employee newsletters. He also knew Lakeport's volumes because he had to structure Newcastle's business around the transportation of those volumes.

46 Mr. Fracassi always wanted to know the worth of GE Capital's warrants. Karen Trudell prepared regular warrant valuations. They assumed a $5 million EBITDA.

47 Mr. Fracassi testified that he did not review the warrant valuation prepared August 28, 2004 showing his Lakeport interest ranging from $6,717,070 (with capitalised EBITDA of $5 million and a four times multiple) to $9,158,320 (with capitalised EBITDA of $5 million and a five times multiple). Ms. Cascioli recalls Mr. Fracassi looking at the document. I accept her evidence for reasons discussed subsequently. In any event, the numbers were discussed with him.

48 He did not deny that valuations existed or that they were done periodically for GE Capital. Ms. Cascioli would write up these charts and sometimes fax them to him. Although he pleaded that in the spring and summer of 2004, he and Ms. Cascioli seriously discussed the possible share valuation scenarios, he disagreed that he had looked at the warrant valuation document prepared August 28, 2004 and saw the high end was $9 million and understood that that was the assessment of his interest.

49 He does say in paragraphs 62 to 64 of his statement of claim:

> 62 Cascioli would periodically prepare spreadsheets detailing and projecting revenues, earnings and various share value analyses. Cascioli would prepare her share valuation models based upon multiples of between three and seven times the value of Lakeport's actual or estimated earnings before interest, taxes, depreciation and amortization ("EBITDA"). The multiples used were based upon industry information typical for valuing shares. Fracassi and Cascioli both understood that this was one method of valuing Lakeport and their share interest.
>
> 63 Through spring and summer 2004, Cascioli and Fracassi seriously discussed the possible share valuation scenarios. The purpose of the discussions was to establish a range for the offering of Fracassi shares in Do 4 U to third party investors.
>
> 64 Based upon discussions between Fracassi and Cascioli, which were premised upon Cascioli's share valuation analyses, Cascioli estimated Fracassi's interest in Lakeport at approximately $9 million. The estimate included the value of Fracassi's shares in Do 4 U and the value of the debts owed to Fracassi and Granvin from Do 4 U, AlphaCorp. and Lakeport. Based upon Cascioli's analyses and representations at that time, Fracassi accepted $9 million as a reasonable estimate of what he would receive for his interest in Lakeport.

50 While I do not accept all of the facts in these paragraphs including the stated purpose described in paragraph 63, that Mr. Fracassi based his decision on Ms. Cascioli's analysis, or that she estimated his interest as being $9 million, these paragraphs do show that in the spring and summer of 2004 the parties were seriously discussing share valuation scenarios and that Mr. Fracassi accepted $9 million as a reasonable estimate of what he would receive.

Mr. Fracassi's Price

51 Ms. Cascioli described herself as a saver and Mr. Fracassi as a spender. In 2004, Mr. Fracassi had a desire for cash. That year Ms. Cascioli gave him both her bonus and her management fees. She did not need the money as much as he did and she thought that some day he would repay her. Her motivation was not money. Ultimately, Mr. Fracassi told Ms. Cascioli that he wanted out of Lakeport at $9 million. The facts relating to the fixing of the $9 million price for Mr. Fracassi's shares are as follows.

(a) Distribution of Proceeds Document

52 After the Molson deal failed to materialize and Ms. Cascioli believed that Mr. Fracassi thought that she should have been able to negotiate a deal, Ms. Cascioli prepared and showed him a document entitled "Distribution of Proceeds" which was prepared after July 31 and before August 31. Ms. Cascioli testified, and I accept, that this was her attempt to show Mr. Fracassi that things were not so bleak and that he could do better than the deal offered by Molson. It showed Lakeport's debt and dividend positions as at August 31, 2004, EBITDA of $5 million and EBITDA multiples ranging from four to six. Ms. Cascioli believed she could deliver EBITDA of $5 million. The multiple was more of a guess. The enterprise value ranged from $20 million to $30 million and Mr. Fracassi's anticipated receipt for his common and preference shares plus dividends ranged from $6,430,120 to $11,312,620 on the document. Mr. Fracassi noted a minor mathematical error Ms. Cascioli had made on the Distribution of Proceeds document.

53 Mr. Fracassi told Ms. Cascioli that she had to get him out of the business. She asked whether he was serious and whether she could get out too, to which he responded no, she had to stay as she was the face of the business. He said she should call Rod Barrett to see about the mechanics of taking out the GE Capital warrants. Mr. Fracassi was asked in his examination in chief whether there was a reason he wanted his investment in Lakeport out in August 2004. He responded that there was no specific reason; he thought that he would get a reasonable return. In spite of his evidence, which I do not accept, it is clear that he was experiencing financial problems with Newcastle at the time and was in need of money. I do not consider it credible that he would leave it to Ms. Cascioli to determine his price.

(b) Contacting Mr. Barrett

54 In August 2004, Mr. Barrett received a telephone call from Ms. Cascioli. There is a difference in the evidence between Mr. Barrett and Ms. Cascioli on the subject matter of this telephone call and more specifically whether in this call Ms. Cascioli told him that Mr. Fracassi had agreed to sell his interest in Lakeport for $9 million. Mr. Barrett testified that Ms. Cascioli told him that Mr. Fracassi was prepared to sell and the price Mr. Fracassi named was $9 million. Mr. Barrett understood from Ms. Cascioli that Mr. Fracassi had picked the purchase price. Thereupon, Mr. Barrett suggested to Ms. Cascioli that Lakeport retain an investment bank to raise funds to effect the transaction.

55 In contrast, Ms. Cascioli, whose description of the phone conversation I accept, testified that she told Mr. Barrett that Mr. Fracassi wanted out and had asked her to call him about the GE Capital warrants and to get the names of some investment bankers. The price was not mentioned. While Mr. Barrett testified that Ms. Cascioli told him that Mr. Fracassi had named his price of $9 million prior to August 16, 2004, he did agree in cross-examination that it was possible that he was mistaken in this regard and that he may have compressed two conversations into one. He also made other minor factual errors in his testimony. For instance, he recalled that GE Capital had a 20% equity position and that Lakeport had been purchased out of receivership. In fact, GE Capital held warrants representing 30% of the common shares of Lakeport [6] and Lakeport had been purchased through *CCAA* proceedings. Neither of these are consequential errors and are completely understandable given the nature of a legal practice. In my view, it is more likely that Ms. Cascioli would correctly recall the events affecting her business than would Mr. Barrett. Furthermore, had Mr. Fracassi's price been named prior to August 16, 2004, there would have been no need to discuss the need for a price with Westwind and Mr. Fracassi on August 26, 2004. I find that in their first telephone call, Ms. Cascioli did not advise Mr. Barrett of Mr. Fracassi's price. Mr. Barrett called her back and gave her the names of two investment bankers.

(c) August 16, 2004 Westwind Meeting

56 Westwind Partners Inc. ("Westwind") was one of the investment bankers proposed. On August 16, 2004, Ms. Cascioli met with Lionel Conacher who was the President and CEO of Westwind.[7] At this first meeting, they discussed amongst other things, the fact that Mr. Fracassi wanted to exit Lakeport and the possibility that Ms. Cascioli would buy out his position. She told Mr. Conacher that she did not yet have a price from Mr. Fracassi. Mr. Conacher subsequently sent her an engagement letter dated August 16, 2004. It spoke of a proposed purchase of Brick Brewing. As it was a public company, the transaction would involve a reverse takeover by Lakeport. That said, Mr. Conacher did not recall any discussion of transactions involving another brewing company at that first meeting.

(d) August 26, 2004 Westwind Meeting

57 On August 26, 2004, Ms. Cascioli and Mr. Fracassi met with Mr. Conacher. Ms. Cascioli wished to engage Westwind. Mr. Conacher said that he needed Mr. Fracassi's purchase price before he could go to market and that the price should not be a revolving number. Both Mr. Conacher and Ms. Cascioli testified, and I find, that Mr. Fracassi acknowledged the need for a firm price. There was a discussion around timing. Mr. Conacher advised that the process would take eight to ten weeks from the date Mr. Fracassi named his purchase price. Mr. Conacher said that even if an agreement was not signed, there should be a business deal Westwind could represent. At the meeting, Mr. Conacher also said that there needed to be clarity that Mr. Fracassi would be out of the company. This was because of reputational issues relating to the collapse of PSC.

58 Westwind sent Lakeport an engagement letter dated August 26, 2004. Westwind would serve as the financial advisor in connection with the proposed share buy back and as its lead agent in connection with the raising of equity and/or debt capital. Westwind would identify potential investors for the raising of equity capital, potential lenders for the senior debt loan, and potential investors for a mezzanine offering. The bulk of Westwind's fees was contingent on a successful transaction and based on the value of gross proceeds raised. Mr. Barrett reviewed the letter. GE Capital and Mr. Fracassi would exit and Lakeport would acquire their interests. Ms. Cascioli would remain as a shareholder. Ms. Cascioli had been advised by her legal counsel not to sign the engagement letter until GE Capital had expressed a desire to be bought out. It was ultimately signed on September 28, 2004.

59 In a Westwind internal document dated August 27, 2004, that was not sent to Ms. Cascioli, Mr. Conacher noted that Westwind proposed that Lakeport raise $35 million to buy out Mr. Fracassi and GE Capital and pay down debt and fund working capital needs. The cash need of $35 million included an AlphaCorp. payment of $9,341,000 comprised of equity valued at $4,867 million and preferred shares plus dividends of $4,474 million. As at August 26, 2004, EBITDA was shown as $5,311 million and estimated to be $9,319 million in 2005 and $8,096 million and $6,145 million in 2006 and 2007 respectively. At this point, Westwind had not done any substantive work.

(e) Mr. Fracassi Names his Purchase Price

60 Ms. Cascioli described how Mr. Fracassi named his purchase price. Mr. Fracassi told Ms. Cascioli that he had his number and he met with her in the Lakeport boardroom. He removed from his daytimer the Distribution of Proceeds document given to him and on the reverse wrote "9". He said his price was $9 million. Ms. Cascioli inquired as to whether it was $9 million all in or did he want his preference shares on top of that figure. He responded that this was an all in figure. She also asked whether she could give that number to Mr. Conacher and he responded affirmatively. She asked him whether he wanted her to call Peter Schmuck, a valuator Mr. Fracassi had used in his time at PSC. He said she should call Rob Barrett. Mr. Fracassi put the document back into his daytimer. He did not tell her to get the best price possible for his interest. She also understood that he did not want more financial information.

61 At trial, Mr. Fracassi's version of events was very different from that of Ms. Cascioli. Although he pleaded that in the spring and summer of 2004, he and Ms. Cascioli seriously discussed the possible share valuation scenarios, he disagreed that he had looked at the warrant valuation prepared August 28, 2004 and saw the high end was $9 million and understood that this was an assessment of his interest. He testified that he did not recall the document entitled

"Distribution of Proceeds". He denied that he wrote the number 9 on the back of the document and told Ms. Cascioli that he wanted $9 million for his entire interest in Lakeport. He denied that this document was discussed with him. He testified that he thought she was selling his equity and in late November or early December, she told him the best she could get for him was $9 million. He states that he thought a sales process was going on and that he never gave her a number but was asked to agree to hers. I do not accept his version of events. I accept Ms. Cascioli's description of the facts including that he did not say that it was her responsibility to get the best price possible for his interest or that he wanted more financial information to value his interest. I conclude that he had named his price well before November or December of 2004.

62 The precise date that Mr. Fracassi selected his price is unclear. Amongst other things, the Distribution of Proceeds document on which he made the $9 million notation has an entry for Lakeport's debt position as of August 31, 2004 and another for dividends as of August 31, 2004. Mr. Barrett's letter is dated September 1, 2004 and contains the $9 million figure. Mr. Conacher testified that Ms. Cascioli told him that she could buy out Mr. Fracassi's position for $9 million. Mr. Conacher had no knowledge of how she came up with the number. Mr. Conacher had no recollection of when Ms. Cascioli came back to him with the $9 million figure. He thought it took more than one week but he clearly had no recollection of the date. A timeline created by Westwind on August 30, 2004, noted under the heading "Alpha" that between September 7 and 14, negotiation of the terms and finalizing of pricing was to occur. A Westwind document created September 1 noted the total AlphaCorp. payment as being $9 million. A Westwind document dated September 29, 2004 entitled "Potential Investor Questions for Management Reference" asks whether the valuation of AlphaCorp.'s equity had been negotiated and "when do you expect to finalize the purchase price". There were also inconsistencies in Ms. Cascioli's evidence at trial and her examination for discovery. That said, I did not view her as being intentionally dishonest. For reasons discussed subsequently, I preferred Ms. Cascioli's credibility to that of Mr. Fracassi.

63 It was Ms. Cascioli's evidence, which I accept, that the meeting with Mr. Fracassi took place after August 26 (the second Westwind meeting) and before September 21, 2004 (the date of the meeting with GE Capital). In correspondence from her counsel dated September 29, 2010, she states that Ms. Cascioli's recollection was that Mr. Fracassi named his price after August 26, 2004 and before September 1, 2004. She told Mr. Barrett and Mr. Conacher about the $9 million figure around the same time. Stikeman Elliott prepared a draft letter of intent dated September 1, 2004 that made reference to the $9 million figure in square brackets. Mr. Barrett testified that it was in brackets because he did not know if the $9 million was subject to adjustments.

(f) Professionals' Roles

64 Stikeman Elliott LLP's role consisted of examining the engagement letter with Westwind; drafting a form of purchase agreement; examining the term sheets for the financing proposed by Bank of Montreal, Vengrowth and National Bank; negotiating an agreement with Mr. Fracassi's lawyer; and conducting the work necessary to close the purchase and sale transaction. The matter consumed four months of relatively intensive work. Mr. Barrett had the overall responsibility for the deal. He and his partner, Ron Ferguson, worked on the Fracassi buyout transaction.

65 As mentioned, on September 1, 2004, a term sheet was prepared by Stikeman Elliot LLP between Lakeport and Mr. Fracassi. Mr. Barrett testified, and I accept, that he advised Mr. Fracassi that he needed to get his own lawyer and that Mr. Fracassi responded that there was no way, however, Mr. Barrett insisted. Mr. Fracassi testified that he had no recollection of that conversation. Mr. Fracassi retained the Hamilton law firm of Scarfone Hawkins LLP. Mr. Barrett never understood that Ms. Cascioli was acting as Mr. Fracassi's agent. His understanding was that Mr. Fracassi and Ms. Cascioli were operating at arm's length.

66 KPMG, Lakeport's auditors, designed an indirect purchase mechanism so that Mr. Fracassi would get the best tax structure. This had Lakeport buying Mr. Fracassi's interest through funds provided by Lakeport. Financing would be arranged and then a dividend paid out to Mr. Fracassi. The steps to effect this transaction on a tax effective basis were set out in a letter from KPMG to Ms. Cascioli, President and Chief Executive Officer, Lakeport Brewing Corporation dated November 19, 2004 (the "steps memo") [8] . The steps memo of November 19, 2004 began with "Dear Ms. Cascioli" and

expressly stated that she was effectively buying Mr. Fracassi's interest and that he would receive $9 million. Mr. Fracassi sent this letter to his lawyer Mr. Teal of Scarfone & Hawkins on November 19, 2004. Mr. Teal then sent it to Mr. Barrett.

67 The first time Mr. Fracassi dealt with his lawyer, Mr. Teal, was on November 17, 2004. At trial Mr. Fracassi testified that the $9 million price figure had not been fixed prior to his first meeting with Mr. Teal; however, when examined for discovery in the Stikeman's action, Mr. Fracassi gave the following evidence:

> Q. So the question is — this is Mr. Griffin: "You also expected that Mr. Teal and his firm would be on the lookout for events that would generate an increase in the purchase price if the EBITDA of the business increased?
>
> A. No.
>
> Q. They weren't to play any role on the purchase price?
>
> A. That is correct.
>
> Q. When the documents were created that reflected the structure of the transaction, you weren't expecting the purchase price, if you like to change?
>
> A. Correct.
>
> Q. That was because that had been locked down before the retainer?
>
> A. It had been agreed to.
>
> Q. That is the specific amount of money that had been agreed to?
>
> A. Correct.
>
> Q. And that was $9 million, plus or minus depending on how various loans and other amounts were retired?
>
> A. That is fair.

68 In correspondence dated November 29, 2004, from Mr. Fracassi to Mr. Teal, Mr. Fracassi states that he just got off the phone having spoken with Ms. Cascioli. There is no reference in the email to any price discussion with Ms. Cascioli, which one would expect at that juncture if the price for Mr. Fracassi's shares had not been agreed upon.

69 In my view, although there are some discrepancies in Ms. Cascioli's evidence, I did not find Mr. Fracassi's evidence on price to be credible. When their evidence conflicted, I preferred Ms. Cascioli's evidence to his for reasons I will elaborate upon later. I conclude that Mr. Fracassi named his price of $9 million on a date prior to September 21, 2004.

Westwind

70 Westwind prepared a wide variety of analyses. In addition, information packages would be tailored to each investor. Different presentations were made to lenders and investors. For instance, a document entitled "Westwind We Get It Done" contained an aggressive forecast entitled the "Growth Forecast". Mr. Conacher testified Westwind would have chosen this aggressive forecast based on to whom they were speaking — a mezzanine or equity investor unlike the Offering Memorandum which was for a senior lender and which contained a more conservative forecast called the "Conservative Forecast". In essence, Westwind used different forecasts depending on its audience.

71 Of 19 senior lenders contacted, Westwind received term sheets from three. Of the 49 private equity contacts, no terms sheets were received.

72 Westwind considered that it owed a fiduciary obligation to Lakeport, the buyer, and none to Mr. Fracassi, the seller. It would be unusual for a buyer to give a seller advice on price according to Mr. Conacher and it was open to Mr. Fracassi to hire a valuator.

Meeting with Brick Brewing

73 In September 2004, Mr. Conacher and Ms. Cascioli met with James Brickman who was the executive chairman of Brick Brewing and with the new President and CEO, Mr. Burchtold. Ms. Cascioli had met Mr. Brickman before. She did most of the talking and asked the Brick Brewing representatives whether they were interested in merging. There was a discussion of a possible reverse takeover. Mr. Brickman inquired as to Mr. Fracassi's role and Ms. Cascioli responded that he would be bought out under the circumstances. The subject of an income trust was not raised. Nothing further materialized between Lakeport and Brick Brewing. There were no agreements made and no due diligence was conducted.

Exit of GE Capital

74 The equation of normalized or sustainable EBITDA times a multiple less debt less preferred shares resulted in a value for the common shares of Lakeport. Mr. Fracassi and Ms. Cascioli discussed the earnings multiples of the business *ad nauseam* and generally the range would be between 4 and 6. Ms. Trudell testified, and I accept, that in August 2004, Lakeport's view of sustainable or normalized EBITDA was $5 million. In an internal Lakeport warrant valuation prepared in August 2004, multiples between 4 and 5.5 were used. These multiples were the best estimate of value based on Ms. Trudell's and Ms. Cascioli's discussions.

75 As mentioned, at the time of the original acquisition of Lakeport, GE Capital was its lender. It had a loan and warrant position. The loan agreement between GE Capital and Lakeport provided that notice had to be given to redeem its warrants. The agreement also then called for a valuation of the warrants. The lending agreement with GE Capital was to expire in March 2006.

76 The forecasts prepared for GE Capital in August 2004 applied earnings multiples of four to six times and an EBITDA estimate of $5 million to arrive at a rough estimate of total enterprise value of between $20 and $30 million. Whatever the enterprise value, to reach an estimate of the common equity, one had to first deduct the debt to GE Capital of between $11 and $12 million, the $3.3 million owed to Mr. Fracassi on account of his preferred shares, and $1.07 million for accrued dividends and interest relating to the preferred shares. The range of Mr. Fracassi's total interest based on these forecasts ranged from approximately $6.58 million to $11.83 million.

77 On September 21, 2004, Ms. Cascioli and Mr. Fracassi flew to Connecticut to meet with GE Capital representatives to ask GE Capital to redeem its warrants. Ms. Cascioli had Mr. Fracassi's $9 million price by the time of this meeting. Mr. Fracassi led the discussion by expressing his desire to exit Lakeport and indicated that he had remained in the company long past his time horizon. The presentation to GE Capital included financial forecasts as at July 4, 2004. They showed actual EBITDA of $5.1 million for the fiscal year ended January 31, 2004 and forecasts of $9.072 million and $5 million EBITDA for fiscal years 2005 and 2006 respectively. Although it strains credulity, Mr. Fracassi testified that he was unaware of the reforecasted 2005 EBITDA of $9.072 million and that he thought Lakeport was doing well but that it was performing at $5 to $6 million on the EBITDA. His recollection was that he left the meeting when Ms. Cascioli made the presentation. He denies that he was suggesting that Ms. Cascioli was keeping that information from him. Indeed, in cross-examination, he acknowledged that the fact that the business was doing much better than forecast was not kept from him. He also admitted in cross-examination that it was possible that on the flight down to New York, he and Ms. Cascioli would have discussed what they were going to say to the GE Capital representatives. The meeting went well and GE Capital indicated that it would positively consider being taken out. The GE Capital representatives advised that they would get back to Ms. Cascioli and Mr. Fracassi.

78 On September 28, 2004, GE Capital issued its repurchase notice with respect to its warrants. They were to be valued as at August 31, 2004 and the valuator was to be PricewaterhouseCoopers ("PWC").

79 In late September or early October, Mr. Barrett had a telephone call with Ms. Cascioli and Mr. Fracassi. Lakeport had suggested that Dundee Securities value GE Capital's warrants but GE Capital insisted on PWC. Mr. Barrett testified, and I accept, that Mr. Fracassi was very upset that GE Capital would not accept Dundee as the valuator. Amongst other things, if the valuation was too high, there would be no deal because not enough money could be borrowed to take out both Mr. Fracassi and GE Capital. Mr. Barrett said that PWC would not inform Mr. Fracassi's price. According to Mr. Barrett, Mr. Fracassi said that there was no way that they should allow GE Capital to dictate this. Mr. Barrett testified that Mr. Fracassi was concerned that GE Capital would come in at a price that was too high and would take too much time. Mr. Fracassi testified that he did not recall this conversation. I accept Mr. Barrett's evidence in this regard. Ms. Cascioli described Mr. Fracassi as saying that he and GE Capital were "joined at the hip". He used the term "*pari passu*".

Communications Between Mr. Fracassi, Westwind and Lakeport

80 Westwind had called Mr. Fracassi directly to obtain a minute book. Mr. Fracassi called Ms. Cascioli and inquired as to why Westwind was calling him. He was very angry. Ms. Cascioli told Mr. Conacher that Westwind was not to communicate with Mr. Fracassi. She gave similar instructions to her Lakeport staff given Mr. Fracassi's position at Newcastle, it being a supplier to Lakeport.

Molson Bohemian

81 On September 20, 2004, Lakeport launched Lakeport Lite at 24 for $24 plus a deposit of $2.40 for a total of $26.40. That same day, Molson launched Bohemian at 24 for $24 including deposit. Ms. Cascioli was surprised and concerned. Summer, an important season for beer, was over and, in her experience, large brewers did not launch new brands. In addition, Molson had the ability to make large marketing expenditures. She thought Molson was taking a run at Lakeport — the Plan B Mr. O'Neil had referred to. Ms. Trudell regarded the introduction of Bohemian by Molson as a serious negative for Lakeport.

82 Ms. Cascioli immediately called a competition lawyer at Stikeman Elliott LLP. She lowered Lakeport's prices for Honey Lager, Pilsener and Light to $23.70 including deposit — the lowest legal price allowed. The price took effect on October 12, 2004. Other brewers followed and by November 8, 2004, Lakeport's competitors were pricing their beer at $23.70 as well. This included Molson, Labatt, Brick Brewing and Sleeman. The price war was in play and continued through December 2004 and January 2005. It would affect significant variables for Lakeport including volume of sales and the corresponding large brewer tax threshold and uncertainty as to price increases.

83 Pricing was a challenge for Lakeport. It had a lack of historical information on the size of the consumer discount pie. There was an increased need for money for marketing, uncertainty about the large brewer tax applicability and uncertainty on what price increases could be anticipated.

84 In October and November 2004, Lakeport was unsure whether it would cross the large brewer tax threshold in March 2005 or March 2006. Ms. Trudell testified that Lakeport thought of stopping production to avoid going over the threshold. The price war continued until the end of January 2005.

85 Lakeport did not start the price war and could not stop it. In essence, Lakeport was at the mercy of Molson and Labatt who together commanded a market share of in excess of 88%. The price war started on September 20, 2004, and Lakeport did not know when it would end. In the short term, according to Ms. Trudell, the strategy of reducing price worked. If Lakeport sold more beer, however, it would attain large brewer status sooner. Ms. Trudell regarded the price war as a very bad thing. Ms. Trudell did an analysis at the time to consider the impact of a price reduction. If Lakeport priced at 24 for $24 all in for a full year, EBITDA would be $6.4 million less than selling at $26.40 for a full year even accounting for increased sales. In addition, once the price war ended, prices could not be increased as rapidly as expected prior to the price war.

86 In this environment, accurate predictions and forecasts were extremely difficult if not impossible.

Forecasts

87 Lakeport prepared certain forecasts with Westwind in the fall of 2004. The purpose of these forecasts was to help Westwind market the company. As mentioned, Lakeport also provided GE Capital with a forecast for EBITDA in fiscal 2005 and 2006 in the package sent in August 2004. In addition, many other forecasts were prepared by Lakeport for varying purposes. Some of the forecasts are outlined below.

88 In considering these forecasts, it is important to note that the EBITDA were internal estimates of value. The forecasts were not guarantees of future performance. This was the first time management had attempted to forecast EBITDA for more than one year in the future. Some of the forecasts were prepared at the same time but used different assumptions.

89 The difficulties associated with forecasting were reflected in an investor presentation created September 19, 2004, prepared by Westwind who wrote:

> This offering memorandum contains forward-looking statements relating to the business and financial outlook of Lakeport which are based on the current expectations, estimates and projections of Lakeport. In some cases, forward-looking statements can be identified by terminology such as "may", "will", "should", "expects", "plans", "anticipates", "believes", "estimates", "predicts", "potential" or "continue" or the negative of these terms or other comparable terminology. These forward-looking statements are not guarantees of future performance and involve risks, uncertainties, estimates and assumptions that are difficult to predict. Therefore, actual outcomes and results may differ materially from those expressed in these forward-looking statements.

(a) Conservative Forecast

90 Westwind prepared an Offering Memorandum ("OM") dated October 2004. It noted that Lakeport had retained Westwind to raise $26 million in senior and subordinated debt capital through a private placement from Canadian investors that were accredited investors or were otherwise exempt from the prospectus or registration requirements of applicable securities legislation.

91 Ms. Trudell was involved in putting together the OM and mostly provided the numbers for that document. They were generated towards the end of September 2004.

92 Ms. Trudell and Ms. Cascioli prepared a forecast they described internally as the "Conservative Forecast". It was incorporated into the OM. They felt that the assumptions were the most realistic at the time. The assumptions included attaining large brewer status in January 2007; modest competition; no increase in marketing expenditures; similar pricing in 2006 as in 2005 ($26.40 per case); and increased pricing in 2007 and forward. Estimated EBITDA was $9.3 million in 2005, $6 million in 2006, $5.1 million in 2007, and $5.4 million in 2008.

93 Ms. Cascioli did not have a distinct recollection of handing the OM to Mr. Fracassi but it was her practice to put such materials in his file folder. She gave the OM to PWC. Ms. Cascioli considered the OM to be a marketing document and did not know the legal consequences of an inaccurate OM. Mr. Conacher had no recollection of explaining the significance of an OM to Ms. Cascioli. She did not sign the OM. She did believe that she could achieve the Conservative Forecast that was contained in the OM.

(b) Growth Forecast

94 A Growth Forecast was also prepared by Lakeport and Westwind in mid to late September and into October 2004. The stated assumptions were largely the same as those in the Conservative Forecast. Estimated EBITDA was shown as $9.3 million in 2005; $8.687 million in 2006; $7.1 million in 2007; and $7.6 million in 2008. The Growth Forecast reflected an increase in pricing in 2007 and on. Ms. Cascioli stated that Mr. Conacher had all the forecasts and depending on who he would speak to, he would reflect whichever was suitable to the lender. Mr. Conacher described the Growth Forecast

as the upside case directed at the equity holders whereas the Conservative Forecast was the base case, the most likely case the company could achieve.

(c) Ultra Conservative Forecast

95 In November 2004, the price war was in effect. Ms. Cascioli was working with counsel at Stikeman Elliott LLP to analyze its impact on Lakeport. She and Ms. Trudell prepared another forecast. It had two purposes: to see the impact on EBITDA of the failure to take a price increase and, as it looked as though they were going to be subject to the large brewer tax, the consequences of that tax. In this forecast, the GE Capital relationship continued. Mike's Hard Lemonade ("Mikes") contract was not included in this forecast. The forecast assumed marketing dollars fixed at $1.4 million for fiscal 2006 through to fiscal 2008, attaining large brewer status in April 1, 2005 (fiscal 2006), modest competition, pricing only rose to $26.90 in 2007 and $27.30 in 2008. EBITDA was forecast to be $9.344 million in 2005, $4.031 million in 2006, $4.142 million in 2007 and $4.118 million in 2008. Ms Trudell and Ms. Cascioli referred to this model as the "Ultra Conservative Forecast". Ms. Trudell testified that this forecast reflected their thoughts on how Lakeport could deal with prices in the future. They could not raise them rapidly. The Ultra Conservative Forecast was given to PWC.

(d) Doom Forecast

96 Ms. Trudell and Ms. Cascioli referred to an additional forecast as the "Doom Forecast" as they were very concerned about pricing and it reflected that concern. In this forecast, the GE Capital relationship continued and Mike's contract was not included. It showed increased volume and market share with the attendant large brewer tax status being reached in fiscal 2006. Pricing continued at $23.70 in 2006 and increased to $24.20 in 2007 and $24.65 in 2008. EBITDA was $9,344 million in 2005, $962,000 in 2006, $1.126 million in 2007, and $838,000 in 2008. This forecast was prepared at the same time as the Ultra Conservative Forecast.

Mr Fracassi's Impatience

97 The buy out of Mr. Fracassi's interest had been targeted for the end of October 2004. In about the third week of October 2004, Ms. Cascioli had asked Westwind for an update on timing and was advised that the transaction would not get done by the end of the month. Ms. Cascioli called Mr. Fracassi at home to tell him this and he was very upset. He said "Just get me my fucking money" and hung up on her. She called back. He said to just get it done and hung up again.

98 If Ms. Cascioli showed Mr. Fracassi anything during the month of November, he would give it back to her and say "Just get me my money." She was going to give him a summary of where they were at with the lenders but he did not want to look at it and said "I don't want to hear this anymore. Just get me my money." She understood that her mandate was to go and get him $9 million and get financing to replace GE Capital. Ms. Cascioli regarded Mr. Fracassi as her boss and partner in addition to being the majority shareholder. He was going to get anything material or significant.

99 In December, when Lakeport was closing its November month end statements, Ms. Cascioli told Mr. Fracassi that they had not had time to do the November MD&A. She gave him the financial statement and a financial package and he handed it back saying "Just get me my fucking money." Legitimately in my view, she understood that Mr. Fracassi just wanted his $9 million.

100 Mr. Fracassi had the Conservative Forecast and the PWC valuation which contained the Ultra Conservative Forecast. He did not have either the Growth or Doom Forecasts. In any event, Mr. Fracassi had the ability to prepare his own forecasts based on the information available to him.

Westwind's Spreadsheets

101 As mentioned, the earnings multiples of the business were something Mr. Fracassi and Ms. Cascioli discussed *ad nauseam*. He thought generally that the range would be from four to six.

102 Westwind prepared numerous spreadsheets during the period of their retainer. One created October 23, 2004 and entitled "Value created for Teresa" compared the actual purchase price for Mr. Fracassi and GE Capital with what "Should've Been". Mr. Fracassi was noted as having been underpaid by $9,502,533 and GE Capital by $5,430,019. The preferred shares and the debt were described as being overpaid by $84,486 and $734,542 respectively. These calculations were based on what Westwind thought was in the range of fair market value at the time. The document concluded by describing $12,613,523 as being the overall value created. According to Mr. Conacher, this money was for the Lakeport management team. This Westwind calculation used a 7 times multiple and normalized EBITDA of $6 million rather than a 4 to 6 times multiple and a normalized EBITDA of $5 million usually used by Lakeport and also differed from the normalized EBITDA and multiples used in the GE Capital warrant valuations. Westwind created another analysis that same day using normalized EBITDA of $5 million and a 4.8 times multiple. Westwind was running these numbers as part of their efforts to market Lakeport. Mr. Conacher told Ms. Cascioli that if they were successful, she would become a millionairess many times over and that it would be worthwhile so long as she could hit the numbers. The more Westwind could attract for the business, the more it would get in fees. They advocated a fair market value of Lakeport in the $35 million range using normalized EBITDA of $5 million and a 7 times multiple.

103 That said in a portion of a PowerPoint presentation entitled "Lakeport Valuation — Status Quo", Westwind wrote that AlphaCorp.'s negotiated selling price of their 52.5% interest in Lakeport had established a base value for Lakeport of $8.7 million and in a "fair market value" scenario, the business would be valued using 2006 EBITDA of $6 million and a 6 times multiple to reach $20.7 million in value with $10.9 million allocated for Mr. Fracassi's interest and $6.2 million for GE Capital.

104 I will comment later on the evidence of Mr. Conacher and Westwind's role but, generally speaking, I do not regard his evidence or their materials as particularly reliable indicators of value.

PricewaterhouseCoopers

105 Karen Trudell was Lakeport's CFO having joined Lakeport in 2002. She is a chartered accountant but does not have training or experience as a business valuator. She reported to Ms. Cascioli. She has no apparent interest in the outcome of this litigation. One of her responsibilities was the creation of financial projections or forecasts. She prepared many during the period in issue. The pace of activity at Lakeport in October and November of 2004 was crazy, hectic and very, very busy to use Ms. Trudell's words.

106 Ms. Trudell learned of PWC's mandate to value GE Capital's warrants as at August 31, 2004, in September 2004. At that time, Ms. Cascioli told Ms. Trudell that Mr. Fracassi needed out. Ms. Cascioli had told Ms. Trudell that he needed $9 million. She did not recall how the determination of the $9 million came about but she was told at the same time she found out about GE Capital exiting. When she heard that Mr. Fracassi wanted $9 million, the price had not seemed out of line.

107 Ms. Trudell was the primary person who interacted with PWC in terms of gathering the documents they needed to do the valuation.

108 As stated in the closing argument on behalf of Mr. Fracassi, the core allegation that drives Mr. Fracassi's case is the allegation that Ms. Cascioli deceived PWC and that this deception was then extended to include him.

109 The engagement letter between PWC and Lakeport was dated November 11, 2004 and was signed by Ms. Cascioli on November 12, 2004. It indicated that prior to issuing its final report, PWC would require a letter of representation from management confirming the completeness and accuracy of information provided. PWC expected its fees to be in the $70,000 to $80,000 range. The quote was for valuation services only. PWC assumed no responsibility and made no representations with respect to the accuracy or completeness of any information provided by or on Lakeport's behalf. The PWC valuation would be used to determine the fair market value of GE Capital's warrants.

110 PWC also provided Lakeport with a list of information it required to commence its valuation estimate. The list included a request for projections for fiscal 2005 to fiscal 2010 which existed at the valuation date including details of all the underlying assumptions and all accompanying narrative.

111 Ms. Trudell prepared a forecast for PWC entitled "PWC — Valuation Model". It was created around November 11, 2004 and provided to PWC and was based on best estimates at that time. It reflected estimates as of August 31, 2004 but was adjusted for certain occurrences subsequent to that date. It reflected the Ultra Conservative Forecast although Ms. Trudell stated that the numbers were not ultra conservative.

112 Ms. Trudell and Ms. Cascioli identified the assumptions that informed the forecasts. Firstly, the PWC valuation was prepared based on the capital structure as it existed at Lakeport in August 2004; that is, with Mr. Fracassi as the indirect majority shareholder and with GE Capital as Lakeport's lender and with the warrants outstanding.

113 Secondly, Lakeport assumed that large brewers' status would be attained by April 1, 2005 (which is fiscal 2006 given the January 31 year end). In July, Lakeport knew that it was going to cross the 150,000 hectare litre threshold. Lakeport attempted to do a calculation to suggest that Sleeman Brewery should include the beer that had been brewed by Lakeport for them so that it did not come within Lakeport's calculation. They discovered in January, February or March of 2005 that this was not going to be possible.

114 It is the case that Ms. Cascioli was lobbying the government for relief from the large brewers' tax and that she had hired a professional lobbyist to assist her. They were presenting different options to the government including increasing the volume threshold, excluding from Lakeport's calculation any beer it produced for other brewers and increasing the requisite time horizon from a 5 to a 7 year average. She believed that she would likely succeed with her lobbying. This belief was reflected in the Draft Preliminary Prospectus prepared for investors filed by Lakeport on May 3, 2005. She testified that had she thought that her lobbying efforts were unlikely to succeed, she would have taken a reserve on May 3, 2005. Although she thought her lobbying would be successful and she did not take a reserve, nonetheless the Ultra Conservative Forecast assumed incurring the large brewers' tax in fiscal 2006.[9] Ms. Trudell stated that in July 2004, she knew that Lakeport would cross the large brewer tax threshold.

115 Thirdly, Lakeport assumed modest competition, namely 6% of The Beer Store market share in fiscal 2006. Ninety percent of Lakeport's product was sold through The Beer Store. As for pricing, by November 9, 2004, Lakeport knew that Lakeport's price reduction strategy was working better than expected and that it had increased its volumes to a sufficient degree that it was making more money than it had projected in its July 2004 reforecast.

116 Lakeport had also been notified that the business they were doing for Mike's was being terminated. The expiry date was October 2004. Ms. Cascioli testified that she did not want to lose the co-pack business but it was hard to control the volume because one was at the mercy of the customer. On the other hand, the profit margin on proprietary beer was better than on co-pack products. In its October 2004 MD&A, Lakeport reported that Lakeport and Mike's would not be renewing their contract for fiscal 2006. Mike's wanted the pricing to remain the same as in the past three years, but Lakeport's costs had gone up and Mike's wanted Lakeport to absorb the increased costs with no corresponding price increase. Lakeport walked away because Mike's would not accept the increase in price. In contrast, Lakeport did very well with Mott's who accepted the increase in pricing.

117 The PWC valuation reflected higher beer volumes for fiscal 2005 and 2006. With prices going down, Lakeport's pricing had been lowered to compete with Molson's Bohemian. The lower pricing resulted in higher volumes of Lakeport beer being sold.

118 There was also a plan to increase marketing. Marketing was increased to achieve a higher volume of sales. For October 2004, Lakeport was forecasting just over a 10% increase. For November, it was 20%. In 2005, marketing expenses were stated to be $1.2 million and were forecast to be $1.4 million in fiscal 2006 through to fiscal 2008.

119 Ms. Trudell explained the difference between the information given to PWC in the Ultra Conservative Forecast and that contained in the Conservative Forecast in the OM. Firstly, the purposes were different. The OM was to raise funds for the business going forward. The purpose of the PWC valuation was to put a value on GE Capital's warrants as of August 31, 2004. The differences did not concern her. She did not intentionally keep anything back from PWC in order to support a forecast she did not believe in. The PWC valuation model represented her best estimate of the future anticipated performance of the business. Ms. Cascioli did not tell Ms. Trudell to low ball or intentionally understate the anticipated results in giving information to PWC.

120 The biggest difference between the two forecasts was the large brewer tax. In addition, Mike's contract had ended and Molson had launched Bohemian at a lower price. Marketing was forecast to be $1.201 million in 2005 and $1.4 million thereafter in the Ultra Conservative Forecast as opposed to $1.7 million in the Conservative Forecast, but Ms. Trudell could not recall why. She did note that GE Capital was always cautious about spending.

121 James Forbes was the partner at PWC who had responsibility for the valuation of the common equity of Lakeport. He is a chartered accountant, a certified business valuator and a certified fraud examiner and has practised for approximately 25 years. Mr. Forbes was the principal author of the valuation report ultimately provided to Lakeport on or about November 26, 2004. The report reflected PWC's understanding that the valuation was required as the result of GE Capital's repurchase notice dated September 29, 2004.

122 In the report, Mr. Forbes noted that PWC had used assumptions made by Lakeport management regarding future events with respect to the industry and the economy in which Lakeport operated "which by their nature cannot be fully substantiated and while currently considered reasonable, will likely not occur exactly as forecast." PWC's estimate of value was based on information made available to them, discussions with Lakeport management, and market research undertaken by PWC. PWC did not seek any additional audit or review of the financial affairs of the company.

123 The scope of PWC's review consisted primarily of enquiry, review and discussion regarding historical operating results and future expectations for the company. PWC also utilized its own research into general industry and economic conditions. Its representatives had discussions with Ms. Cascioli and Ms. Trudell; they toured Lakeport's facilities and questioned key Lakeport employees.

124 In arriving at its conclusions, PWC assumed that the forecast for the fiscal years ending January 31, 2005 through 2008 was management's best estimate of future operating expectations as at or about the valuation date of August 31, 2004.

125 In the body of its report, PWC reported that management had informed them that the Mike's contract had not been renewed and no plans existed to renew it. PWC noted that historically as the company was struggling to increase its beer brand volumes, the co-pack customers provided cash flow but now that the beer brand volumes had increased, the reliance on co-pack customers had lessened. The beer brands were forecast to generate an estimated $13.78 million in contribution margin or 78% of total company contribution margin in 2005 with the largest sellers being Lakeport Honey Lager and Lakeport Pilsener. The increase in 2005 reflected the success the company had achieved in the value or discount segment of the beer market. PWC noted that Brick Brewing was reporting increased sales due mainly to increases resulting from sales to the value segment of the market.

126 In discussing the market, PWC wrote:

> Historically, the company's 24's were generally priced below the major national brands. However, recently Molson and Labatt had entered Lakeport's market and have begun pricing equivalent 24's close to Lakeport's prices. Further, another Ontario company, Brick Brewing, competes with the company in the value segment with its "laker" brand. Based on discussions with management, we understand that these developments should not influence Lakeport's ability to increase its market share going forward as the value segment of the market is expected to increase.

127 In the report, certain risks and challenges facing Lakeport were identified. PWC wrote that "at the valuation date, some of the larger brewers in Canada are actively competing for the value segment" and noted Molson's new product, Bohemian. Should the "price war" continue in the Ontario market, the forecast results of Lakeport would be negatively impacted. In addition, PWC noted that with an increase in production, management estimated that as of 2006, Lakeport would no longer pay reduced taxes at the "micro-brewery" rates.

128 PWC reported that EBITDA was forecast to be $9.07 million in 2005 up from $5.12 million in 2004 and that management was of the view that the improved EBITDA margin in 2005 was not attainable in the future. PWC reported that management had forecasted the EBITDA margin for Lakeport in 2006 to be lower than that achieved by the somewhat comparable publicly traded beer companies which PWC had examined. In establishing a maintainable EBITDA level for Lakeport, the historical EBITDA for the years ending January 31, 2003 through 2004 and for the forecast period were considered. The results for fiscal 2002 were included for informational purposes. It was PWC's view that a maintainable EBITDA level for Lakeport was between $3.9 million and $4.3 million.

129 In selecting an appropriate EBITDA multiple to apply to the chosen range of maintainable EBITDA, PWC considered amongst other things the economic and industry outlook between the valuation date and the notice period, Lakeport's current market position, its historical financial position, its historical forecast and year-to-date operating results including consideration of Lakeport's forecast 2005 results, its dependence on a few key proprietary brand beers, its dependence on The Beer Store, consideration of publicly available information with respect to somewhat comparable trading multiples of minority interests in publicly quoted companies, open market transaction related data, and PWC's experience in the valuation of companies in the brewing industry. Based on various factors, it was PWC's view that the appropriate EBITDA multiple to apply was in the range of 6 to 7 times EBITDA. PWC observed that Brick Brewing was the most comparable company to Lakeport since it conducted business mainly in Ontario but PWC chose not to rely solely on its multiple in its analysis.

130 Maintainable EBITDA of $3.9 million to $4.3 million was capitalized using the selected EBITDA multiples of 6 to 7 times EBITDA. This resulted in an enterprise value range of approximately $25.80 million to $27.30 million. PWC therefore estimated that the appraised value of all the common equity of Lakeport as at the valuation date of August 31, 2004 was in the range of $9.2 million to $11 million with a mid-point of $10.1 million.

131 PWC valued the common equity of Lakeport without giving effect to a discount for any lack of liquidity of the shares. The reason for this was that the criteria set out in the warrants prohibited such a discount. If a liquidity discount were required, it was PWC's view that it would amount to $3.5 million which would have resulted in a common equity value for the Lakeport shares of $6.6 million ($10.1 million less $3.5 million).

132 Lakeport management provided PWC with the Ultra Conservative Forecast for the fiscal years ending January 31, 2005 through to 2008. The term "ultra conservative" was never used to describe the forecast relied upon by PWC. Mr. Forbes understood that that forecast represented management's best estimate of future operating expectations as or about the valuation date. He discussed with management the assumptions contained in the forecast and independently assessed the reasonableness of those assumptions. Ms. Trudell's evidence was that the Ultra Conservative Forecast given to PWC was management's best estimate of EBITDA at the time the forecast was prepared. She was a witness called by the Plaintiffs.

133 In preparing its calculations, PWC was given, amongst other things, the OM with the Conservative Forecast dated October 2004. As mentioned, it projected EBITDA in 2005 of $9.3 million, $6 million in 2006, $5.1 million in 2007 and $5.4 million in 2008. It projected marketing costs of $1.2 million in 2005 and $1.7 for the years thereafter. The seven months ended August 28, 2004 showed EBITDA of $6.28 million and marketing expenses of $1.19 million.

134 PWC told Lakeport management that the time frame they were looking at was between the valuation date and the notice date. PWC was not considering facts after September 28, 2004.

135 Mr. Forbes testified that PWC did not rely on the EBITDA in the OM. The differences between the EBITDA in the Ultra Conservative Forecast used by PWC and the Conservative Forecast reflected certain assumptions. Firstly, PWC assumed Lakeport would incur the large brewer tax in fiscal 2006 whereas the Conservative Forecast assumed it was fiscal 2007. Secondly, the contract for Mike's was not to be renewed in PWC's valuation whereas in the other it was continued. Thirdly, there was to be no price increase in PWC's valuation whereas in the Conservative Forecast there was a price increase.

136 Mr. Forbes testified that he did not receive Lakeport's MD&A including the month-end financial results as at August 2004. Mr. Forbes was not prepared to say this was the type of information he would like to get as he would expect more detail than was provided in the MD&A report.

137 PWC did not get the MD&A dated September 2004, which would have been prepared after the valuation date. PWC knew of Bohemian's launch on September 20, 2004 and knew that Bohemian had dropped its price between the valuation date and the end of September 2004. It did not know that Lucky Lager had dropped its price to $23.70 and did not know of the drop in price to $23.70 on October 12, 2004. Management had told him, however, that if Molson's price went down, Lakeport would have to respond. He was of the view that PWC did not get the October 2004 MD&A dated November 2004, which referred to the term sheets to replace GE Capital's financing and PWC did not receive details of those terms sheets.

138 PWC did not receive Westwind's analysis of the financing proposals received. It did not know that a few days after its valuation was finalized, Lakeport was presenting EBITDA values from the Conservative forecast to Vengrowth.

139 Mr. Forbes accepted that projections were extremely relevant to PWC's valuation. If the projections were prepared on a different basis or for a different purpose or with information after the valuation date, they may not have been as important to see. Mr. Forbes confirmed that he had been on files where he had had a reasonable set of projections to do for a certain purpose and there were more aggressive projections made for another purpose.

140 GE Capital was an existing client of PWC and PWC's relationship with GE Capital was important to PWC. Lakeport was not entitled to select the firm it wished over any objection of GE Capital. The PWC valuation was prepared for the specific purpose of valuing the GE Capital warrants as at August 31, 2004. It was not prepared for the purpose of valuing Mr. Fracassi's interest as at December 2004. Indeed, there is a specific exclusion stating that the report was not to be used for any other purposes. Mr. Forbes did not have any conversations with Mr. Fracassi in which Mr. Fracassi indicated that he would be relying on the PWC valuation for the purpose of valuing his interest in Lakeport. Mr. Fracassi confirmed in his cross-examination that he was not looking to the PWC valuation to establish or inform his price. He was not relying on the PWC results.

141 Mr. Forbes testified that PWC reviewed the projected income statement in the Conservative Forecast in connection with the preparation of its valuation. He understood at the time that this document was prepared for the purpose of soliciting an investment in Lakeport and refinancing. The EBITDA figures in this projected income statement were different from those contained in PWC's report. They showed EBITDA of $9.34 million in 2005, $6 million in 2006, $5.15 million in 2007 and $5.40 million in 2008. He testified that he understood the basic assumptions behind this EBITDA forecast, including that Lakeport would cross the large brewer tax threshold in fiscal 2007.

142 Mr. Forbes testified that there is some art to the selection of an EBITDA multiple; it is a matter of professional judgment and a matter over which there may be a legitimate disagreement amongst professional valuators. PWC chose the multiple of 6 and 7 based on EBITDA projections of under $9 million, not Ms. Cascioli or Lakeport.

Receipt of the PWC Valuation Report

143 On November 26, 2004, Ms. Cascioli received a draft of PWC's valuation report. Ms. Trudell also saw it and described her own reaction to the report in her cross-examination. She stated that it was not significantly different from their internal valuations.

144 Ms. Cascioli gave the draft to Mr. Fracassi by hand together with a red pen and paper and told him to let her know if he saw glaring errors. If GE Capital took a stand that they did not agree, it was for her to reassure Mr. Fracassi that the deal could get done based on what they had already presented to prospective lenders. She testified as follows from her examination for discovery read ins:

> A. He has seen every MD&A since the beginning of creation of MD&As, he has been at every critical meeting with lenders, with prospective lenders and with our current lenders. He has seen ... he used to tease me about the filing cabinets that people used to have to keep because of the information that I gave him. And, in his case, I gave him all the information that he ever wanted. There was no reason ... it wouldn't be part of my practice, simply because the money that we were going to pay GE could have affected the deal. Because, if GE had taken a stand that they didn't agree with it or that they were going to go for the 11 million or whatever, it was for me to reassure him, as well, that his deal could get done, based on what we had already presented to prospective lenders. So, this wasn't just about a regular document that he could throw back at me; this was something that I wanted him ... it wasn't a normal MD&A. This was a document that affected him particularly in the event that the ... so that the transaction could close. [10]

145 Mr. Fracassi reviewed the valuation in the Lakeport boardroom. She was very impressed with him because he had named his price at $9 million. He had never told her how he came up with that figure and PWC's number was almost exactly the same. She said to him: "You're good Allen" or words to that effect. She inquired as to how he could get so close without the benefit of the valuation. He chuckled and said it was fine and it was okay to call PWC to that effect. She recalled thinking that it was probably because he had done so many of these. Ms. Cascioli told Ms. Trudell that Mr. Fracassi was fine with PWC's report. Ms. Cascioli also called Mr. Forbes of PWC and said the document had been approved. There was no difference between the draft and the final report. Mr. Fracassi's evidence of what happened differed on his examination for discovery and at trial. At discovery he said he was not at her office for the purpose of discussing the report and they had no discussion about the document whereas at trial he said he did attend her office for the purpose of discussing the report and they did talk about the report. I accept Ms. Cascioli's version of the event and find that the parties did discuss the report as she described. In his examination for discovery, which was read into the record, Mr. Fracassi testified that the PWC valuation had nothing to do with him and was not of interest to him. The result of the valuation did not matter to him. Specifically, he stated the following on his examination for discovery that was read in at trial:

> Q. So, then, were you interested to know the result of the PWC analysis to inform the decision as to whether you were going to get...how much you were going to get for your equity interest?
>
> A. That had nothing to do with me.
>
> Q. So, valuation...
>
> A. That had nothing to do with me. That valuation was purely for GE and the purpose of achieving redemption of the warrants. That had nothing to do with me.
>
> Q. Why wouldn't it have anything to do with you?
>
> A. Why would it? Only from the perspective that I would like to pay them the least amount of money.
>
> Q. It was a valuation of the business.

A. It was a valuation of the business for the purposes of taking the warrants out at the least possible cost; correct?

Q. No. It was a valuation of the business.

A. Fair enough. But, the purpose of the valuation, it was to negotiate a settlement with GE to redeem warrants.

Term Sheets

146 Westwind presented five proposed term sheets to Lakeport. Legitimately, in my view, Ms. Cascioli did not pay attention to others such as that of Edgestone that were not summarized and presented for discussion by Westwind. Ms. Cascioli asked for a summary and the impact of the proposals on Lakeport. Instead, Mr. Conacher valued Ms. Cascioli's interest. He produced a document that compared various scenarios using the Growth and Conservative Forecasts and a 7 times multiple. This was not a multiple typically used by Lakeport. The document expressed concern about the financial covenants in the HSBC proposal, the National Bank of Canada/Vengrowth Capital Partners Inc. and Vengrowth Asset Management Inc. ("Vengrowth") proposal and the BMO proposal when using the Conservative Forecast.

147 Ms. Cascioli's reaction to the covenants was captured by the evidence read in from her examination for discovery:

A. Again, my objective was not a personal one. It was really around the company, and I remember having conversations around, "am I going to be able to meet the covenants? Forget this, but let's talk about, am I going to be offside?" You know, if the conservative model comes in, because at this time, this is still me knowing that in this timeline the price is at $23.70 and I have no idea when it is going to go back up, if it is even going to go back up. So, my focus was on the business and can we meet these covenants. [11]

And later,

Q. Did you not see page 21 as outlining a significant opportunity for you, personally?

A. No, I understand that it outlined that, but...

Q. That wasn't your focus?

A. No, it wasn't. When I saw 2010, I said, "Yes, whatever". I knew that it was Lionel doing this ... I am not trying to be derogatory ... sell job, "This is what you could get, you know, by 2010". It was almost like I blanked out, because ... not that I ... I had been through so much in five or six years that ... not that I didn't believe in my business, but I had also walked ... by this point, 200 people had been approached on Lakeport, and I was already late in the deadline and all these things had happened, and I had had a real fair market value offer for assets just three, four months prior to this that said $28 million. That was a real hard company in the beer business telling me my business was worth $28 million in assets and all that.

So, I am not suggesting to you that he didn't point this out and that it isn't included and yes, it is here, but I think now I am looking at it more and saying, "Wow, $28 million by 2010. How far off were we?" But, I can tell you honestly that, at the time, my focus was on getting this done, my focus was on what it was going to do to the business, and my focus was on staying alive in 2004. [12]

148 In a presentation relating to the HSBC financing, Westwind compared AlphaCorp.'s negotiated selling price of its 52.5% interest in Lakeport having established a base value and compared it with a "fair market value" scenario using fiscal year 2006 EBITDA of $6 million and a multiple of 6 times, which showed AlphaCorp.'s interest as $10.9 million. The presentation went on to state: "This scenario implies an equity value to Lakeport management of $3.6 million. The same would be true in 5 years time, as there is no significant EBITDA growth built into the existing model."

149 The BMO proposal was not approved by BMO's investment committee due to Mr. Fracassi's involvement in Lakeport. By the end of November, Lakeport only had a term sheet from Vengrowth. It received National Bank's term sheet at the beginning of December. When the forecasts in issue in this litigation were prepared, none of the term sheets had been executed.

Westwind Concerns

150 George Fowlie was the head of investment banking and a managing director of Westwind. He is now retired. When he started at Westwind in October 2004, Westwind was working on the Lakeport financing. His role was one of oversight. In giving his testimony, he did not have much recollection of the facts relating to Westwind and Lakeport. Paul Colucci, a vice president and director of Westwind, had been involved. He resigned from Westwind in November 2010 and now resides in the UK. Mr. Fowlie had passing knowledge of the brewery business. He was not surprised there was a price war. He knew that the loss of Mike's was a factor for Lakeport and he became aware of the large brewer tax in October 2004. That said, he had little recall of details of discussions surrounding these issues.

151 Mr. Fowlie did recall the concerns he discussed with Mr. Barrett in November 2004. At that time, Mr. Fowlie contacted Mr. Barrett and advised him that they had a big problem as Ms. Cascioli was showing different projections in the OM prepared by Westwind for the purposes of soliciting interest in making an investment and in the valuation for PWC that was being done at GE Capital's request. Specifically, the EBITDA was different in the two sets of projections.

152 For his part, Mr. Conacher knew that lower EBITDA had been given to PWC but he was not concerned. He felt that this was an issue for Lakeport. He and Mr. Fowlie had a major disagreement over the issue but Mr. Conacher thought that from a legal standpoint, there was no need to tell PWC.

153 Mr. Fowlie asked Mr. Barrett for some help. Mr. Fowlie had expressed concerns about Ms. Cascioli signing the representation and warrant certificate prepared for PWC. He was concerned that the calculation of the investment return to the lender could be flawed.

154 Mr. Barrett's focus was on the fact that Ms. Cascioli was not showing the different projections to both parties. This called into question the fairness of the process because different people would have different information. Mr. Barrett was so concerned about the matter that he told his colleague, Mr. Ferguson, that Stikeman Elliott LLP might have to resign from the retainer.

155 Mr. Barrett advised Mr. Fowlie that he would have to convince Ms. Cascioli that this was not an appropriate course of conduct. He suggested that Mr. Fowlie prepare a draft e-mail for Mr. Fowlie's signature addressed to Ms. Cascioli outlining the issue. Mr. Fowlie prepared a draft e-mail and then Mr. Barrett prepared an e-mail for Mr. Fowlie's signature which he felt was a better summary of the issues. They both addressed concerns about the differences in EBITDA in the PWC report and the OM used to arrange financing for the transaction.

156 The two e-mails differed somewhat. Mr. Fowlie's email stated:

> My concern is as follows:
>
> One of the key points of the PWC report is to establish that the results for 2005 (i.e. EBITDA of 9 MM dollars) should not be the basis for valuing the company, since there will be a dramatic increase in tax related costs in subsequent years. Therefore, the forecast of declining EBITDA is critical. By having such dramatically different forecasts for financing versus valuation you could be accused of misleading either or both groups.
>
> In the case of PWC you will be required to sign a letter which they will rely on wherein you represent and warrant as follows:

(Note: I have copied this directly from the draft valuation report.) I'm even more concerned about this having reviewed these reps and warranties.

I would like to suggest that if you haven't already sent a copy of this to Rod, that you should do so. If he has a copy we should get on a call with him to get his advice as I think this has a very high risk and we should ask PWC to hold off completing the report pending review of the forecasts.

157 Mr. Barrett changed Mr. Fowlie's email somewhat. He added the following paragraphs:

I agree with you that under normal circumstances projections should be only one of many issues that one would look at in determining value. After our meeting however, I realized that in this particular case projections are extremely relevant in determining value and I should have brought that to your attention. As you are aware, one of the key points of the PWC report is to establish that the results for 2005 (i.e. EBITDA of 9 MM) should not be the basis for valuing the company, since there will be a dramatic increase in tax related costs in subsequent years. Therefore, the forecast of declining EBITDA is critical.

To the extent that the projections are relevant, I think it is incumbent upon us to show the same projections to PWC as we showed to the lender. There are two reasons for this. First, Vengrowth will want to see the PWC report. Given that they have a call at fair market value, they have a vested interest in insuring that you deal with GE's call in a fair fashion. Will they conclude that GE had been dealt with fairly? I am concerned that they will not because of the different projections. Second, I'm concerned that the certificate that you are being asked to sign will not be correct in that you must say that you are satisfied that PWC's estimate fully and accurately sets out all relevant facts which you believe to be significant to the determining of fair market value and that you have no other information which could reasonably be expected to affect the conclusions.

While I am not a lawyer, again, I am concerned that the different projections could be said to be a relevant fact in determining fair market value and that the second set of estimates is other information which would reasonably be expected to affect the conclusions.

158 In Mr. Barrett's e-mail, he omitted the statement relating to dramatically different forecasts being misleading. He did not think an accusation was helpful to resolving the issue. Mr. Barrett wanted to better understand why Ms. Cascioli was not giving the information to both parties. Ms. Cascioli was never given either of these e-mails.

159 It was left to Mr. Fowlie to arrange a telephone conference call.

160 Prior to the conference call, Mr. Barrett received a copy of the representation letter signed by Ms. Cascioli in favour of PWC. That letter dated November 26, 2004 stated:

We further understand that in preparing your report, you were relying on the following representations and warranties which we have made to you and which we are confirming in this letter:

a) We have reviewed your report, without inclusion, in draft form and have discussed same with you;

b) We are satisfied that your estimate fully and accurately sets out all facts with respect to Lakeport, and its assets and operations that we believe to be significant to the determination of fair market value; and

c) We never intended that the warrant valuation be prepared on the basis that Lakeport be treated as or compared to a public company.

We have no information or knowledge of facts not disclosed to you to date which, in our view, could reasonably be expected to affect the conclusions noted herein.

161 In a telephone conference call that took place on November 29, 2004 amongst Ms. Cascioli, Mr. Barrett and Mr. Fowlie, it became apparent that the issue of concern that GE Capital and the lender were not getting comparable information was false. According to Mr. Barrett whose evidence in this regard I accept, Ms. Cascioli stated that she had given the OM to PWC and the projections given to PWC had been given to the lenders including Vengrowth. Mr. Barrett said that what had happened was appropriate. He was relieved because his concern was therefore of no consequence.

162 In the call, Ms. Cascioli indicated that GE Capital had been keeping a tight rein on marketing expenses and once one had a lender who would allow marketing expenses to be made, the EBITDA would improve. The restraint on the business was the ability to access marketing dollars and this would be relieved with a new lender. According to Mr. Barrett, while in valuing GE Capital's position it was inappropriate to give credence to a new lender and access to marketing expenses, the important issue was that all parties had similar information. PWC and Vengrowth were highly sophisticated parties.

163 Mr. Barrett testified, and I accept, that Mr. Fowlie was satisfied as well. At that, Mr. Fowlie could not remember whether his concerns were satisfied or not but stated that a reasonable mezzanine investor would accept Ms. Cascioli's explanation as a reasonable reason for the differences between the projections. At the end of the conversation, Mr. Barrett's conclusion was that all parties had all the information. Mr. Barrett was of the view that it was appropriate for Ms. Cascioli to deliver the representation letter to PWC.

164 Mr. Barrett did a memo to file. The memo to file stated that Ms. Cascioli had given them a number of reasons why she believed that the projections which she provided to PWC were reasonable. She also gave them a number of reasons why the projections which she gave to the lenders was not information which should affect the conclusions reached in the valuation. Mr. Barrett wrote that in a nutshell, Ms. Cascioli made the case that for so long as GE Capital was a lender, the maintainable EBITDA would be substantially lower than it would be if BMO and Vengrowth were lenders to the company. This was so because in Ms. Cascioli's view, Vengrowth was more willing to permit both the capital and operational expenditures required in order to grow the business and grow the EBITDA. Mr. Barrett noted that Mr. Ferguson and he agreed that it would be inappropriate to value the company based upon who is in and who is not. The relevant determination in terms of value is the identity of the departing shareholder and not the identity of the new shareholders and more particularly, the value that those new shareholders can bring.

165 GE Capital accepted PWC's valuation.

National Bank and Vengrowth Financing

166 A presentation to Vengrowth was made in November 2004. It was prepared by Westwind on November 30th. Mr. Conacher stated that they would stick to the Conservative Forecast numbers. Ms. Cascioli said fine because it was a meet and greet session. She told him that the page dealing with pricing should be corrected from $26.40 to $23.70. The EBITDA numbers reflected the Conservative Forecast. At this time, Westwind had the Conservative Forecast, the Growth Forecast and the Ultra Conservative Forecast. Vengrowth was given the Conservative Forecast, the Growth Forecast and PWC's valuation which contained the Ultra Conservative Forecast.

167 As mentioned, it should be noted that when the forecasts were prepared, there were no agreed upon banking covenants in place.

168 Westwind made a presentation to Lakeport summarizing the term sheets it had received from HSBC, National Bank and Vengrowth, and BMO. It presented an analysis of the proposals and the proposed financial covenants using both the Growth and Conservative Forecasts.

169 National Bank agreed to become Lakeport's operating lender and authorized a credit facility of $15 million for Lakeport. The National Bank term sheet was received on December 6, 2004.

170 Lakeport did the deal with Vengrowth even though, based on the Conservative model, the financial covenants were offside.

171 Vengrowth Capital Partners Inc. and Vengrowth Asset Management Inc. (collectively, "Vengrowth") agreed to a $9 million credit facility for Lakeport for a 5 year term at 15% interest and an equity position consisting of warrants for 22% of the equity of Lakeport on a fully diluted basis. Covenants were described in Vengrowth's term sheet dated November 16, 2004. Financial covenants included a total funded debt to EBITDA covenant and debt service coverage ratios. The Vengrowth term sheet required that the $9 million Vengrowth credit facility be used to:

1. repurchase the shares and warrants of all existing shareholders excluding those held directly or indirectly by Ms. Cascioli;

2. finance existing indebtedness; and

3. for general working capital purposes.

172 Graham McBride, the former Managing General Partner of Vengrowth involved in the Lakeport transaction, testified. He stated that he was cynical about going forward numbers in forecasts and Vengrowth would do its own due diligence which they did in this case. He noted that valuation is as much an art as a science. Vengrowth used an earnings multiple of 4.5 on an EBITDA range between $5 and $6 million. Vengrowth prepared an Investment Committee Memorandum dated December 8, 2004, which referred to the price wars, the expectation that the large brewer tax would be incurred in fiscal 2006, [13] and the loss of the Mike's contract. This document was not shared with Ms. Cascioli. It stated that Lakeport's success over the last 5 years was primarily attributable to Ms. Cascioli. Similar to PWC, Vengrowth estimated the enterprise value of Lakeport as being between $23.1 and $28.3 million between 2007 and 2010. Price competition was a highlighted risk and was considered to be a high risk. The business could be destroyed pretty quickly and the cash flow Vengrowth was relying on could disappear. Mr. McBride testified that this transaction had a larger list of risks than most. Vengrowth did receive the PWC valuation.

The Deal

173 Mr. Fracassi had regularly received the MD&As for Lakeport including the October 2004 month end financial results which stated that EBITDA was ahead by $2.6 million over the prior year. As mentioned, Mr. Fracassi acknowledged that the fact of the increased EBITDA was not kept from him.

174 Mr. Conacher had told Ms. Cascioli that after Mr. Fracassi had named his price, Mr. Conacher would go and get investors and she was not to tell Mr. Fracassi more about the business. Ms. Cascioli responded that Mr. Fracassi was her partner and she would still give him information. Her view was that until October 2004, Mr. Fracassi was her partner and she would give him anything material and significant. This persisted until he hung up on her. According to Ms. Cascioli, and I accept, Mr. Fracassi could have obtained any information he wanted from her. She gave him the PWC valuation and believes the OM was put in his envelope but, as mentioned, had no specific recollection of having put it there. The OM contained the Conservative Forecast. He did not receive any of the other forecasts.

175 Mr. Fracassi admitted that there were a number of risks that could negatively affect Lakeport EBITDA in fiscal 2006 including the loss of the small brewer tax credit of approximately $2.7 million in calendar 2005, the reliance on Lakeport Honey Lager which accounted for approximately 50% of Lakeport's net revenue in 2005, the continued minimum pricing of $23.70 by the large brewers, the expiry of Lakeport's Collective Agreement at the end of January 2005, and Lakeport's dependence on The Beer Store.

176 Mr. Fracassi was independently represented by the law firm of Scarfone Hawkins LLP on the sale of his Lakeport interest. There were no restrictions on the retainer.

177 As mentioned, KPMG was retained by Lakeport to structure the transaction in the most tax efficient manner for Mr. Fracassi. KPMG prepared a November 19, 2004 letter setting out the required steps. It commenced by stating:

> As requested, we are writing to outline, in general terms, the potential strategy that will allow you to effectively purchase Allen Fracassi's ("Allen") interest in the Do 4 U Services Corporation which includes Lakeport Brewing Corporation ("Lakeport"), the Alpha Corp. Holdings Ltd. ("Alpha Corp.") and Do 4 U Services Corporation ("Do 4 U"), in a tax effective manner.
>
> You have indicated that Allen, either directly or through his company, will receive approximately $9 million. This $9 million will satisfy all loans and advances which Allen and/or his holding companies have made to the group and to purchase his shareholder interest in Do 4 U. We understand that Lakeport will borrow $9 million to finance the buyout.

178 The steps described in the letter included the incorporation by Ms. Cascioli of a new company, the defendant, Casc Corp, as a *CBCA* company. She was the sole director and shareholder of Casc Corp. [14] Mr. Fracassi received a copy of the November 19, 2004 KPMG letter and that same day sent it with a covering memo to his lawyer at Scarfone Hawkins LLP. Mr. Fracassi understood that it was important that the actual documents for closing corresponded with the steps outlined by KPMG. The ledger of Scarfone Hawkins revealed that Mr. Fracassi had approximately 28 phone calls and 5 meetings with lawyers at Scarfone Hawkins in connection with the purchase transaction.

179 Mr. Fracassi signed the December 10, 2004 letter outlining the terms of Ms. Cascioli's purchase of Mr. Fracassi's interest in Lakeport. Ms. Cascioli signed in her personal capacity and on behalf of Lakeport, AlphaCorp. and Do 4 U. The letter stated that Mr. Fracassi agreed to sell for an aggregate consideration of $9 million. It also said that:

> The transaction will be effected by Teresa Cascioli arranging, in her capacity as President and Chief Executive Officer of Lakeport, for third party financing for Lakeport, the proceeds of which will be used to purchase the Fracassi interest.
>
> The transaction will be structured as currently contemplated on Schedule A as prepared by KPMG.

180 Schedule A to the December 10 letter was a version of the KPMG letter originally dated November 19, 2004 which had been revised. It recited the value of the GE Capital warrants and stated that the valuation of AlphaCorp. was based on the fair market value of the GE Capital warrants. It went on to state that management had indicated that the fair market value of Mr. Fracassi's Do 4 U shares was $5,379,000 and KPMG had not undertaken any review of this valuation and expressed no opinion thereon.

181 As a condition of closing, Mr. Fracassi and Granvin Investments Inc. released Lakeport and Ms. Cascioli from all actions, loss or injury of any nature in law or in equity in connection with the sale of Mr. Fracassi's interest in Lakeport. Specifically, the Plaintiffs released any and all claims they "ever had, now have or may have in the future against any released person, relating to or arising out of any cause, matter or thing existing up to and including this date" of closing. In addition, Mr. Fracassi executed a Share Purchase Agreement between Granvin Investments Inc. and Casc Corp. which contained an entire agreement clause stating that the Share Purchase Agreement constituted the entire agreement between the parties and:

> ... supercedes any prior agreements, understandings, negotiations and discussions, whether oral or written of the parties with respect to the subject matter of this Agreement. There are no representations, warranties, covenants, conditions or other agreements, expressed or implied, collateral, statutory or otherwise between the parties in connection with the subject matter of this agreement, except as specifically set forth in this Agreement. The parties have not relied and are not relying on any other information, discussion or understanding in entering into and completing the transactions contemplated by this Agreement.

182 At the closing, while the documents were lined up and available for review, Mr. Fracassi did not review or check them before he signed them. Mr. Fracassi would not have executed the closing documents unless his lawyer, Mr. Teal, had reviewed them and said they were okay. In response to a question put to Mr. Fracassi in his cross-examination as to whether Mr. Teal was there to protect him, Mr. Fracassi stated:

> Well, we have a difference of opinion there. I thought Mr. Teal was there to accommodate the closing of the transaction and not to negotiate or seek legal advice, to ensure that the documents were complete and in accordance with what the steps memo that we had was and that it would be executed on that basis.

183 He then went on to state that he thought Vengrowth was acquiring his equity position even though he had never spoken to Vengrowth, never had an agreement with Vengrowth and Vengrowth never sought any representation or warranties from him. There is nothing in writing that records any reliance by Mr. Fracassi on Ms. Cascioli with respect to this transaction.

184 Fundamentally, I did not find Mr. Fracassi to be a credible witness. His description of the role of his lawyers given the number of phone calls and meetings he had with them and the absence of any limited retainer is not believable. The same is this with respect to Vengrowth's role. I find that Mr. Fracassi knew Ms. Cascioli was the effective purchaser of his interest in Lakeport and did not in fact believe that Vengrowth was acquiring his equity position.

185 Mr. Fracassi received $9,319,250 for the purchase of his interest in Lakeport consisting of:

a. $5,369,000 for his 75% interest in Do 4 U (an indirect 52.5% equity interest in Lakeport);

b. $10,000 for 1,000 preferred shares in Do 4 U; and

c. $3,940,250 for repayment of loans, dividends and fees owing to Mr. Fracassi, AlphaCorp., Do 4 U and Granvin.

186 He had invested $3.3 million in Lakeport in 1999 and 2000 and exited five years later in 2004 for $9.3 million. He testified that he did well.

187 In January 2005, Ms. Cascioli's buyout of Mr. Fracassi's interest in Lakeport was front-page news in the *Hamilton Spectator* newspaper and received extensive coverage in other national newspapers, local and provincial radio stations, and local and national television. The press release disclosed her as having secured 100% ownership of Lakeport. Mr. Fracassi already knew that Ms. Cascioli was the owner of Lakeport at that time.

188 Ms. Cascioli testified, and I accept, that the relationship between her and Mr. Fracassi changed after the sale of his interest. She was very, very busy at Lakeport and had new partners. She was busy with her new constituents. More importantly, the commonality between her and Mr. Fracassi started and stopped with Lakeport. When that fell off, their relationship changed. The tipping point was in February 2005. Mr. Fracassi called her to lend him money personally. She said she could not do that. She was surprised because he had just been paid. While she felt very grateful to him for putting her in the Lakeport role, she realized that the ask for cash did not stop.

Board of Directors' Meeting February 4, 2005

189 At the Lakeport Board of Directors' meeting of February 4, 2005, Ms. Cascioli handed out a financial package. It included a memo on why EBITDA had increased in comparison with the prior year. Now EBITDA for fiscal 2006 was projected to be $8,504,000. This was more than any prior forecast and more than PWC's valuation. There were two reasons for the change. Firstly, all brewers, including Lakeport, had increased their prices to $26.40. On January 17, 2005, Molson increased its pricing and Lakeport followed on January 20, 2005. This added an additional $3 million to EBITDA for Lakeport. Secondly, in the Ultra Conservative Forecast, Lakeport had projected 2% less market share. In this revised forecast, the discount pie was growing and market share was up. This added $3,859,000 to EBITDA. Ms. Cascioli noted that as the market grew, it was harder to forecast.

The Public Offering

190 Mr. Barrett testified that the issue of taking Lakeport public had not been discussed by him with Ms. Cascioli in 2004. He heard of the possibility of taking Lakeport public in February 2010 and was very surprised at the suggestion. At that time he had a discussion with Mr. Conacher of Westwind. Mr. Barrett indicated that Lakeport had been a terrific file for all of them and Mr. Conacher indicated that there could be more as Lakeport could become an income trust. He said that this was not imminent but the markets were frothy. Mr. Conacher did not suggest that they proceed with an IPO.

191 In response to a question as to whether there were discussions between August and November about taking Lakeport public, Mr. Conacher maintained that he had explained to Ms. Cascioli the need for there to be a liquidity event within a time frame of five years. This could be an IPO, a reverse takeover in the brewing industry, a sale of the company to a brewer, or an income trust IPO. Mr. Conacher testified that the first time he discussed specifics of taking Lakeport public as an income trust with Ms. Cascioli was in late 2004 or early 2005 and the first time an IPO was seriously presented to Lakeport was in February 2005.

192 The first time Mr. McBride of Vengrowth heard of Lakeport going public was in late January or February 2005. Mr. Ferguson and Mr. Conacher asked him what he thought about the idea and he responded that Lakeport was not big enough for an income trust to work.

193 I find that Ms. Cascioli did not know on December 30, 2004 that she would be taking the company public. Further, Ms. Cascioli first seriously considered taking Lakeport public by using an income trust in February 2005. The circumstances were as follows.

194 One of the Vengrowth loan conditions was that an Employee Stock Option Plan ("ESOP") be established at Lakeport. Ms. Cascioli met with Mr. Barrett and a Vengrowth representative. It was suggested that an ESOP would be easier if Lakeport were a public company because an employee can sell into a public marketplace and as such, perhaps Lakeport should think about an income trust. A series of meetings were arranged including one in mid-March 2005. Ms. Cascioli told Mr. Fracassi that she was considering this. He told her that it might be too soon because Lakeport was too small but that she should check it out.

195 When Mr. Fracassi learned of Ms. Cascioli's effort to take Lakeport public, he congratulated her.

196 It was decided that Mr. Barrett would affect an introduction to an investment banker and he accordingly contacted RBC and Scotia Bank. Mr. Barrett discussed with Ms. Cascioli what it meant to be public and in his view, the likelihood of success was low. RBC and Scotia Bank made presentations and said that Lakeport could become an income trust. This was in March of 2005. Mr. Barrett did not contact Westwind because he did not feel they had a retail presence and income trusts were a retail product. In March 2005 Lakeport agreed to proceed. A preliminary prospectus for the Lakeport income trust was filed with the various provincial securities regulators on May 4, 2005 and published on SEDAR. In mid May 2005, as predicted in the Ultra Conservative Forecast, Lakeport discovered that it had become a large brewer in fiscal 2005 and that Ms. Cascioli's lobbying efforts had been unsuccessful. This was therefore consistent with the Ultra Conservative Forecast and inconsistent with the Conservative and Growth Forecasts.

197 As part of the effort to take Lakeport public, the OSC insisted on confirmation and public disclosure by Lakeport that none of the proceeds of the offering would be paid to Mr. Fracassi and that Mr. Fracassi would have no role in the new public entity. The OSC had concerns that Mr. Fracassi still had an interest in Lakeport and also was of the view that he should be treated as a promoter in the prospectus. As a promoter he would have to sign the prospectus and would attract liability. Mr. Barrett had discussions with the OSC on this subject to dispel its view. The OSC wanted disclosure that Mr. Fracassi was still in proceedings with the OSC. Ms. Cascioli called Mr. Fracassi to tell him about the disclosure language proposed for the prospectus. She felt badly that he had been dragged into this debate. Ultimately the prospectus disclosed Mr. Fracassi's lack of involvement and Ms. Cascioli advised the OSC that Mr. Fracassi had

approved the disclosure about him in the prospectus. An agreement was reached on this disclosure with the OSC and Mr. Barrett called Mr. Fracassi to thank him and left the following voice mail on or about June 9, 2005:

> Allen Fracassi, Rod Barrett. Thursday morning, I'm just sitting here reading about George Croft and Lakeport and we've been fighting with VenGrowth and we've been fighting with Westwind and we've been fighting with everybody. I just wanted to let you know, the guy who has been the cornerstone of this and has been a prince every time you turn around, supportive et cetera is you and I just wanted to let you know that we at Stikeman Elliott, and I in particular, appreciate, you know, knowing you and the fact that you've really been a, you know, a great supporter and the one guy that, you know, has been outstanding in all this. Everybody else has been appallingly behaved in terms of feeding at the trough et cetera. Anyway, thought I'd let you know that. Bye.

198 The comment relating to feeding at the trough related to Westwind with whom there had been two disputes over fees. Westwind thought they were entitled to more for the public offering. Mr. Barrett was required to address the matter with Mr. Conacher. Ultimately, Westwind and Lakeport agreed to attend a final and binding informal arbitration. Lakeport was successful.

199 I infer from Mr. Barrett's testimony that this reference did not include Ms. Cascioli. Mr. Barrett described Ms. Cascioli very favourably, stating that she was bright, capable and straight forward although not experienced in transactions such as the sale of an ownership interest in a company. Like Mr. Fracassi who had described her as honest, Mr. Barrett described her as "a very straight shooter".

200 The Lakeport public offering was successfully completed on June 21, 2005 and the Lakeport Brewing Income Fund ("LBIF") was created.

201 The first meeting of the Board of Trustees was held on July 7, 2005. When Lakeport had gone public, it had assumed 7% market share. By July it had grown to 9%. The business grew beyond the most optimistic projections. The discount category had grown in the marketplace, prices had increased, more was spent on marketing, and Lakeport, spearheaded by Ms. Cascioli, was a true competitor for the large brewers.

202 After Lakeport went public, Mr. Fracassi and Ms. Cascioli stopped socializing and talking on the phone.

The Labatt Takeover

203 In early 2007, Labatt Brewing Company Limited ("Labatt") made an unsolicited offer to purchase all outstanding units of LBIF for a price of $28 per unit or $200 million. The expected "take up" date for the units was announced as being March 29, 2007. There was an issue with the Competition Bureau over the acquisition of Lakeport by Labatt. Again, there was much media coverage.

204 Three weeks prior to the proposed closing date, Mr. Fracassi telephoned Mr. Barrett. Mr. Fracassi wished to see him. Mr. Fracassi met with Mr. Barrett and told him that Ms. Cascioli knew of the IPO prior to the closing of his transaction. Mr. Barrett told him that this was untrue. Mr. Fracassi indicated that he wanted a quick settlement and suggested a meeting with Ms. Cascioli. Mr. Barrett indicated that he would speak to his partners. Mr. Barrett then met three days later with Mr. Fracassi's lawyers from the Scarfone firm and with one of Mr. Barrett's partners. Mr. Malocki of the Scarfone firm outlined the issue saying that Ms. Cascioli knew the company was going public and that an IPO could not have been done in that time frame. In addition, he argued that she had insider trading issues.

205 Mr. Barrett responded at length and took them through the timeline and offered to show his time dockets to show that the IPO process started in March. The Scarfone representatives asked Mr. Barrett to speak to Mr. Fracassi as they maintained that he would not accept this information from them. Mr. Barrett declined to do so. Subsequently, Stikeman Elliott LLP and Mr. Barrett were sued. [15]

206 Mr. Fracassi testified that he was suspicious. The fact that Lakeport was ready to go public so soon after his buy out did not sit well with him. He considered Mr. Barrett's June 9, 2005, phone message to be awkward. Furthermore, the distancing in his relationship with Ms. Cascioli became very pronounced at the end of 2005 and into 2006. By the fall of 2006, there was no communication. This was quite disturbing to Mr. Fracassi. Mr. Fracassi testified that he had found out through a phone call that he had been deceived by Ms. Cascioli. Mr. Fracassi testified that he received a phone call from an anonymous investment banker. Mr. Fracassi did not recognize the voice and the man did not give him his name although told Mr. Fracassi that he knew him. There was no evidence that Mr. Fracassi asked him his name. According to Mr. Fracassi, the phone call was the "cumulative event".

207 The Labatt takeover transaction attracted an extensive amount of media interest. On March 28, 2007, the day of the Competition Bureau's announcement of its approval of the Labatt takeover, Mr. Fracassi caused a notice of action to be issued in the Superior Court of Justice at Hamilton against Ms. Cascioli, Lakeport, Labatt and others claiming damages of $50 million and injunctive relief. He claimed negligent misrepresentation, breach of fiduciary duty and breach of certain corporate statutes. He alleged that the defendants had failed to disclose material facts and confidential information. In connection with the commencement of this action, Mr. Fracassi's solicitors, Scarfone Hawkins LLP, called a press conference and discussed the allegations made in the notice of action even though it had not yet been served on Ms. Cascioli or Lakeport. Mr. Fracassi's intention was to bring pressure to have the issue resolved. He expected that it would attract press coverage. Ms. Cascioli at that time was a prominent member of the Hamilton community. It was his goal to generate some press coverage for his allegations and to force her to pay him. The press conference received significant media attention via print, radio and television both in Hamilton and elsewhere.

208 Ms. Cascioli learned of the lawsuit in a most unfortunate manner. She was expecting a telephone call from Mr. Barrett on the Competition Bureau's decision on Labatt's proposed takeover of Lakeport. Mr. Barrett phoned to say that Labatt had been given the go ahead and to express his congratulations. She was in shock and could not believe the good news. The telephone then rang again and it was Mr. Barrett again. He advised her that Mr. Fracassi had sued her and Labatt for $50 million. Stikeman Elliott LLP had received the notice of action. The next telephone call Ms. Cascioli received was from her assistant who inquired as to whether it was all right for camera people from the local television station to meet with her. They had called and wanted Ms. Cascioli's comments on the lawsuit brought by Mr. Fracassi against her and Labatt. At that point, she still had not been served with the notice of action and she decided to go home. She was very upset about her family's name being dragged into the media in this manner.

209 On March 29, 2007, Labatt completed the takeover of LBIF for a price of approximately $201,400,000. Ms. Cascioli and Roseto (or entities controlled by or related to them) received approximately $43.5 million in consideration for the sale of those LBIF units held or controlled by them.

210 Mr. Fracassi's strategy had not worked. Mr. Fracassi discontinued the notice of action against Ms. Cascioli and the other defendants and commenced this action against her and her two conpanies on June 5, 2007 for $50 million. Scarfone Hawkins LLP also acted for Mr. Fracassi in connection with the commencement of this second action. Just prior to the examinations for discovery, Scarfone Hawkins LLP withdrew and Mr. Fracassi's current counsel, Crawley Meredith Brush LLP, went onto the record. Following the examinations for discovery, Mr. Fracassi amended his claim to allege fraudulent misrepresentation. The statement of claim was amended approximately five months before the commencement of the trial. He testified that until this litigation, he had not seen many of the valuation documents.

Valuation Evidence

(a) Campbell Valuation Partners Limited

211 The Plaintiffs called Howard Johnson of Campbell Valuation Partners Limited ("CVP") as an expert in business valuation. He was asked to estimate the fair market value of Lakeport's shares as at December 10, 2004 and the fair value of Mr. Fracassi's ownership interest at that date. He was requested to explain the difference, if any, between the

estimate of the fair value of Mr. Fracassi's interest and the price paid following the investment by Vengrowth. He was also asked to determine whether the Vengrowth Investment Committee Memorandum ("ICM") represented an independent valuation of the fair market value of the shares of Lakeport.

212 The CVP report was an estimate and not a comprehensive valuation report. An estimate valuation report provides a moderate level of verification of underlying data. Initially CVP concluded that the enterprise value of Lakeport was between $36,400 and $40,300. Having received additional information including a reply report from the Defendants, CVP revised its July 5, 2010 report and revised its valuation conclusion. CVP's revised valuation conclusion was that the enterprise value of Lakeport was between $33.886 million and $37.452 million and the estimated *en bloc* fair market value of all the common shares of Lakeport fell within the range of $18.6 million to $22.7 million. The estimated fair value of Mr. Fracassi's common shares was between $9.8 million and $11.9 million with a mid-point of $10.8 million. This figure meant that there was a shortfall in payment to Mr. Fracassi of $5.5 million according to CVP.

213 It was Mr. Johnson's view that having regard to the Canadian Institute of Charted Business Valuators Standards, PWC should have been provided with the Conservative and Growth models and had they, it was likely PWC would have arrived at a different conclusion. He was unaware that PWC had in fact received the Conservative Forecast.

214 According to CVP, the Vengrowth ICM did not provide an independent assessment of Lakeport's value but did provide an assessment of the investment opportunity in Lakeport and Vengrowth's potential return. Repayment of Vengrowth's investment was premised on Lakeport achieving the Conservative model. The ICM did not affirm the PWC valuation but served to illustrate that it was below market comparables as indicated by the higher multiples afforded to comparable companies such as Brick Brewing Company and Big Rock Brewing Income Trust.

215 Mr. Johnson used a discounted cash flow methodology.

216 Mr. Johnson used the Conservative Forecast because it was dated December 10, 2004; it was adopted by Vengrowth and Vengrowth was satisfied with the $6 million normalized EBITDA contained therein; and the covenants in favour of National Bank were dependant on Lakeport achieving the Conservative Forecast. Otherwise, Lakeport would be in breach of its banking covenants. National Bank therefore also must have been satisfied with the Conservative Forecast. In addition, the OM dated October 2004 that was provided to prospective investors including Vengrowth, contained the operating results for fiscal years ending January 31, 2005 to 2008 that were in the Conservative Forecast.

217 Mr. Johnson noted that the Vengrowth funding was to bridge the gap between the $15 million National Bank senior debt and the $24 million required to effect the transaction. Vengrowth therefore never had to negotiate the value of the business. Its role was to negotiate the terms on which $9 million would be advanced.

218 Mr. Johnson testified that while PWC had the Conservative Forecast, PWC did not receive the underlying assumptions associated with that Forecast. It should be noted, however, that Mr. Forbes of PWC testified before me that he had understood the basic assumptions behind the Conservative Forecast. I accept Mr. Forbes' evidence in that regard.

219 In his analysis, Mr. Johnson acknowledged that he assumed that as of December 10, 2004, Lakeport would attain large brewer status in January 2007. The value of this adjustment was approximately $2.5 million. When he prepared his report, he did not believe that PWC had had the Conservative Forecast. As mentioned, in fact, PWC had Westwind's OM and the Conservative Forecast was contained in it. Mr. Johnson did not speak with PWC representatives as they had refused to speak with him and he did not review PWC's working papers.

220 Assumptions in the Conservative Forecast included attaining the large brewer tax in fiscal 2007, the continuation of Mike's contract, and a beer price of $26.40 in fiscal 2006 but increased in 2007 and 2008. In contrast, assumptions in the Ultra Conservative Forecast had large brewer status being attained in fiscal 2006, exclusion of Mike's contract, and no price increases in 2007 and 2008.

221 With hindsight, the Ultra Conservative Forecast proved to be the more accurate with respect to those three factors. The reason the business did so well, though, was because the sales volumes increased beyond all expectations in any of the forecasts including the Growth Forecast.

(b) Duff and Phelps Canada Limited

222 The Defendants called William Dovey, the managing director of Duff and Phelps Canada Limited, as an expert in business valuations. He too prepared an estimate valuation report. He was asked to review CVP's report and advise whether he agreed with it. He disagreed with its conclusions.

223 In contrast with CVP's opinion, he concluded that the fair market value of the Lakeport shares on December 10, 2004 was in the range of $11.1 to $13.2 million with a mid-point of $12.1 million and that Mr. Fracassi's interest was in the range of $5.8 million to $6.9 million with a mid-point of $6.4 million.

224 Mr. Dovey testified that there were two elements to his valuation: the forecast of operating results over which he and Mr. Johnson disagreed and the multiple to apply. On average, the difference between the Conservative and the Ultra Conservative EBITDA Forecasts for 2006 to 2010 would be $5.7 million as opposed to $4 million. The EBITDA difference between the two forecasts was therefore approximately $2 million. He noted that the largest component of this was $1.536 million representing the impact of moving to the large brewer status ($2.5 million of additional tax less $800,000 of additional profit from higher volumes of beer sales and costs savings of $250,000). The second largest component was the loss of the Mike's contract which represented $736,000. By November it was known that that contract was lost. There was also a marketing expenditure differential of $300,000. The September Conservative Forecast had higher forecasted prices because there was no knowledge of the price war at that time. He concluded from his analysis that the November business environment was riskier than that in September 2004.

225 Mr. Dovey chose the November or Ultra Conservative forecast for his valuation because it was the most current as at December 10, 2004. There was increased uncertainty because of the price war and the loss of the Mike's contract. These were not addressed in the September Conservative forecast. Ms. Trudell thought it was the most realistic forecast at the time and PWC adopted it. Implicitly GE Capital did as well. With the benefit of hindsight, the November Ultra Conservative Forecast assumptions relating to pricing and the Mike's contract were not overly conservative. Furthermore, neither the Ultra Conservative nor the Conservative Forecast anticipated the success ultimately achieved by Lakeport.

226 Unlike CVP who used a discounted cash flow methodology, Mr. Dovey used an EBITDA methodology as his primary approach but tested it using a discounted cash flow methodology to reply to CVP's conclusion. Using maintainable EBITDA of $4.4 million and a multiple of 6 or 7 resulted in an enterprise value of $26.4 million to $28 million with a mid-point of $27.2 million and a fair market value of the equity of $11.1 to $13.2 million with a mid-point of $12.1. The discounted cash flow methodology resulted in a fair market value figure of $11.5 million which compared comfortably with his EBITDA methodology figure of $12.1 million.

227 Mr. Dovey compared his enterprise value of $27.2 and equity value of $12.1conclusions with other value metrics. His enterprise value and common equity values were supported by the other valuation of PWC ($26.6 million and $10.1 million), Vengrowth's ICM ($26 million and $11 million), Molson's offer ($28 million and $2.3 million) and KPMG's 2002 preliminary value indicator ($30.6 million and $12 million). Additionally, while KPMG did not independently or formally value GE Capital's warrants, it gave a clean opinion on the financial statements for the year ended January 31, 2005 in which the warrants were given a value that reflected common equity of $12.7 million. Molson's asset offer was a relevant value indicator. Mr. Dovey was not prepared to treat Westwind's calculations as independent as they had an interest in the outcome, meaning a fee arrangement that was contingent on a deal happening. CVP's value conclusions did not compare well with these other value metrics. I agree with Mr. Dovey in this regard.

228 In cross-examination, Mr. Dovey observed that both the September Conservative Forecast and the November Ultra Conservative Forecast would be offside a banking covenant if one adjusted the September Conservative Forecast to account for loss of the small brewer tax status in 2006.

Issues

229 There are numerous issues for me to consider. As the other defendants are Ms. Cascioli's holding companies, for simplicity, I will simply refer to her. [16] The same is true with respect to Mr. Fracassi and the Granvin Investments Inc. plaintiff.

1. Did Ms. Cascioli make fraudulent misrepresentations which induced Mr. Fracassi to act?

2. Are the Plaintiffs' claims barred by virtue of the *Limitations Act, 2002*?

3. Are the Plaintiffs' claims barred by virtue of the Share Purchase Agreement and the release in favour of the Defendants contained in it?

4. Did Ms. Cascioli owe a fiduciary duty to Mr. Fracassi and, if so, was it breached?

5. Did Ms. Cascioli purchase Mr. Fracassi's shares of Do 4 U with knowledge of confidential information that, if generally known, might reasonably be expected to affect materially the value of his shares?

6. Did Ms. Cascioli conduct herself in a manner that was oppressive, unfairly prejudicial to, or unfairly disregarded Mr. Fracassi's interests?

7. In any event, did Mr. Fracassi suffer any damages?

230 The Plaintiffs' claim for damages for negligent misrepresentation was abandoned at the commencement of the trial.

231 There is not a huge debate between the parties on many of the legal principles engaged by this law suit. It is the application of the legal principles to the facts of the case that is contested. To commence, I will outline the applicable evidentiary burden. I will then address credibility. Lastly, I will review the law relating to each issue and the application of the law to the facts.

Burden of Proof and Credibility

232 The standard of proof is of course on a balance of probabilities and the burden of proof is on the plaintiffs. As stated by Justice Rothstein in *C. (R.) v. McDougall*, [17] evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. [18] He stated that in all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred. [19]

233 The facts are very much in dispute and the inferences that should be drawn from the facts are also frequently contested. As O'Halloran J.A. in *R. v. Pressley* [20] stated,

> The most satisfactory judicial test of truth lies in its harmony or lack of harmony with the preponderance of probabilities disclosed by the facts and circumstances in the conditions of the particular case.

234 Findings of credibility are not always easy to make. There are instances where both of the adversaries have had their evidence effectively challenged. In addition, deception may be mastered by a seasoned prevaricator. Indeed, experience is often a liar's best friend.

235 In this case, both Mr. Fracassi and Ms. Cascioli were impeached at trial. Their evidence at their examinations for discovery differed from time to time with their evidence at trial and in Mr. Fracassi's case, with the evidence given in the action he brought against Mr. Barrett and Stikeman Elliott LLP. That said, with regard to differences between the evidence of Mr. Fracassi and Ms. Cascioli as to what was discussed between them, I preferred the evidence of Ms. Cascioli as being more reliable. I found Mr. Fracassi's memory to be selective. For instance, he could not recall a discussion with Mr. Barrett in which he expressed his desire to get out of the Lakeport business and later also expressed displeasure with the choice of PWC as valuator. Similarly, he had no recollection of any conversation with Mr. Barrett about getting another lawyer.

236 More significantly, Mr. Fracassi was frequently impeached at trial on material issues. For instance, at his discovery taken on December 15, 2008, he denied that he and Ms. Cascioli had a discussion about the PWC valuation or that he attended at Lakeport for the purpose of reviewing the valuation. In contrast, at trial, he admitted that he and Ms. Cascioli did discuss the valuation and that indeed he went to her office and she flipped through the document.

237 In his discovery, Mr. Fracassi indicated that he was aware of some of the risks that would negatively affect Lakeport's EBITDA described in the statement of defence. In his cross-examination at trial, on the other hand, he denied that he was aware of these risks until he was confronted with his discovery evidence.

238 In his discovery evidence in the Stikeman's Action which was given on April 30, 2009, he testified that $9 million was the price he had agreed upon before he retained Mr. Teal of Scarfone Hawkins LLP. As mentioned, he first dealt with Mr. Teal on November 17, 2004. In contrast, in his cross-examination at trial, he stated that while the price had been discussed, he refused to admit that the price had been fixed prior to his meeting with Mr. Teal.

239 In his discovery in the Stikeman's Action, he stated that he was dependant on the Lakeport sale to meet his Newcastle obligations and in his statement of claim he pleaded that he was especially vulnerable at that time because he needed to liquidate his other business assets to fund his other proposals. He also pleaded that he was vulnerable in December 2004 because of his obligations to Newcastle. In contrast, in his examination-in-chief at trial, he testified that he did not need to exit Lakeport to meet his obligations and asserted that he had other alternatives.

240 In his examination-in-chief at trial, he stated that at PSC, Ms. Cascioli did his family and his tax returns whereas in cross-examination he indicated that she did not do Mr. Fracassi's or his family's tax returns; he employed a tax accountant and lawyer to manage his personal affairs and Ms. Cascioli would coordinate these various individuals. These numerous inconsistencies were not simply minor slips on inconsequential matters. Rather, frequently they were material misrepresentations on material issues.

241 Ms. Cascioli, while also impeached, did strike me as more candid and forthright. Indeed, even Mr. Fracassi described her as honest. On issues that might suggest a lack of credibility on her part, there was typically (although not invariably) no supporting key evidence from any reliable witness. For instance, there was no reliable evidence that an IPO was seriously considered prior to the winter of 2005, in spite of Mr. Fracassi's contention to the contrary. I specifically reject that Ms. Cascioli represented to him that $9 million was the most he could expect for his entire interest in Lakeport or that she gave him the PWC valuation for nefarious or duplicitous purposes. As she stated in the read-in from her examination for discovery:

> I wanted to reassure him, as well, that it was within the ballpark, because there was the fear that PWC, being an accounting firm ... this wasn't an investment banking firm that was going to take the company and market it; this was an accounting firm that reviewed hundreds of documents and came up with a number. So, if they had come up with a number that was beyond what we had originally estimated, it would have had a material impact on our ability to execute the transaction, which would have had a material impact on him and consequently me.
>
> So, I felt it was important that he ... this wasn't a marketing document; this was a document that was going to decide whether or not we were going to get this deal done on time.

242 One must consider this evidence in light of Mr. Fracassi's commentary that he and GE Capital were "joined at the hips" or "*pari passu*" and his concern about PWC being chosen to do the valuation by GE Capital and that he might not be taken out as a result of its valuation. In addition, one must be mindful of the context, namely, Lakeport's history of difficulty attracting financing.

243 I also had significant doubts about much of the evidence of Mr. Conacher. In my view, his testimony lacked impartiality. I believe this derived from the disputes he had with Ms. Cascioli and Lakeport over fees and the contested arbitration which his company lost. For instance, his comment that there was not a meeting that Ms. Cascioli was in that she did not lead was expressed in a very negative tone and was unlike the description offered of her by Mr. Barrett. It was also completely inconsistent with how she appeared at trial and on her examination for discovery from which there were extensive read-ins.

Fraudulent Misrepresentation

244 As stated in the factum filed on behalf of the Plaintiffs, the core allegation that drives Mr. Fracassi's case is the allegation that Ms. Cascioli deceived PWC and that this deception was then extended to include him and that the Conservative Forecast in the OM was Ms. Cascioli's best estimate and she told PWC not to rely on it.

(a) Parties' Positions

245 In their written closing argument, the Plaintiffs state that on the question of whether Ms. Cascioli deceived Mr. Fracassi, the Plaintiffs must demonstrate on a balance of probabilities that:

1. Ms. Cascioli knowingly made false representations to PWC about the Ultra Conservative EBITDA Forecast and its underlying assumptions;

2. She either knew these representations to be untrue or was indifferent as to their truth;

3. She intended to deceive PWC;

4. The false representation induced PWC to prepare a misleading valuation report;

5. Ms. Cascioli used this misleading report to deceive Mr. Fracassi, who was himself induced to accept a price well under fair market value for his interest in Lakeport; and

6. Mr. Fracassi suffered damages as a result.

246 They submit that the strongest evidence showing Ms. Cascioli did not believe that Lakeport would only achieve the EBITDA in the Ultra Conservative Forecast is found in the banking covenants as Lakeport would have been in breach of the National Bank covenants based on that Forecast. As such, it is not credible for Ms. Cascioli to suggest that she believed that the Ultra Conservative Forecast represented management's best estimate of future operating expectations. Ms. Cascioli believed she would succeed with her lobbying efforts with the government and the May 3, 2005 preliminary prospectus did not include a deduction in fiscal 2006 for the large brewer tax. Furthermore, she believed the assumption relating to pricing found in the Conservative Forecast and thought that the loss of the Mike's contract was best for the company.

247 The name "Ultra Conservative" was very apt, submit the Plaintiffs. Furthermore, the explanation Ms. Cascioli gave to Messrs. Fowlie and Barrett with respect to marketing expenses was without foundation. The Conservative Forecast did not assume an increase in marketing dollars with a new lender and the Ultra Conservative Forecast assumed a decrease of marketing dollars from the level GE Capital had already approved. The Plaintiffs further submit that Ms. Cascioli believed that at $9 million, she was buying out Mr. Fracassi at less than fair market value and Westwind was of this view and Mr. Conacher walked her through the analysis. Furthermore, on October 25, 2004, Westwind made

a presentation to Ms. Cascioli with respect to the HSBC financing showing a fair market value of $20.7 million, Mr. Fracassi's interest at $10.9 million, GE Capital's at $6.2 million and management's at $3.6 million. The Plaintiffs state that Ms. Cascioli deceived Mr. Fracassi by using the PWC report to reassure him about the $9 million price and omitted to tell him that the valuation was based on an Ultra Conservative Forecast she did not believe; that she believed Lakeport would achieve a higher forecast; and that Westwind had told her that $9 million was less than fair market value and that she was generating in excess of $12 million for herself.

248 The Plaintiffs submit that Ms. Cascioli came up with the $9 million price and this version is consistent with Mr. Barrett's and Mr. Conacher's evidence and the documentary record. In addition, Mr. Fracassi was paid $9,319,250, not $9 million. If Ms. Cascioli came up with the $9 million price, she made a fraudulent misrepresentation. She told him that $9 million was the best they could do and they needed to get it done according to the Plaintiffs.

249 The Defendants submit that the requisite elements in support of a claim for fraudulent misrepresentation have not been established by the Plaintiffs. Ms. Cascioli provided Mr. Fracassi with the PWC valuation which was relevant as it was an actual valuation as opposed to the speculative forecasts and other marginal information which Ms. Cascioli had no obligation to disclose. The industry in 2004 and 2005 was volatile and rapidly changing and different forecasts were the norm. Mr. Fracassi grew tired of the constant flow of information and materials and instructed Ms. Cascioli to just get him his money. There is no evidence that material information was being concealed from him or that he was being deliberately kept from discovering information. Furthermore, there were no misrepresentations of fact, active concealment of a material fact, or conduct preventing the discovery of the true state of affairs or discouraging the ascertainment of the true state of affairs.

250 The Defendants further argue that Mr. Fracassi named his own price as he was required to do before all of the models were prepared and Westwind went out to the market. Mr. Fracassi's version of events is inconsistent with his own pleading and with the transaction documents. The evidence of Ms. Cascioli, Mr. Barrett, Ms. Trudell and Mr. McBride support the conclusion that there was no real prospect for a public offering for Lakeport until February 2005, almost two months after Mr. Fracassi's buyout.

251 The Plaintiffs must establish that the Defendants knew that the statement was false or was indifferent to its truth or falsity. Here there was no such knowledge. Forecasts by their very nature are speculative. In addition, the Defendants submit that the Plaintiffs have failed to establish that any false statement was made with the intention of deceiving Mr. Fracassi. Indeed, the evidence suggests just the opposite, namely that Ms. Cascioli had disclosed all relevant information to the point where Mr. Fracassi, in his impatience, began rejecting information. Both parties had independent counsel. No inducement has been established; the evidence is clear that Mr. Fracassi did not rely on the PWC valuation and that he believed it was prepared with a view to producing the lowest possible valuation for the GE warrants. Lastly, there is no evidence that suggested that Mr. Fracassi would have done anything different than what he actually did. Mr. Fracassi testified that he was unaware of a lender willing to offer more and the evidence of Mr. McBride of Vengrowth was that at $24 million ($15 million senior and $9 million mezzanine), the company was at the limit of what it could borrow.

(b) Discussion

252 The Supreme Court addressed fraud in *Parna v. G. & S. Properties Ltd.* [21] In that case, Spence J. referred to the definition of fraud found in Anson on Contracts:

> Fraud is a false representation of fact, made with knowledge of its falsehood, or recklessly, without belief in its truth, with the intention that it should be acted upon by the complaining party, and actually inducing him to act upon it. [22]

253 The elements of the tort are:

1. the defendant made a false statement;

2. the defendant knew that the statement was false or was indifferent to its truth or falsity;

3. the defendant had the intention to deceive the plaintiff;

4. the false statement was material in that it induced the plaintiff to act; and

5. the plaintiff suffered damages as a result of so acting: *Fiorillo v. Krispy Kreme Doughnuts Inc.* [23]

254 Fraud must be proved strictly, however, a victim's own negligence affords no defence to the wrongdoer.

> Even if the victim of the misrepresentation could have found out that it was fraudulent, but did not do so, and thus could have avoided the consequences of the deception, he will not be deprived of a remedy. [24]

255 Failure to disclose may also in certain circumstances amount to a fraudulent misrepresentation. Professor Waddams writes:

> In the case of mistaken assumptions, however, the court's attitude has been strikingly different. One can buy land knowing there is a gold mine under it and knowing that the seller is ignorant of the fact. In a sense, the buyer in such a case deliberately takes advantage of the seller's ignorance. But the requirements of the law are, Cockburn C.J. said in *Smith v. Hughes*, not governed by what a person of tender conscience or scrupulous morality would do in such circumstances. This general position had been affirmed in modern cases.
>
> The question can be posed in various ways. Is there a duty to disclose material facts? Is there a duty of good faith in contractual negotiation? Can silence be a misrepresentation? All these questions amount to the same thing: can one knowingly take advantage of another's mistake?
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> From the uncompromising words of Cockburn C.J. in *Smith v. Hughes*, there are several ways of escape. Some contracts, notably insurance contracts, are characterized as contracts of utmost good faith (contracts, *uberrimae fidei*). The effect of the characterization is to require disclosure by the insured of the facts material to the risk and of material changes in the risk ... Another approach to the question is by way of misrepresentation. It is generally said that mere silence is not misrepresentation. But when is silence "mere" silence? It has been said that:
>
> > ... there is in truth, no such thing as "mere silence" because the significance of silence always falls to be considered in the context in which it occurs. That context may or may not include facts giving rise to a reasonable expectation, in the circumstances of the case, that if particular matters exist they will be disclosed.
>
> Conduct may amount to a misrepresentation and the circumstances of the transaction may lead the court to imply a warranty as to some fact assumed by the mistaken party. An incomplete statement may be as misleading as a false one, and such half-truths have frequently been treated as legally significant misrepresentations. Almost always something is said to induce the transaction, and it is open to the court to hold that the concealment of the material facts can, when taken with general statements, true in themselves but incomplete, turn those statement into misrepresentations. A statement true when made, will be treated as a misrepresentation if subsequent occurrences make it untrue to the knowledge of the representor. Silence may, in its context, amount to an assertion that there is nothing of significance to reveal. [25]

256 In *Motkoski Holdings Ltd. v. Yellowhead (County)*, [26] at para. 45, the Alberta Court of Appeal commented on the law relating to misrepresentation of future statements:

> The supposition that actions for misrepresentation will generally be based on misrepresentations of fact is even stronger when allegations of fraud are made. As was said by Lord Herschell in *Peek v. Derry* at p. 374, to make out fraud the plaintiff must show: "that the representations were statements of fact rather than statements of law

or of intention, promise or mere puffery". If nothing else, it is very difficult to prove that statements about future intentions are fraudulent: *Prather v. King Resources Co.* (1972), [1973] 1 W.W.O.R. 700, 33 D.L.R. (3rd) 112 (Alta. Ca.) at pp. 706-7.

257 Applying these principles to this case, it is helpful to consider the environment in which the various forecasts were produced. Lakeport clearly was in a volatile state and this volatility was reflected in the numerous forecasts using different assumptions that were prepared by Ms. Cascioli and Ms. Trudell. It had been under insolvency protection in 1999 and the 2000 financial statements showed an EBITDA loss of $2,952,000. The results of the refinancing efforts in 2000 with Newpoint had proven to be abysmal. Mr. Fracassi had been charged with violations of the Ontario *Securities Act* in August 2000. By early 2002, Mr. Fracassi wanted out of the Lakeport business. Between 2002 and May 2004, Ms. Cascioli made extensive efforts to secure refinancing and a buyer for Mr. Fracassi's shares. She estimated that she approached approximately 140 parties between 2000 and May 2004 and Mr. Fracassi was an active participant in many of these overtures. Mr. Barrett also assisted in trying to find investors and to raise money without success. No one in any of the forecasts expected Lakeport to perform as spectacularly as it did. The GE Capital warrant valuation was as of August 31, 2004. Molson's offer two months earlier was for an amount that would have yielded substantially less than $9 million to Mr. Fracassi.

258 The discount beer market was dynamic and highly competitive. Evidence of the volatility may be found in the forecasts themselves. The optimistic 2004 Growth Forecast estimated 2006 and 2007 EBITDA to be $8.6 million and $7.1 million respectively. In fact, actual EBITDA for the 11 months was $13.6 million (a 57% difference) and $20.1 million (a 181% difference) respectively. The growth in the Lakeport business following Mr. Fracassi's departure exceeded all predictions and expectations. This was not the product of deceit or fraud. PWC's was the only actual valuation that was conducted and it was provided to Mr. Fracassi. Furthermore, there was no misrepresentation of fact made by Ms. Cascioli to PWC or to Mr. Fracassi. I agree with the Defendants that there was no active concealment of a material fact or conduct preventing or discouraging the discovery of the true state of affairs. I reject any contention that Ms. Cascioli took advantage of Mr. Fracassi in any way.

259 Forecasts are intrinsically uncertain and inaccurate. Those prepared by Ms. Trudell and Ms. Cascioli were no exception. Furthermore, the forecasts were prepared by them before the term sheets containing the banking covenants were executed.

260 In addition, it cannot be said that Mr. Fracassi was induced to act as a result of any false statement in the PWC report. He had stipulated his price well before the forecasts and PWC's valuation were completed. Even though the parties did not adhere to the terms of the Shareholders' Agreement, the scheme of that agreement was that the purchaser would stipulate his price. The stipulation of price by Mr. Fracassi was also consistent with Westwind's stated requirement that the price be fixed before it sought financing. Mr. Fracassi was completely indifferent to the PWC valuation. Furthermore, as was clear from his examination for discovery evidence, Mr. Fracassi saw the GE Capital warrant valuation as a valuation of the business for the purpose of taking the warrants out at the least possible cost. He never spoke to PWC or to Vengrowth. He was not relying on the PWC valuation for any purpose. This was not because he was relying on Ms. Cascioli for input into his price but because he was impatient, wanted to exit from Lakeport and was anxious to get his $9 million. Put differently, it is hard to imagine that Mr. Fracassi would have been writing a cheque to Ms. Cascioli if Lakeport's results had proven to be less successful.

261 Mr. Fracassi's theory of the case is premised on Ms. Cascioli lying to him, PWC and GE Capital. I reject this premise in its entirety. I reject the contention that Ms. Cascioli had any intention to deceive Mr. Fracassi or that she withheld information for that purpose. Her focus was not on Westwind's aggressive personal windfall projections. She really was trying to accommodate Mr. Fracassi and at the same time keep the company afloat. She provided him with continuous disclosure and he chastised her for doing so. He also had his own lawyer. Furthermore, the assumptions that underlay the PWC forecast and which his counsel now challenges were reasonable in the circumstances. While it is the case that Ms. Cascioli testified that she thought she would be successful in her efforts with the government to change

the parameters of the larger brewer tax, no one can fault Ms. Cascioli and Ms. Trudell from not advocating to PWC a forecast based on that ray of hope. Furthermore, that assumption proved to be correct and Lakeport did attain large brewer status as assumed in the PWC forecast. Similarly, the Mike's contract was indeed lost.

262 The major unanticipated change was the success of the price war. In essence, Lakeport was victorious but predicting this outcome could not have been reasonably anticipated. I also note that GE Capital, an arm's length and sophisticated party with access to all of Lakeport's financial results and who had financed Lakeport for six years including through its *CCAA* restructuring, accepted PWC's valuation. Neither PWC nor GE Capital has ever alleged that they were misled in any way. Neither can be said to be unsophisticated. Mr. Conacher testified that different forecasts are the norm as they are prepared for different purposes. Ms. Cascioli was no valuations expert. Relative to Mr. Fracassi, she was a complete ingénue with respect to acquisitions, divestitures and valuation.

263 Lastly, in an action for fraudulent misrepresentation, the Plaintiffs are entitled to be put in the same position they would have been in if the representations had not been made. In spite of the great efforts made by Ms. Cascioli and Mr. Barrett and others hired by Lakeport, there were no other offers to buy out Mr. Fracassi's position. As stated by the Defendants' counsel, this is not a situation where Mr. Fracassi was denied a better opportunity; there was no other opportunity. Once he made his decision to sell, he named his price. Mr. Fracassi himself testified that he was unaware of any lender willing to offer more. In addition, Mr. McBride testified that at $24 million, Lakeport was at the limit of what it could borrow. No one was offering financing in an amount that approximated the claim now asserted by Mr. Fracassi and a corresponding increase in the payment to GE Capital.

264 The Plaintiffs' statement of claim requests a declaration and order that Ms. Cascioli made fraudulent misrepresentations to Mr. Fracassi upon which he and Granvin relied to their detriment and suffered damages. This claim for fraudulent representation must fail.

Limitations Act, 2002

265 I will next turn to two affirmative defences which, if successful, effectively determine the remaining causes of action. These consist of breach of fiduciary duty, oppression, and insider trading (the "remaining causes of action"). The first of these two defences is that the Plaintiffs' claims are barred by the *Limitations Act*, *2002*.

(a) Parties' Positions

266 The Defendants submit that Mr. Fracassi's action is barred by the two year limitation period contained in the *Act*. He knew or ought to have known that Ms. Cascioli was the effective purchaser of his interest in Lakeport when he executed the closing documents in December 2004 and also by virtue of the widespread media coverage her purchase received in January 2005. Similarly, in his reply, he admits that he became aware in March 2005 that Ms. Cascioli was planning to take Lakeport public by way of an income trust. Three of the four events that alerted Mr. Fracassi to Lakeport going public occurred in March 2005. Even though Mr. Fracassi had access to all financial information relating to the value of his interest in Lakeport up until the date of the closing in December 2004 and even though he knew Ms. Cascioli was the purchaser of his interest and intended to take Lakeport public by March 2005, he did not decide to sue Ms. Cascioli until Labatt announced its interest in purchasing Lakeport for more than $200 million in March 2007. To the extent that Mr. Fracassi places his case on the basis that he did not understand that Ms. Cascioli was the effective purchaser of his interest and that Ms. Cascioli intended to take Lakeport public, he is out of time. Furthermore, the Defendants submit that the timing of the commencement of the notice of action on the closing date of the sale to Labatt and the late blooming fraud allegations raise serious questions about the credibility of the Plaintiffs. There was no allegation of fraud in the original statement of claim.

267 The Defendants also submit that the Court of Appeal decision in *Joseph v. Paramount Canada's Wonderland* [27] is the governing law and the decisions of *Paragon Development Corp. v. Sonka Properties Inc.* [28] and *Ford Motor Co. of Canada v. Ontario (Municipal Employees Retirement Board)* [29] no longer represent good law under Ontario's new

Limitations Act, *2002*. In *Joseph v. Paramount Canada's Wonderland*, the Court of Appeal interpreted the new *Limitations Act*, *2002* strictly, and held that a common law discretion no longer exists to extend a limitation period by applying the doctrine of special circumstances. Section 4 of the Act makes it clear that a two year limitation period applies unless the *Act* provides otherwise. There is no carve-out for any of the causes of action asserted by the Plaintiffs. The Defendants submit that the action was commenced on June 7, 2007 and all the facts relevant to the causes of action advanced by the Plaintiffs were known or ought to have been known more than two years before that date.

268 The Plaintiffs resist the Defendants' limitation argument by submitting that in *Paragon Development Corp. v. Sonka Properties Inc.*, Wilton-Siegel J. concluded that there was no applicable limitation period in respect of claims for breach of fiduciary duty or for actions brought pursuant to section 248 of the *OBCA*. This was consistent with comments of the Court of Appeal in the *Ford Motor Co. of Canada v. Ontario (Municipal Employees Retirement Board)*, *supra*. The Plaintiffs submit that while *Ford Motor* was decided under the old limitations legislation, the same result is warranted under the *Limitations Act*, *2002*. In any event, they submit that the conduct in issue was not discovered until after the litigation started and Westwind's documents were produced which occurred some time after March 2009. Similarly, although a two year limitation period applies for insider trading, the Plaintiffs submit that the claim is based on confidential information only discovered on production of the Westwind documents. The Plaintiffs state that the conduct they rely upon in support of their claim for fraudulent misrepresentation is the same conduct that underlies the amended claim for insider trading, namely that Ms. Cascioli knew she was buying Mr. Fracassi's interest in Lakeport for less than fair market value. She knew that Westwind believed the fair market value of Lakeport was significantly higher than the value determined by GE Capital which was based on Ultra Conservative assumptions that she did not believe were likely and she knew that the difference would be a $12 million windfall for herself.

(b) Discussion

269 The *Limitations Act*, *2002* [30] is applicable to this case. Section 4 of the Act states that unless the Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.

270 Section 5 provides:

(1) a claim is discovered on the earlier of,

(a) the day on which the person with the claim first knew,

(i) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the act or omission was that of the person against whom the claim is made, and

(iv) that having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with a claim first ought to have known of the matters referred to in clause (a).

(2) a person with a claim shall be presumed to have known of the matters referred to in clause (1)(a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

271 The Court of Appeal addressed the new *Limitations Act, 2002* in *Joseph v. Paramount Canada's Wonderland*, *supra*. The Court stated that section 16 of the statute sets out a list of claims to which no limitation period applies. For other claims, the new Act establishes a basic two year limitation period and a maximum limitation period of fifteen years. The Court held that as section 4 of the new Act mandates a two year limitation period unless the Act provides otherwise,

a court must look in the Act for the authority to depart from the application of the two year limitation period. As the Court noted, the wording of section 4 compels the conclusion that the new Act is intended to be comprehensive.

272 There is nothing in the *Limitations Act, 2002* that suggests that breach of a fiduciary duty or a claim for oppression escapes the statute's two year parameter. Reliance therefore cannot properly be placed on the limitation conclusion in *Paragon Development Corp. v. Sonka Properties Inc.* The *Ford Motor Co.* case was decided under the old limitation statute and in any event, it would appear that the oppression in that case continued until the commencement of the action. Accordingly, given the Court of Appeal's strict interpretation of the *Limitations Act, 2002* as reflected in *Joseph v. Paramount Canada's Wonderland*, I conclude that a two year limitation period applies to the remaining causes of action in this case.[31] I do agree with the Defendants that to the extent Mr. Fracassi advanced his case on the basis that he did not know that Ms. Cascioli was the effective purchaser of his interest and that she intended to take Lakeport public, he is out of time. It was abundantly obvious that Ms. Cascioli was the effective purchaser from the November 19, 2004 letter from KPMG and from the closing documents in December 2004. In addition, Ms. Cascioli's purchase received widespread media coverage in January 2005. Ms. Cascioli told Mr. Fracassi in March 2005 that she was taking Lakeport public. He only issued his notice of action on the date of the Labatt closing but he discontinued that action and only started this action in June 2007.

273 There is also the added wrinkle of the applicable limitation period for an oppression claim. I am of the view that the limitation period begins two years after the day on which the claim for oppression was discovered. In this regard, I agree with the comments of Markus Koehnen in his book, *Oppression and Related Remedies*:[32]

> Ordinarily, limitation periods begin from the time the plaintiff knows or ought to know of his cause of action. The fact that certain types of oppression continue until they are rectified has given rise to unusual results with respect to limitation periods. In *Hart Estate v. Legacy Farms Inc.*, the plaintiff complained of oppression in respect of a share issue that was completed more than six years before the action was commenced. The plaintiff knew about the share issue when it occurred. The British Columbia Supreme Court held that the claim was not caught by the *Limitations Act* because oppression continues until it is rectified. Manitoba courts have reached the opposite conclusion and have held that limitation periods do apply even to continuing conduct. This is generally the preferable approach. The concept that the limitation period does not begin to run until the oppression is remedied is counter-intuitive. Limitation periods begin when the cause of action arises, not when it is remedied. A limitation period for a breach of contract begins when the contract is breached, not when the breach is corrected. The idea that limitation periods begin to run when the oppression stops makes even less sense given the requirement of some courts that the oppression continue until the action is commenced. The combination of these two rules would result in an absurd situation. In essence, the limitation period does not begin to run until the oppression stops. But once the oppression stops, the plaintiff has no cause of action.

274 That said, it seems to me that the factual underpinnings for the remaining causes of action asserted by Mr. Fracassi stem from Westwind's documents and these were not available until after the lawsuit was commenced. One could not reasonably suggest that Mr. Fracassi could have obtained this information from Westwind voluntarily. Westwind's retainer was with Lakeport, not Mr. Fracassi. Subject to the aforementioned exception relating to Ms. Cascioli's identity as the effective purchaser and the IPO, I am of the view that the Plaintiffs asserted their claims within the two year anniversary of the day on which the remaining claims were discovered. The limitation defence therefore fails in part.

Share Purchase Agreement and Release

275 The second affirmative defence advanced by the Defendants is that the Plaintiffs' claims are barred by contract, namely the Share Purchase Agreement (the "Agreement") and the Release.

(a) Parties' Positions

276 The Defendants submit that the Agreement contains a robust entire agreement clause. This clause would encompass all but the claim for fraudulent misrepresentation. The parties were free to bargain away their common law and statutory rights of redress and did so in order to have finality in their dealings. In addition, Mr. Fracassi signed a Release. Mr. Fracassi was sophisticated, was represented by independent counsel and received valuable consideration. The Defendants submit that he should be bound by the Agreement and Release he signed.

277 The Plaintiffs submit that their claims are not precluded by the entire agreement clause and the Release. Misrepresentations permit the party deceived to void the contract: *Panapers Inc. v. 1260539 Ontario Ltd.* [33] Oppression is based on reasonable expectations, not representations, and similarly, a breach of fiduciary duty is not dependent on representations. In addition, the claims are based on deceitful conduct. A party cannot deceive someone into entering an agreement and then use that agreement to bar a claim relating to the deceitful conduct.

(b) Discussion

278 There is no real issue relating to the claim for fraudulent misrepresentation. Absent an express and deliberate provision, such claims may not be avoided due to a contractual release or an entire agreement clause. On the other hand, the remaining claims would be, and in my view should be, captured by the Release. Put differently, if Ms. Cascioli is found not to have deceived the Plaintiffs, the Plaintiffs should not be permitted to raise other claims against Ms. Cascioli. Absent fraud, there should be some finality associated with commercial agreements of purchase and sale. This is particularly so in this case in that Mr. Fracassi was an extremely sophisticated businessman. His return on his Lakeport investment was not insubstantial. Additionally, Mr. Fracassi had independent counsel. In these circumstances, the language of the contract should be respected. Such a conclusion is consistent with the reasonable expectations of any objective observer and the intentions of the parties.

279 I do note that the Agreement was between Granvin Investments Inc. and Casc Corp. as vendor and purchaser respectively and is binding upon and enures to the benefit of the parties and their respective heirs, executors, personal legal representatives, successors and permitted assigns. The Plaintiffs did not argue that the absence of Mr. Fracassi and Ms. Cascioli as personal signatories to the Agreement impacted the legal analysis. Both Granvin Investments Inc. and Casc Corp. were wholly owned by the individual parties and Mr. Fracassi's claims by necessity flowed through Granvin. Both Granvin and Mr. Fracassi in his personal capacity signed the Release. As such, absent fraud, recovery would be barred by virtue of the provisions of the Release.

280 In conclusion, as I have determined that the claim for fraudulent misrepresentation should not succeed, the Release precludes the remaining causes of action. Even though I have so concluded, I will nonetheless address the other claims as if they were not barred as a result of these documents.

Fiduciary Duty

(a) Parties' Positions

281 In argument, the Plaintiffs limited their claim for breach of fiduciary duty to Ms. Cascioli's position as officer and director of Lakeport. A partnership was not the basis for the claim. Rather, the Plaintiffs submit that in circumstances where an officer or director is buying out the only other shareholder, controls the flow of information and has material knowledge that the other shareholder lacks, there is a basis for finding the existence of a fiduciary duty. Counsel for Mr. Fracassi argues that the imposition of a fiduciary duty seeks to protect the imbalance of information between the parties. They state that Ms. Cascioli was the directing mind of Lakeport and exercised power to affect Mr. Fracassi's interest and he relied on her and had a relationship of trust and confidence. The transaction was of importance to Mr. Fracassi and he understood that, as with the Molson transaction, Ms. Cascioli was undertaking to negotiate a better price for him. Ms. Cascioli was the sole director and sole source of information. They submit that Ms. Cascioli failed to disclose material information, provided misleading information, and failed to disclose the benefit she was receiving. Mr. Fracassi

argues that he believed Ms. Cascioli was his trusted business partner as did she and, as such, he was vulnerable and Ms. Cascioli had discretionary power to affect his interests. Furthermore, counsel for Mr. Fracassi argues that there was a long history of Ms. Cascioli performing the operational and due diligence steps associated with their exit initiatives. Mr. Fracassi was vulnerable to Ms. Cascioli who did have discretionary power to affect his legal and practical interests. The Plaintiffs rely on *Francis v. Dingman* [34] and *Dusik v. Newton*. [35]

282 Counsel for Ms. Cascioli submits that the Supreme Court of Canada in *BCE Inc., Re* [36] put to rest any suggestion that corporate directors owe a fiduciary duty to shareholders. Ms. Cascioli's primary obligation was to Lakeport. The imposition of a duty in favour of Mr. Fracassi would place her in direct conflict with her duties to Lakeport. She could not try to get him the best price possible and protect Lakeport which was taking on the additional debt required to finance the buyout Mr. Fracassi had demanded. Furthermore, submit counsel for Ms. Cascioli, there was no power-dependency relationship and Ms. Cascioli exercised no discretionary power to affect his legal or practical interests as required according the Supreme Court of Canada decision of *Perez v. Galambos*. [37] Additionally there was no express or implied undertaking by Ms. Cascioli to exercise any discretionary power in Mr. Fracassi's best interest.

(b) Discussion

283 The Supreme Court of Canada has provided much guidance on the subject of fiduciary duties. In *Hodgkinson v. Simms*, [38] at para. 30, LaForest J. wrote that indicia which assisted in the recognition of a fiduciary relationship were:

1. scope for the exercise of some discretion or power;

2. the discretion or power may be exercised unilaterally so as to effect the beneficiary's legal or practical interest; and

3. a peculiar vulnerability to the exercise of that discretion or power.

284 More recently, the Supreme Court of Canada addressed fiduciary relationships in *Perez v. Galambos*, *supra*. Cromwell J. discussed both *per se* and *ad hoc* fiduciary relationships. In describing the former, he said, at para. 36:

> Certain categories of relationships are considered to give rise to fiduciary obligations because of their inherent purpose or their presumed factual or legal incidents.

285 Examples of *per se* fiduciary relationships include a solicitor-client relationship and the relationship between a corporation and its board members. Cromwell J. noted that not every legal claim arising out of a *per se* fiduciary relationship will give rise to a claim for a breach of fiduciary duty.

286 An *ad hoc* fiduciary relationship is one which falls outside established categories. An *ad hoc* fiduciary obligation arises as a matter of fact out of the specific circumstances of a particular relationship. [39] The existence of the fiduciary obligation is therefore primarily a question of fact.

> It is fundamental to *ad hoc* fiduciary duties that there be an undertaking by the fiduciary, which may be express or implied, that the fiduciary will act in the best interests of the other party. [40]

287 It may not be necessary for the beneficiary to consent to this undertaking. Cromwell J. stressed that fiduciary law is more concerned with the position of the parties that results from the relationship which gives rise to the fiduciary duty than with the respective positions of the parties after they enter into the relationship. It is the nature of the relationship that gives rise to the fiduciary duty. In both *per se* and *ad hoc* fiduciary relationships, there will be some undertaking on the part of the fiduciary to act with loyalty. [41] Cromwell J. then referred to Professor P. D. Finn's commentary in his book *Fiduciary Obligations*:

> For a person to be a fiduciary he must first and foremost have bound himself in some way to protect and/or to advance the interest of another. [42]

288 The situations in which a fiduciary duty may arise are of course not closed and the determination of whether a duty exists will depend on the circumstances of the case: *Francis v. Dingman*, *supra*.

289 Applying these principles to the facts of this case, I am unable to conclude that the parties were in a fiduciary relationship or that there was a breach of any fiduciary duty.

290 Mr. Fracassi had considerably more business and financial experience than Ms. Cascioli. In relative terms, he was a shrewd business guru and she was a mere loyal ingénue. He never relinquished his decision making power to her. Au contraire, he dictated his price and as the controlling shareholder, had the ability to replace her whenever he so chose. He also dictated the timeline and urged Ms. Cascioli to get his money with some dispatch — although using a different choice of words. She did not have a discretionary power to affect his interests and Mr. Fracassi was not a vulnerable party. Ms. Cascioli never agreed to protect him with respect to his choice of purchase price. Rather, she aimed to please; working hard to try and secure his $9 million as quickly as reasonably possible and as he had instructed her to do.

291 Lakeport's financial information including the MD&A's was made available to him. The forecasts which Mr. Fracassi now claims were so crucial were simply estimates and none of them ultimately proved to be accurate. She would have given him any information he wanted but he rejected her attempts to provide him with more information. I find that, at the time, both he and Ms. Cascioli viewed the $9 million figure to be reasonable.

292 Mr. Fracassi focuses his claim of a fiduciary duty on Ms. Cascioli's capacity as Lakeport's sole officer and director. As stated by the Supreme Court of Canada in the *BCE* decision:

> However, the directors owe a fiduciary duty to the corporation, and only to the corporation. [43]

293 I agree with the Defendants that to anchor a fiduciary obligation on this basis would conflict with Ms. Cascioli's duties owed to Lakeport. As noted by the Defendants, she had a duty to act in Lakeport's best interests. On a buyout of Mr. Fracassi's shareholdings using Lakeport's balance sheet, the imposition of a fiduciary duty would place her in conflict with her duties owed to Lakeport. While it is the case that Ms. Cascioli referred to Mr. Fracassi as her partner, the claim for breach of fiduciary duty is not based on a partnership relationship.

294 In my view, there is no sound basis for his claim for breach of a fiduciary duty. The claim is also encompassed by the Release. Having observed Ms. Cascioli's extraordinary financial success, Mr. Fracassi now claims a portion of the proceeds of disposition as his own and in the process attempts to unfairly debase her character and integrity. Experienced as he is, I can only conclude that this action was commenced in an effort to manoeuvre Ms. Cascioli into settling with him.

Insider Trading

295 The Plaintiffs claim that the Defendants misused confidential information contrary to the provisions of section 138 of the *OBCA* and/or section 131 of the *CBCA*.

(a) Parties' Positions

296 The Plaintiffs submit that Ms. Cascioli bought Mr. Fracassi's shares of Do 4 U, a *CBCA* corporation, in December 2004 with knowledge of confidential information that, if generally known, might reasonably be expected to affect materially the value of the shares. The Plaintiffs submit that Ms. Cascioli knew that the PWC valuation was based on an Ultra Conservative forecast; she did not believe that forecast but rather thought that Lakeport would achieve a higher forecast. She also knew that Westwind had told her that the $9 million figure was less than fair market value and that she would generate in excess of $12 million in value for herself. The Plaintiffs therefore submit that the prohibition

on insider trading found in section 131(4) of the *CBCA* imposed a duty of disclosure on Ms. Cascioli and her failure to disclose constituted insider trading contrary to Part XI of the *CBCA.* The Plaintiffs rely on *Tongue v. Vencap Equities Alberta Ltd.*[44] and *Multiple Access Ltd. v. McCutcheon*.[45]

297 The Defendants do not dispute that Ms. Cascioli was an insider. They submit that the information in issue was that of Lakeport, which was an *OBCA* company. As such, it must be shown that the Defendants benefited from the use of specific confidential information in their knowledge and that the information, if generally known, might reasonably be expected to affect materially the value of the security. In addition, the Plaintiffs must show that they did not have actual knowledge of the information and that they would not have discovered it had they exercised reasonable diligence. The Defendants submit that the Plaintiffs are unable to prove this cause of action. They submit that multiple different forecasts were the norm, were based on different assumptions and prepared for different purposes. They argue that Ms. Cascioli disclosed all the underlying financial material and all the relevant material was in Mr. Fracassi's hands. Insider trading prohibitions are intended to prevent an insider from benefiting from an unfair advantage. They are not designed to protect traders from themselves. Here Mr. Fracassi named his price and had access to all the necessary data to assess Lakeport's performance. With the barest of effort, Mr. Fracassi could have obtained an independent valuation. The playing field was a level one. In any event, no lender was prepared to finance the purchase of Mr. Fracassi's interest in Lakeport at a price greater than $9 million.

(b) Discussion

298 I must first determine whether the *OBCA* or the *CBCA* is applicable and then address liability. The two statutes differ.

299 Section 138(5) of the *OBCA* states:

> An insider who, in connection with a transaction in a security of the corporation or any of its affiliates, makes use of any specific confidential information for the insider's own benefit or advantage that, if generally known, might reasonably be expected to affect materially the value of the security,
>
> > (a) is liable to compensate any person for any direct loss suffered by that person as a result of the transaction, unless the information was known or in the exercise of reasonable diligence should have been known to that person; and
> >
> > (b) is accountable to the corporation for any direct benefit or advantage received or receivable by the insider as a result of the transaction.

300 Section 131(4) of the *CBCA* states:

> An insider who purchases or sells the security of the corporation with knowledge of confidential information that, if generally known, might reasonably be expected to affect materially the value of any of the securities of the corporation is liable to compensate the seller of the security or the purchaser of the security, as the case may be, for any damages suffered by the seller or purchaser as a result of the purchase or sale, unless the insider establishes that
>
> > a. the insider reasonably believed that the information had been generally disclosed;
> >
> > b. the information was known, or ought reasonably to have been known, by the seller or purchaser; or
> >
> > c. the purchase or sale of the security took place in the prescribed circumstances.[46]

301 The *OBCA* therefore requires that the insider "makes use of" the confidential information for his or her "own benefit or advantage" whereas the requirement to prove that the defendant made use of the confidential information has been removed from the *CBCA*.

302 The test for civil liability for *OBCA* insider trading was usefully summarized in *Ballard v. Stavro*:[47]

a. the existence of specific confidential information in the knowledge of the defendant;

b. the defendant benefited from the use of this information; and

c. the plaintiff did not have this information.

303 In *Multiple Access Ltd. v. McCutcheon*, *supra*, Chief Justice Dickson described the policy underlying the statutory insider trading provisions:

> Insiders should not benefit, either at the expense of the company or at the expense of other shareholders, from their access to confidential information intended to be available only for a corporate purpose and not for the personal benefit of anyone. Information so acquired is at the expense of the enterprise. Confidential company information is a corporate asset the benefit of which is intended to benefit the company, its shareholders and creditors.[48]

304 Granvin was selling its 7,500 common shares plus 1,000 Class A preferred shares in Do 4 U and Casc Corp purchased these shares. Do 4 U was a *CBCA* company which held all of the shares of AlphaCorp., which in turn held all of the shares of Lakeport, an *OBCA* company.

305 Although the information in issue related to Lakeport, based on the language of both statutes, it is the locus of the purchase or sale of shares that is the determining factor. I therefore conclude that as Do 4 U was a *CBCA* corporation, that statute governs.

306 Based on the statute and the case law, under the *CBCA* the following must be established:

1. the existence of confidential information in the knowledge of the defendant;

2. the defendant did not reasonably believe that the information had been generally disclosed;

3. the information was not known to the plaintiff or ought not reasonably to have been known by the plaintiff;

4. the information, if generally known, might reasonably be expected to affect the value of the shares; and

5. the affect must be material.

307 In my view, the Plaintiffs have not met this test. The context of this case was that Mr. Fracassi, a very sophisticated businessman, stipulated his price and was very impatient with Ms. Cascioli in his insistence that she deliver that price. In spite of his demands, she continued to make Lakeport's information available to him. The reason she instructed Westwind not to communicate with him was because he was angry on the occasion when they had been in contact with him.

308 Certainly she had information but I believe and find that she would have given Mr. Fracassi any information he wanted to see or get from her. The forecasts and Westwind's materials would have been provided if Mr. Fracassi had asked for them, but I do not consider them to have been material in any event. That said, it is not obvious to me that he would have done anything differently if, as alleged, Mr. Fracassi had known that the PWC valuation was based on an Ultra Conservative forecast Ms. Cascioli did not believe in; that she believed Lakeport would achieve a higher forecast; that Westwind had stated that $9 million was less than fair market value; and that Westwind had stated that she would generate $12 million in value for herself. Furthermore, he could have done his own due diligence and hired a valuator. He also had his own independent counsel. He did not hire a valuator, not because he trusted Ms. Cascioli but because he trusted himself and his own abilities to assess what his investment should generate. He knew that EBITDA was projected to go from $5 million to $9 million. Given the volatility of Lakeport, his assessment of $9 million was reasonable in the circumstances — a reality reflected in his statement of claim.

309 In addition, I do not believe that great weight should be placed on Westwind's statements. Westwind was attempting to appeal to its client, Lakeport, and produced numerous different scenarios. Mr. Conacher was himself indifferent to any ethical distinction between forecasts given to potential investors and those given to PWC and it was in Westwind's own financial interest to boost the funds raised given the fee structure. Furthermore, Mr. Conacher's evidence must be considered in the light of his ultimate fractured relationship with Lakeport and Ms. Cascioli which concluded in adversarial arbitration proceedings.

310 As for the public offering, this was not considered to be a serious proposition until February 2005, and certainly no one contemplated the Labatt purchase.

311 Insider trading prohibitions are designed to prevent unfair advantages in favour of insiders. This is not such a case. In conclusion, at a minimum, the third requirement to succeed with this claim has not been met. I am also not persuaded that the fourth and fifth requirements have been met either.

312 The insider trading claim must fail. As mentioned, it also fails on the basis of the Release.

Oppression

313 The Plaintiffs plead oppression pursuant to section 248 of the *OBCA* or section 239 of the *CBCA*.

(a) Parties' Positions

314 The Plaintiffs submit that the conduct of Ms. Cascioli was oppressive, unfairly prejudicial and unfairly disregarded the reasonable expectations of Mr. Fracassi as: there was a lack of good faith and Ms. Cascioli was in a conflict of interest position; there was inadequate disclosure; and there was a failure by the corporation and Ms. Cascioli to take reasonable steps to simulate an arm's length transaction. The Plaintiffs submit that Ms. Cascioli manipulated the flow of information for her personal gain, took advantage of material inside information to benefit herself, withheld information, preferred her interests to those of Mr. Fracassi, failed to establish a process that would ensure all stakeholders had the information they needed to fairly value their interests in circumstances in which Mr. Fracassi placed trust in her and named her President, CEO and the sole director of Lakeport. In addition, she showed him unfavourable information to reassure him about the valuations they had discussed. To rectify the oppression, the Plaintiffs state that the Defendants should pay the difference between the actual purchase price and the fair market value of the common shares as of the date of the closing of the transaction.

315 The Defendants submit that Mr. Fracassi was the majority shareholder in Lakeport and his reasonable expectations were governed by the terms of the Shareholders' Agreement, the Share Purchase Agreement and the Release he executed in favour of the Defendants. These contractual terms negate the existence of reasonable expectations outside the terms of the contracts. Mr. Fracassi named his price at $9 million and there can be no credible suggestion that his reasonable expectations were not met.

(b) Discussion

316 *BCE Inc., Re*, *supra*, is the leading Canadian case on oppression. As the Supreme Court of Canada noted, oppression is an equitable remedy and seeks to ensure fairness. It gives the court broad, equitable jurisdiction to enforce not just what is legal but what is fair. "It follows that courts considering claims for oppression should look at business realities, not merely narrow legalities." [49]

317 One should first consider whether the evidence supports the reasonable expectation asserted by the claimant. If so, one should then consider whether the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest.

318 The concept of reasonable expectations is objective and contextual. The actual expectation of a particular stakeholder is not conclusive.

319 Actual unlawfulness is not required to invoke the oppression remedy. [50] The remedy is focused on concepts of fairness and equity rather than on legal rights. Factors that are useful in determining whether a reasonable expectation exists include: general commercial practice; the nature of the corporation; the relationship between the parties; past practice; steps the claimant could have taken to protect himself or herself; representations and agreements; and the fair resolution of conflicting interests between corporate stakeholders. [51] With respect to relationships, the Supreme Court stated that reasonable expectations may emerge from the personal relationships between the claimant and other corporate actors. Relationships between shareholders based on ties of family or friendship may be governed by different standards than relationships between arm's length shareholders in a widely held corporation. [52] Shareholder agreements may be viewed as reflecting the reasonable expectations of the parties.

320 To complete a claim for oppression, the claimant must establish the second prong of the remedy by showing that the failure to meet the expectation involved oppression, unfair prejudice or unfair disregard of relevant interests. As stated in *BCE Inc.*,

> Even if reasonable, not every unmet expectation gives rise to a claim under section 241. The section requires that the conduct complained of amount to "oppression", "unfair prejudice" or "unfair disregard" of relevant interests. "Oppression" carries the sense of conduct that is coercive and abusive, and suggests bad faith. "Unfair prejudice" may admit of a less culpable state of mind that nevertheless has unfair consequences. Finally, "unfair disregard" of interests extends the remedy to ignoring an interest as being of no importance, contrary to the stakeholders' reasonable expectations: see Koehnen, at pp. 81-88. The phrases describe, in adjectival terms, ways in which corporate actors may fail to meet the reasonable expectations of stakeholders. [53]

321 While there are no fixed categories of qualifying conduct that attract the application of the oppression remedy, *Arthur v. Signum Communications Ltd.* [54] described categories of conduct that could be considered oppressive: (1) lack of a valid corporate purpose for the transaction; (2) failure on the part of the corporation and its controlling shareholders to take reasonable steps to simulate an arm's length transaction; (3) lack of good faith on the part of the directors of the corporation; (4) discrimination between shareholders with the effect of benefiting the majority shareholder to the exclusion or to the detriment of the minority shareholder; (5) lack of adequate and appropriate disclosure of material information to the minority shareholder; and (6) a plan or design to eliminate the minority shareholder.

322 Turning to an application of these principles to the facts of this case, it seems to me that Mr. Fracassi's reasonable expectation was that he would be paid $9 million, that Ms. Cascioli would act in good faith, and that the parties would comply with the provisions of the Share Purchase Agreement and the Release.

323 While the parties did not strictly adhere to the terms of the Shareholders' Agreement, it is noteworthy that under that Agreement, a shareholder wishing to exit the company must name his or her price. This is exactly what Mr. Fracassi did. His reasonable expectation was that he would receive $9 million and this was objectively reasonable in the circumstances.

324 I wholly reject the contention that Ms. Cascioli was deceitful, withheld information or failed to act in good faith. She was no expert. She had an idea, namely to target the discount beer market and while she adopted a compelling marketing slogan of "24 for $24", she was no business sophisticate. The industry was extraordinarily turbulent, making accurate predictions difficult — indeed the forecasts produced by the company and Westwind were like kittens in a litter, numerous and of different hues. Ms. Cascioli was focused on keeping the business afloat and meeting Mr. Fracassi's demands. There could be no reasonable expectation that she would do more and I am convinced that had she provided Mr. Fracassi with the information which he now complains he lacked, he would have ignored it in its entirety. One must

recall that at its heart, the information not disclosed consisted of forecasts, Ms. Cascioli's faith or belief in the forecasts, and Westwind's promotional commentary. In my view, the Doom Forecast was as likely a predictor of the future as the Growth Forecast. Given their inherently unreliable quality, the volatility of the market, the tenuous likelihood of Lakeport's long term success, Mr. Fracassi's express or implied instructions to Ms. Cascioli not to provide him with information and to get him his money, apart from compliance with the Share Purchase Agreement and the Release, Mr. Fracassi's only reasonable expectation was that she do her best to secure the $9 million and act in good faith. In my view, she did both.

325 The nature of the corporation, the relationship between the parties, the parties' agreements and the steps Mr. Fracassi could have taken to protect himself all cause me to conclude that the reasonable expectations he now asserts were unwarranted. In support of the oppression claim, the Plaintiffs state that they rely on the same conduct that underlies their claim in fraud which I have already dismissed. I reject the submission that the conduct in issue was oppressive, unfairly prejudicial or unfairly disregarded Mr. Fracassi's interests.

326 In conclusion, I dismiss the claim for oppression. As mentioned, it is also barred based on the provisions of the Release.

Damages

327 I have concluded that the Plaintiffs' actions should be dismissed. Even if I had found in favour of Mr. Fracassi with respect to his causes of action, in my view he suffered no damages.

328 The Plaintiffs submit that based on the valuation conducted by their expert, CVP, there was a shortfall in the payment to Mr. Fracassi of $5.5 million.

329 I agree with the Defendants' submissions that Mr. Fracassi received exactly what he asked for. Furthermore, there is no evidence that any other lender was prepared to finance the purchase of Mr. Fracassi's interest at an amount greater than $9 million. Mr. Fracassi acknowledged that he could not identify any lender who was prepared to lend more than National Bank and Vengrowth and Mr. McBride testified that $24 million ($15 million of senior debt and $9 million of mezzanine debt) was the upper limit of debt that could be raised. To find that Mr. Fracassi was entitled to receive fair market value, I would have to conclude that, amongst other things, there existed some other lender or investor willing to pay the amount Mr. Fracassi maintains was fair market value.

330 The Plaintiffs submit that Edge Stone Capital Partners Inc. was prepared to participate in a mezzanine and equity deal but no one from that company was called to give evidence in support of that submission. Ms. Cascioli gave a reasonable explanation as to why its overture did not receive more consideration. In my view, given the totality of the evidence, the likelihood of any such deal materializing was too remote. Indeed, Mr. Fracassi in essence testified that there were no other parties willing to finance a larger amount than the funds provided by National Bank and Vengrowth; the HSBC, Crowne and BMO proposals not having materialized.

331 I also note that Mr. Fracassi's damage claim far exceeds the amount offered by Molson, PWC's valuation and Vengrowth's assessment of Lakeport's value.

332 In conclusion, even if Mr. Fracassi had established his causes of action, in my view he suffered no damages.

Conclusion

333 In closing, I am obviously aware of the fact that Ms. Cascioli ultimately generated huge financial returns from Lakeport. It would be very easy to allocate the $5.5 million requested by Mr. Fracassi to him. After all, one might say, Lakeport was his idea and he provided its initial capital. That said, this is a lawsuit and at its heart, it is a claim for damages for fraud. In my view, that claim and the other causes of action asserted by Mr. Fracassi are unjustified.

Litigation should not be used as a mechanism to extract a payment that is legally unwarranted. The Plaintiffs' action is dismissed. If they are unable to agree, the parties may make written submissions on costs.

Action dismissed.

Footnotes

1 The Do 4 U business plan.

2 R.S.C.1985, c.C-44.

3 Leonard Finelli (Mr. Fracassi's brother-in-law) and Pennin Trust (Mr. Fracassi's offshore trust) were also parties to the agreement.

4 R.S.O. 1990, c. B.16.

5 Ms. Cascioli had been contacted by David Hartley, an analyst, who suggested she meet with the investment banker, Phil Benson. She and Mr. Fracassi did so and discussed Brick Brewing. Subsequently, Ms. Cascioli met with Doug Berchtold of Brick Brewing in May 2004. The Molson offer described subsequently in these reasons then arrived.

6 Although once it had been 20%.

7 He now lives in California and was called by the Plaintiffs.

8 This is also discussed on p. 52.

9 The forecast in this regard proved to be correct.

10 Question 2104 in part.

11 p. 610, lines 1-11.

12 Questions 1888-1889.

13 This was unlike the Conservative Forecast in which the large brewer tax was incurred in fiscal 2007 although the defendants' expert, Mr. Dovey, testified that in fact the ICM forecast was prepared on the basis of not incurring the large brewer tax in 2006.

14 The Defendant, Roseto Inc., and Lakeport were amalgamated pursuant to the *OBCA* on December 31, 2006. Roseto is a wholly owned subsidiary of Casc Corp.

15 This action was settled.

16 As mentioned, Casc Corp. was established in December 2004 as Ms. Cascioli's holding company. Roseto Inc. was incorporated in 2006 and later amalgamated with Casc Corp. The Plaintiffs plead that Casc Corp., as the amalgamated corporation, is liable for the obligations of each of Casc Corp., Do 4 U and AlphaCorp. as they existed prior to the amalgamation and that Roseto, as the amalgamated corporation is liable for the obligations of Lakeport as they existed prior to the amalgamation.

17 2008 SCC 53, [2008] 3 S.C.R. 41 (S.C.C.).

18 *Ibid*, para. 46.

19 *Ibid*, para. 49.

20 (1948), 94 C.C.C. 29 (B.C. C.A.).

21 (1970), [1971] S.C.R. 306 (S.C.C.).

22 *Ibid.* 316.

23 (2009), 98 O.R. (3d) 103, [2009] O.J. No. 2430 (Ont. S.C.J. [Commercial List]) at para. 67.

24 G.H.L. Fridman, *The Law of Contract In Canada*, 4th ed. (Scarborough, Ont.: Carswell, 1999) p. 316.

25 The Law of Contracts, Fifth Edition, s. 434-436.

26 2010 ABCA 72, 474 A.R. 367 (Alta. C.A.).

27 (2008), 90 O.R. (3d) 401 (Ont. C.A.).

28 (2009), 96 O.R. (3d) 574 (Ont. S.C.J.).

29 (2006), 79 O.R. (3d) 81 (Ont. C.A.).

30 S.O. 2002, c. 24, Sched. B.

31 A two year limitation is applicable to the insider trading claim as a result of the provisions of the *CBCA*.

32 Markus Koehnen, *Oppression and Related Remedies* (Toronto: Carswell, 2004) at 57.

33 [2004] O.J. No. 5298 (Ont. S.C.J.), aff'd on this point [2007] O.J. No. 204 (Ont. C.A.).

34 (1983), 43 O.R. (2d) 641 (Ont. C.A.).

35 [1985] B.C.J. No. 18 (B.C. C.A.).

36 2008 SCC 69, [2008] 3 S.C.R. 560 (S.C.C.).

37 2009 SCC 48, [2009] 3 S.C.R. 247 (S.C.C.).

38 [1994] 3 S.C.R. 377 (S.C.C.).

39 *Galambos*, at para. 48.

40 *Ibid.*, at para. 66

41 *Ibid.*, at para. 77.

42 *Ibid.*, at para. 78.

43 *Supra*, note 36 at para. 66.

44 (1994), 148 A.R. 321, [1994] A.J. No. 115 (Alta. Q.B.), aff'd (1996), 184 A.R. 368, [1996] A.J. No. 435 (Alta. C.A.).

45 [1982] 2 S.C.R. 161 (S.C.C.).

46 Section 131(10) describes the limitation period for such a claim as being two years after discovery of the facts that gave rise to the cause of action.

47 [1997] O.J. No. 3577, 38 O.T.C. 321 (Ont. Gen. Div. [Commercial List]) at para. 103.

48 *Supra* note 49 at 180.

49 *Supra* note 36 at para. 58.

50 *Ibid.*, at para. 71.

51 *Ibid.*, at para. 72.

52 *Ibid.*, at para. 72.

53 *Ibid.*, at para. 67.

54 [1991] O.J. No. 86 (Ont. Gen. Div.) at p. 32; aff'd [1993] O.J. No. 1928 (Ont. Div. Ct.).

Tab 8

2017 ONSC 7649
Ontario Superior Court of Justice

Urbancorp Cumberland 2 GP Inc., (Re)

2017 CarswellOnt 20265, 2017 ONSC 7649, 287 A.C.W.S. (3d) 16, 56 C.B.R. (6th) 86, 75 C.L.R. (4th) 155

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF URBANCORP CUMBERLAND 2 GP INC., URBANCORP CUMBERLAND 2 L.P., BOSVEST INC., EDGE ON TRIANGLE PARK INC., AND EDGE RESIDENTIAL INC.

F.L. Myers J.

Heard: December 13, 2017
Judgment: December 20, 2017
Docket: CV-16-11541-00CL

Counsel: Robert J. Drake, Lori Goldberg, for Monitor, Fuller Landau Group Inc.
Mark van Zandvoort, Timothy Jones, for Cooltech Air Systems Ltd., Cooltech Home Comfort Ltd., Genesis Home Services Inc., AEM Capital Corp., and Icarus Holdings (Milton) Inc.
Clifton P. Prophet, for Alvarez & Marsal Canada Inc., receiver, manager and construction lien trustee of Urbancorp (Leslieville) Developments Inc., Urbancorp (Riverdale) Developments Inc., and Urbancorp (The Beach) Developments Inc.

Subject: Corporate and Commercial; Insolvency

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Monitor

Group of debtor companies was involved in property development — Some debtors made payments-in-kind to creditors of other debtors, receiving inter-company credits in return — Over one year later, debtors sought Companies' Creditors Arrangement Act (CCAA) protection — Monitor alleged that replacing hard assets with impaired loans prejudiced creditors' recovery in CCAA proceedings and was oppressive under Ontario Business Corporations Act (OBCA) — Monitor brought motion for advice and directions, seeking to be recognized as OBCA complainant on behalf of certain creditors — Motion dismissed — Monitor purportedly sought advice and directions, but really sought judgment holding creditor liable — Monitor had not been empowered to bring proceedings on behalf of CCAA debtors — Utility of empowering Monitor to drop its cloak of neutrality to bring inter-creditor proceedings was not established — There was no evidence to assess whether discretion should be exercised to allow Monitor to sue or qualify as OBCA complainant — Absent evidence that could lead to inference of existence of reasonable expectations, reliance, and oppression, Monitor was unsuited to act for creditors in present case — Monitor is more constrained than creditors in its activities and ought to consider seeking court approval before undertaking litigation on behalf of particular interests.

Business associations --- Specific matters of corporate organization — Shareholders — Shareholders' remedies — Relief from oppression — Miscellaneous

Group of debtor companies was involved in property development — Some debtors made payments-in-kind to creditors of other debtors, receiving inter-company credits in return — Over one year later, debtors sought Companies' Creditors Arrangement Act (CCAA) protection — Monitor alleged that replacing hard assets with impaired loans prejudiced creditors' recovery in CCAA proceedings and was oppressive under Ontario Business Corporations Act (OBCA) — Monitor brought motion for advice and directions, seeking to be recognized as OBCA complainant on behalf of certain creditors — Motion dismissed — Monitor had not been empowered to bring proceedings on behalf of CCAA debtors —

There was no evidence to assess whether discretion should be exercised to allow Monitor to sue or qualify as complainant — Even if Monitor was entitled to discretionary recognition as OBCA complainant, it had not proved that, at time debtor transferred property, any creditor had any particular expectations, that any such expectations were reasonable, or that anyone relied on such reasonable expectations — Absent evidence that could lead to inference of existence of reasonable expectations, reliance, and oppression, Monitor was unsuited to act for creditors in present case — Monitor had not proved that any breach of reasonable expectations met qualitative assessments of oppression.

Table of Authorities

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

Ernst & Young Inc. v. Essar Global Fund Ltd. (2017), 2017 ONSC 1366, 2017 CarswellOnt 4049, 46 C.B.R. (6th) 107, 66 B.L.R. (5th) 189, 137 O.R. (3d) 438 (Ont. S.C.J. [Commercial List]) — considered

Lord v. Clearspring Spectrum Holdings L.P. (2017), 2017 ONSC 2246, 2017 CarswellOnt 5287, 67 B.L.R. (5th) 81 (Ont. S.C.J. [Commercial List]) — considered

Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp. (2003), 2003 CarswellOnt 5210, (sub nom. *Olympia & York Developments Ltd. (Bankrupt) v. Olympia & York Realty Corp.*) 180 O.A.C. 158, 46 C.B.R. (4th) 313, 42 B.L.R. (3d) 14, 68 O.R. (3d) 544 (Ont. C.A.) — considered

Stelco Inc., Re (2006), 2006 CarswellOnt 3050, 21 C.B.R. (5th) 157, 210 O.A.C. 129 (Ont. C.A.) — considered

Ted Leroy Trucking Ltd., Re (2010), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada*) 2011 D.T.C. 5006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada*) 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re*) 326 D.L.R. (4th) 577, (sub nom. *Century Services Inc. v. Canada (A.G.)*) [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, (sub nom. *Leroy (Ted) Trucking Ltd., Re*) 296 B.C.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re*) 503 W.A.C. 1 (S.C.C.) — considered

Statutes considered:

Business Corporations Act, R.S.O. 1990, c. B.16

Generally — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 23(1)(k) — considered

MOTION by Monitor seeking advice and directions regarding *Companies' Creditors Arrangement Act* proceedings.

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

Outcome

1 The Monitor moves for advice and directions on whether payments in kind made by the *CCAA* debtors Edge on Triangle Park Inc. and Edge Residential Inc. to creditors of other Urbancorp affiliates were oppressive. The Monitor argues that using the currency of condominium units owned by Edge to satisfy debts of the other affiliates to their trade creditors amounts to oppression that should result in a monetary award against the trade creditors who received the units.

2 In my view, even if the Monitor had been empowered to bring this proceeding and if it is entitled to discretionary recognition as a complainant under the oppression remedy provisions of the *OBCA*, it still has not proved that, at the time that Edge transferred its property, any creditor or "the creditors," collectively, had any particular expectations, that any such expectations as might have been held were reasonable, or that anyone relied on any such reasonable expectations as he, she, it, or they might have held. Neither has the Monitor proved that the breach of any such reasonable expectations met any of the three qualitative assessments of oppression.

3 The motion is therefore dismissed.

The Basic Facts

4 The responding parties, whom I will refer to collectively for convenience as Cooltech, were creditors of Edge on Triangle Park Inc., other Urbancorp affiliates, and Urbancorp's owner Alan Saskin personally. Cooltech was a plumbing and HVAC contractor on several Urbancorp projects. It had a long history of satisfactory business dealings with Mr. Saskin and his businesses.

5 The Monitor challenges approximately $2.3 million paid by Edge to Cooltech, in July and August 2015, by means of the transfer of condominium units, parking spots, and storage lockers, transferred at or near fair market value, to pay off debts of other Urbancorp entities and a debt of $500,000 owed to Cooltech by Alan Saskin personally.

6 The transfers were made more than one year prior to the commencement of insolvency proceedings by Urbancorp. The Monitor does not challenge the transfers as fraudulent conveyances. It does not rely on any badges of fraud surrounding the transactions.

7 The Monitor no longer challenges the payments in kind made by Edge to Cooltech in respect of Edge's own debts. It does not challenge them under even the enhanced powers available in insolvency proceedings to remedy unjust preferences or transfers at undervalue for example.

8 In return for paying Cooltech, Edge received intercompany book entries from the affiliates whose loans it paid and other inter-company credits to account for the payment of Mr. Saskin's personal debt. The Monitor says that replacing hard assets with what have subsequently turned out to be impaired loans from insolvent entities prejudiced creditors' recovery in these proceedings and therefore was oppressive.

The Position of Cooltech

9 Cooltech was am arm's length, third party creditor with a cash-flow strapped customer with whom it had dealt for 20 years. Mr. Saskin approached it and offered to pay Urbancorp's bills by transferring property in kind. Cooltech knew Mr. Saskin to run asset-rich but cash-poor businesses. When Mr. Saskin offered units in kind to pay Cooltech's outstanding invoices, Cooltech agreed.

10 Tthe Monitor does not claim that the value of the units was amiss. Cooltech received value commensurate with what it was owed. There was no gift component to the transaction. Rather, the source of the Monitor's complaints is not the sales *per se*, but the fact that the inter-company loans advanced to compensate Edge have subsequently turned out to be impaired. That had nothing to do with Cooltech. There is no basis in the evidence to suggest that it did anything wrong for which it should be held liable for recovery under an oppression remedy aimed at Triangle or Urbancorp. Cooltech is not alleged in this proceeding to have induced or procured a tort or a breach of fiduciary duty for example.

The Evidence

11 The Monitor has been able to show, from the books and records of various Urbancorp entities, that in mid-2015, when the transfers in kind occurred, Cooltech had been owed money by various Urbacorp entities for many months. There is no evidence as to whether this was unusual for these parties. There was no discussion in the evidence of the implication, if any, of the timing in the condominium development business cycle - just before the buildings were completed - when a developer's cash and credit might be expected to be near exhaustion perhaps. Was this normal for these parties? Was anyone particularly fussed? Payments in kind are not unknown in the industry. Were they unusual between these parties? Without knowing some of these answers, I cannot draw any inference about what Cooltech might have known about the state of Urbancorp's finances if anything.

12 I also do not know what Mr. Saskin thought or knew about the status of his business at the time. There is simply no evidence before me other than (a) the fact that Urbancorp had outstanding debts to Cooltech for many months on different projects or loans; and (b) Urbancorp failed in late 2016. The financial statements are not particularly instructive. A snapshot of a moment in time based on depreciated book values does not provide a real time assessment of cash flows

and realizable values or allow an inference that the business had failed or inevitably would be failing shortly so as to suggest that other creditors' interests ought to have been top-of-mind at the time.

13 In fact, in January, 2016, many months *after* the property transfers occurred, Urbancorp raised a very substantial amount of money by issuing bonds in Israel. That transaction may be challenged by the Israeli bondholders and their legal representative. I am not suggesting that it was not also problematic. But, the simple fact that Urbacorp was having cash flow problems that were then followed by a successful public financing also does not lead to any ready inference that Urbancorp or Cooltech knew or ought to have known that, in the summer of 2015, Urbancorp was so near failure that by accepting units in kind Cooltech was stealing a march on other creditors - some of whom (e.g. the Israeli bondholders) did not even exist as yet.

14 Apparently, Mr. Saskin offered units to other creditors too. Some took them and others did not. Cooltech's principal spoke to some of the other creditors prior to agreeing to take units. That fact, on its own, does not allow me to infer anything nefarious or any particular state of knowledge in Cooltech.

15 Neither does the fact that Cooltech accepted units from Edge on indebtedness from other entities establish any entitlement to relief against Cooltech. A creditor is indifferent as to which entity pays the bills in a wholly-owned group. Absent complicity in a tort or breach of trust, the pocket from which Mr. Saskin chooses to pay is no business of Cooltech. Mr. Saskin owned the whole outfit 100%. Absent insolvency, you are not robbing Peter to pay Paul if you are Peter.

The Role of the Monitor

16 Trustees in bankruptcy can be recognized as complainants in oppression proceedings. *Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.* (2003), 68 O.R. (3d) 544 (Ont. C.A.). The recognition is discretionary. At para. 45 of *Olympia & York Realty Corp.*, Goudge JA explained:

> . . . s. 245(c) confers on the court an unfettered discretion to determine whether an applicant is a proper person to commence oppression proceedings under s. 248. This provision is designed to provide the court with flexibility in determining who should be a complainant in any particular case that accompanies the court's flexibility in determining if there has been oppression and in fashioning an appropriate remedy. The overall flexibility provided is essential for the broad remedial purpose of these oppression provisions to be achieved. Given the clear language of s. 245(c) and its purpose, I think that where the bankrupt is a party to the allegedly [page 556] oppressive transaction, the trustee is neither automatically barred from being a complainant nor automatically entitled to that status. It is for the judge at first instance to determine in the exercise of his or her discretion whether in the circumstances of the particular case, the trustee is a proper person to be a complainant.

17 In *Ernst & Young Inc. v. Essar Global Fund Ltd.*, 2017 ONSC 1366 (Ont. S.C.J. [Commercial List]), the *CCAA* court specifically empowered the Monitor to bring oppression proceedings against a party whom the Monitor alleged was impairing the company's ability to restructure by its oppressive conduct. See paras. 34 and 37.

18 In the case at bar, the Monitor has not been empowered to bring proceedings on behalf of the *CCAA* debtors. Mr. Drake points to the Monitor's authority to seek advice and directions in its initial order. In my view, that power ought to have been used *before* the Monitor purported to act on behalf of the debtor corporations in claiming relief against a creditor. Until empowered to sue, the Monitor is a neutral with duties to all interested parties. See *Essar*, at para. 30.

19 The Monitor is not truly seeking advice and directions in this motion. It has sued Cooltech for monetary relief under the banner of a motion for advice and directions. It seeks judgment holding Cooltech liable. It is not asking for the court's input or advice other than to adjudicate the complaint.

20 Monitors can certainly be empowered to bring legal proceedings and to act on behalf of *CCAA* debtors in appropriate circumstances. Under s. 23 (1)(k) of the *CCAA* the court has broad discretion to empower the Monitor to take steps to facilitate the restructuring or to advance the goals of the *CCAA*. *Ted Leroy Trucking Ltd., Re*, 2010

SCC 60 (S.C.C.) (CanLII) at para. 70. Mr. Drake submits that when the court appointed a creditors' committee in this case, a sealed report from the Monitor made reference to the Monitor bringing proceedings in the interests of creditors. However, the order itself grants no such authority to the Monitor. A reference in a Monitor's report that is not adopted into an order is not approval for the Monitor to take steps. There are no steps delineated. There are no parameters for the exercise established.

21 The Monitor is not a trustee in bankruptcy. The creditors know how to bankrupt a debtor if they believe doing so is appropriate. In the interim, I do not see how, in this liquidating *CCAA* process, the Monitor bringing proceedings in place of the creditors who stand to gain from it can be said to facilitate the restructuring. In *Essar* there was a particular roadblock to a fair and proper restructuring affecting all interested parties. Here, by contrast, the Monitor pits the current creditors against a group of creditors who were paid over one year before the proceedings commenced. Why is this a fight for the Monitor rather than the creditors who stand to benefit from the claim? There is no evidence before me concerning the existing creditor body. Perhaps there are tens of thousands of powerless or involuntary creditors who need representation as in the *CCAA* proceedings for *Nortel Networks Limited.* Or is there, perhaps, one legal representative of a body of similarly situated creditors who is well able to bring proceedings if he should wish to do so?

22 I accept that if proceedings are available, they can be brought summarily within the procedural context of this case as was done in *Essar* and as approved expressly in *Stelco Inc., Re* [2006 CarswellOnt 3050 (Ont. C.A.)], 2006 CanLII 16526. But, I am not convinced in the utility of empowering the Monitor to drop its cloak of neutrality to bring what are really inter-creditor proceedings or that doing so facilitates this restructuring process.

23 Moreover, the Monitor asserts that the creditors generally held a reasonable expectation that they would be treated fairly and lawfully by Edge. It asks to be recognized as a complainant under the oppression remedy on the creditors' behalves. However, in *Lord v. Clearspring Spectrum Holdings L.P.*, 2017 ONSC 2246 (Ont. S.C.J. [Commercial List]) (CanLII), I explained:

> . . . before a person can claim an oppression remedy, he or she must actually, subjectively, i.e. personally, hold an expectation. For example, at para. 63 of [*BCE Inc. v. 1976 Debentureholders*, [2008] 3 S.C.R. 560] the Court wrote:
>
>> [63] Particular circumstances give rise to particular expectations. Stakeholders enter into relationships, with and within corporations, on the basis of understandings and expectations, upon which they are entitled to rely, provided they are reasonable in the context: see *820099 Ontario*; *Main v. Delcan Group Inc.* (1999), 1999 CanLII 14946 (ON SC), 47 B.L.R. (2d) 200 (Ont. S.C.J.). These expectations are what the remedy of oppression seeks to uphold.
>>
>> [56] That is, a stakeholder must personally (i.e. subjectively) have an expectation and actually rely on it before it even gets to the question of whether that expectation is also objectively reasonable.

24 I accept that the Monitor does not have to hold the expectation that it asserts. Moreover, as discussed in *Lord* at para. 56, the expectation may be proved by inference. In this case though, I know absolutely nothing about the creditors in existence in July and August 2015 or what they might have known or expected. I have no facts on which to assess whether any expectation that they might have held was reasonable. I have no evidence that anyone relied or ought reasonably to have relied on whatever expectation they may have held or from which to infer that fact. It is trite to say that any creditor expects fair and legal treatment. In the summer of 2015, did they receive fair and legal treatment? There is no suggestion that the payments made by Edge were unlawful. How do I know if they were fair? Were they offered to all equally? What effect did the payments have on the company when made? Did the payments, perhaps, stave off a group failure for long enough to allow the refinancing of the enterprise to occur in January, 2016? Was that refinancing a good, bad, or indifferent thing *vis-à-vis* Edge and its creditors as at mid-2015?

25 In short, there is no evidence before me to allow me to assess whether there is a reason for the Monitor to be entitled to the exercise of discretion to (a) allow it to sue; or (b) allow it to qualify as complainant. Absent evidence that

can lead to an inference of the existence of reasonable expectations, reliance, and oppression, the Monitor is unsuited to act for creditors in this case.

26 If there is no actual creditor with a sufficient stake to sue or to support the Monitor with evidence in a suit, then I again question the utility of empowering the Monitor to bring a claim that pits creditors against each other. It is not the Monitor's role to "try one on" to see if it can increase recovery for the current creditor body. Creditors are free to spend their money and face the consequences. The Monitor, by contrast, acts with the *imprimatur* the Court. It is far more constrained in its activities and ought typically to consider seeking court approval before undertaking litigation on behalf of particular interests.

Costs

27 The Monitor initially brought the case challenging the value of the transferred units and also challenging the transfers of units by Edge in respect of its own debt. It trimmed back its allegations as it realized it lacked evidence and a legal basis to make those claims. That should have been determined before the Monitor put the respondents to the cost of responding to those broad, meritless claims. Mr. Drake agreed that the respondents' request for $40,000 was a reasonable quantum for costs if they succeeded.

Order

28 The motion for advice and directions is dismissed. The Monitor shall pay costs to the respondents fixed at $40,000 all-in forthwith.

Motion dismissed.

Tab 9

Most Negative Treatment: Not followed
Most Recent Not followed: R. v. Biroc | 2006 PESCTD 50, 2006 CarswellPEI 66, 294 A.P.R. 136, 262 Nfld. & P.E.I.R. 136, 149 C.R.R. (2d) 268, 71 W.C.B. (2d) 873 | (P.E.I. T.D., Nov 27, 2006)

1998 CarswellOnt 1
Supreme Court of Canada

Rizzo & Rizzo Shoes Ltd., Re

1998 CarswellOnt 1, 1998 CarswellOnt 2, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, 106 O.A.C. 1, 154 D.L.R. (4th) 193, 221 N.R. 241, 33 C.C.E.L. (2d) 173, 36 O.R. (3d) 418 (headnote only), 50 C.B.R. (3d) 163, 76 A.C.W.S. (3d) 894, 98 C.L.L.C. 210-006, J.E. 98-201

Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez and Lindy Wagner on their own behalf and on behalf of the other former employees of Rizzo & Rizzo Shoes Limited, Appellants v. Zittrer, Siblin & Associates, Inc., Trustees in Bankruptcy of the Estate of Rizzo & Rizzo Shoes Limited, Respondent and The Ministry of Labour for the Province of Ontario, Employment Standards Branch, Party

Gonthier, Cory, McLachlin, Iacobucci, Major JJ.

Heard: October 16, 1997
Judgment: January 22, 1998
Docket: 24711

Proceedings: reversing (1995), 30 C.B.R. (3d) 1 (C.A.); reversing (1991), 11 C.B.R. (3d) 246 (Ont. Gen. Div.)

Counsel: *Steven M. Barrett* and *Kathleen Martin*, for the appellants.
Raymond M. Slattery, for the respondent.
David Vickers, for the Ministry of Labour for the Province of Ontario, Employment Standards Branch.

Subject: Employment; Insolvency
Headnote
Bankruptcy --- Priorities of claims — Preferred claims — Wages and salaries of employees — Type of wages claimable
Trustee in bankruptcy closed bankruptcy employer's stores and paid employees all outstanding wages, commissions and vacation pay up to termination date — Ministry of Labour determined that employees were owed termination and severance pay, and filed claim with trustee which trustee disallowed — Court of Appeal ultimately upheld trustee's disallowance — Employees appealed — Appeal allowed — Termination resulting from bankruptcy gave rise to unsecured provable claim for termination and severance pay — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 121 — Employment Standards Act, R.S.O. 1980, c. 137, ss. 40(1), 40(7), 40a — Employment Standards Amendment Act, 1981, S.O. 1981, c. 22, s. 2(3) — Interpretation Act, R.S.O. 1990, c. I.11, s. 10.
Employment law --- Termination and dismissal — Termination of employment by employer — Severance pay under employment standards legislation
Trustee in bankruptcy closed bankruptcy employer's stores and paid employees all outstanding wages, commissions and vacation pay up to termination date — Ministry of Labour determined that employees were owed termination and severance pay, and filed claim with trustee which trustee disallowed — Court of Appeal ultimately upheld trustee's disallowance — Employees appealed — Appeal allowed — Termination resulting from bankruptcy gave rise to unsecured provable claim for termination and severance pay — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 121 —

Employment Standards Act, R.S.O. 1980, c. 137, ss. 40 (1), 40(7), 40a — Employment Standards Amendment Act, 1981, S.O. 1981, c. 22, s. 2(3) — Interpretation Act, R.S.O. 1990, c. I.11, s. 10.

Faillite --- Priorité des créances — Créances prioritaires — Traitements et salaires des employés — Types de traitements exigibles

Syndic a procédé à la fermeture des magasins du failli et a payé tous les traitements, commissions et paies de vacances dus aux employés jusqu'à la date de cessation d'emploi — Ministère du travail a déterminé que les employés avaient droit à une indemnité de cessation d'emploi et a présenté une preuve de réclamation au syndic, lequel a rejeté la preuve de réclamation — Ultérieurement, la Cour d'appel a confirmé la décision du syndic — Employés ont formé un pourvoi — Pourvoi a été accueilli — Cessation d'emploi résultant de la faillite donnait lieu à une réclamation prouvable ordinaire au titre des indemnités de cessation d'emploi — Loi sur la faillite et l'insolvabilité, L.R.C. 1985, c. B-3, art. 121 — Loi sur les normes d'emploi, L.R.O. 1980, c. 137, art. 40(1), 40(7), 40a — Employment Standards Amendment Act, 1981, L.O. 1981, c. 22, art. 2(3) — Loi d'interprétation, L.R.O. 1990, c. I.11, art. 10.

Droit du travail --- Cessation d'emploi et indemnité de congédiement — Résiliation du contrat d'emploi par l'employeur — Indemnité de cessation d'emploi en vertu de la législation sur les normes du travail

Syndic a procédé à la fermeture des magasins du failli et a payé tous les traitements, commissions et paies de vacances dus aux employés jusqu'à la date de cessation d'emploi — Ministère du travail a déterminé que les employés avaient droit à une indemnité de cessation d'emploi et a présenté une preuve de réclamation au syndic, lequel a rejeté la preuve de réclamation — Ultérieurement, la Cour d'appel a confirmé la décision du syndic — Employés ont formé un pourvoi — Pourvoi a été accueilli — Cessation d'emploi résultant de la faillite donnait lieu à une réclamation prouvable ordinaire au titre des indemnités de cessation d'emploi — Loi sur la faillite et l'insolvabilité, L.R.C. 1985, c. B-3, art. 121 — Loi sur les normes d'emploi, L.R.O. 1980, c. 137, art. 40(1), 40(7), 40a — Employment Standards Amendment Act, 1981, L.O. 1981, c. 22, art. 2(3) — Loi d'interprétation, L.R.O. 1990, c. I.11, art. 10.

An employer which operated a chain of shoe stores was petitioned into bankruptcy on April 13, 1989. A receiving order was made the following day, and on that day the employment of the employer's employees ended. The trustee in bankruptcy paid all wages, salaries, commissions, and vacation pay which had been earned by the employees up to the date on which the receiving order was made. A few months later, the provincial Ministry of Labour audited the employer' records, and determined that the former employees were owed termination pay and vacation pay thereon. The Ministry accordingly filed a proof of claim for these amounts with the trustee. The trustee subsequently disallowed the claims, inter alia, on the grounds that the bankruptcy of the employer did not constitute a dismissal of the employees from employment; thus, no entitlement to severance, termination or vacation pay was triggered under the *Employment Standards Act* (the "ESA"), and there was no claim provable in bankruptcy. The Ministry's appeal to the Ontario Court of Justice (General Division) was allowed. On appeal to the Ontario Court of Appeal, the court overturned the decision and restored the trustee's decision. The employees resumed an appeal to the Supreme Court of Canada which had been discontinued by the Ministry.

Held: The appeal was allowed.

Section 40(7) of the ESA provided that where an employee's employment was terminated contrary to the ESA's minimum notice provisions, the employer was required to pay termination pay equal to the amount the employee would have received for the applicable notice period. Section 40a of the ESA further provided that the employer must pay severance pay to each employee whose employment had been terminated, and who had been employed for five years or more. Section 2(3) of the *Employment Standards Amendment Act, 1981* (the "ESAA"), which enacted s. 40a of the ESA, also included a transitional provision such that the amendments did not apply to bankrupt or insolvent employers whose assets had been distributed among creditors or whose proposal under the *Bankruptcy Act* (the "BA") had been accepted prior to the day the amendments received royal assent. A fair, large, and liberal construction of the words "terminated by the employer" was mandated by s. 10 of the *Interpretation Act* if the provisions of the ESA were to be given a meaning consistent with its spirit, purpose, and intention. The purpose of the various provisions of the ESA is to protect employees against the adverse effects of economic dislocation likely to follow from the absence of an opportunity to search for alternative employment. Interpreting ss. 40 and 40a of the ESA to apply only to non-bankruptcy-related terminations was incompatible with the object of that statute, and the objects of the termination and severance pay provisions themselves. Moreover, if the ESA's amendments were not intended to apply to terminations caused by operation of the BA, then the transitional provisions of s. 2(3) of the ESAA would have no readily apparent purpose. The inclusion of s. 2(3) of the ESAA necessarily implied that the severance pay obligation did in fact extend to bankrupt employers. To limit the application of those provisions only to employees not terminated through bankruptcy would lead to absurd results, and defeat the purpose of the ESA. Therefore, termination as a result of an employer's bankruptcy does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the BA for termination and severance pay in accordance with ss. 40 and 40a of the ESA. A declaration that the employer's former employees were entitled to make claims for termination pay, including vacation pay due thereon and severance pay as unsecured creditors, was substitued for the order of the Court of Appeal.

Un employeur, qui exploitait une chaîne de magasins, a fait l'objet de procédures en faillite et a été déclaré failli en date du 13 avril 1989. Une ordonnance de séquestre a été émise le jour suivant et c'est à ce moment que les contrats d'emploi entre l'employeur et ses employés ont pris fin. Le syndic a versé tous les traitements, salaires, commissions et paies de vacances gagnés par les employés à la date de l'ordonnance de séquestre. Quelques mois plus tard, le ministère du Travail de la province a procédé à la vérification des livres de l'employeur et déterminé que les employés avaient droit à une indemnité de cessation d'emploi de même que le montant y afférent à titre de paie de vacances. Le ministère a donc soumis une preuve de réclamation à l'égard de ces montants au syndic. Le syndic a rejeté la preuve de réclamation au motif, notamment, que la faillite ne constituait pas un congédiement des employés, et ne donnait donc pas droit à une indemnité de cessation d'emploi, une indemnité de licenciement ni une paie de vacances en vertu de la *Loi sur les normes d'emploi* (la « LNE »). Par conséquent, il ne pouvait y avoir de réclamation prouvable à ce titre. Le pourvoi du ministère à la Cour de l'Ontario (Division générale) a été accueilli. En appel à la Cour d'appel de l'Ontario, la Cour a infirmé le jugement de première instance et a confirmé la décision du syndic. Le ministère s'est désisté de son pourvoi et les employés ont repris le pourvoi à la Cour suprême du Canada.

Arrêt: Le pourvoi a été accueilli.

L'article 40(7) de la LNE prévoyait que, lorsque le contrat d'emploi était résilié sans respecter les dispositions de la LNE relatives à l'avis minimal de cessation d'emploi, l'employeur était tenu de verser une indemnité égale au montant que l'employé aurait reçu pour la période d'avis applicable. D'autre part, l'art. 40a de la LNE prévoyait que l'employeur devait verser une indemnité de cessation d'emploi à chaque employé dont le contrat d'emploi a été résilié et qui travaillait pour l'employeur depuis cinq ans ou plus. L'article 2(3) de la *Employment Standards Amendment Act, 1981* (la « ESAA »), qui édictait l'entrée en vigueur l'art. 40a de la LNE, comprenait aussi une disposition transitoire afin que les amendements ne s'appliquent pas aux employeurs faillis ou insolvables dont les biens avaient été distribués aux créanciers et dont la proposition concordataire en vertu de la *Loi sur la faillite et l'insolvabilité* (la « LFI ») avait été acceptée avant le jour où les amendements ont reçu la sanction royale. L'article 10 de la *Loi d'interprétation* commandait une interprétation juste, généreuse et libérale des mots « l'employeur licencie » afin que les dispositions de la LNE aient un sens qui s'accorde avec l'esprit, l'objet et l'intention de cette loi. L'objectif des diverses dispositions de la LNE est de protéger les employés contre les effets nuisibles d'un bouleversement économique soudain qui peuvent survenir en raison de l'absence de la possibilité de chercher un autre emploi. Interpréter les art. 40 et 40a de la LNE de manière à ce qu'ils s'appliquent uniquement lorsque des cessations d'emploi ne résultent pas d'une faillite était contraire à l'objet de cette loi et même à l'objet des dispositions sur l'indemnité de cessation d'emploi. En outre, si les amendements à la LNE n'étaient pas censés s'appliquer aux cessations d'emploi opérées par la LFI, alors les dispositions transitoires de l'art. 2(3) de la ESAA sembleraient dépourvues d'objet. L'inclusion de l'art. 2(3) de la ESAA impliquait nécessairement que l'obligation de verser une indemnité de cessation d'emploi s'étendait aussi aux employeurs faillis. Restreindre l'application de ces dispositions aux seuls employés non licenciés par suite d'une faillite mènerait à des résultats absurdes et viderait la LNE de son objet. Ainsi, aux termes de l'art. 121 de la LFI, la cessation d'emploi découlant de la faillite de l'employeur donne lieu à une réclamation prouvable ordinaire dans la faillite, à titre d'indemnité de licenciement et d'indemnité de cessation d'emploi, conformément aux art. 40 et 40a de la LNE. Une ordonnance déclarant que les anciens employés de l'employeur ont le droit de présenter des demandes d'indemnité de licenciement, y compris la paie de vacances y afférent, et des demandes d'indemnité de cessation d'emploi en tant que créanciers ordinaires a été substituée à l'ordonnance de la Cour d'appel.

Table of Authorities

Cases considered by / Jurisprudence citée par *Iacobucci J.*:

Abrahams v. Canada (Attorney General), [1983] 1 S.C.R. 2, 142 D.L.R. (3d) 1, 46 N.R. 185, 83 C.L.L.C. 14,010 (S.C.C.) — referred to

British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of), 40 C.B.R. (3d) 25, [1996] 7 W.W.R. 652, 21 B.C.L.R. (3d) 91 (B.C. S.C.) — considered

Canada (Procureure générale) c. Hydro-Québec, (sub nom. *R v. Hydro-Québec)* 118 C.C.C. (3d) 97, (sub nom. *R. v. Hydro-Québec)* 151 D.L.R. (4th) 32, 9 C.R. (5th) 157, (sub nom. *R. v. Hydro-Québec)* 217 N.R. 241, (sub nom. *R. v. Hydro-Québec)* [1997] 3 S.C.R. 213, 24 C.E.L.R. (N.S.) 167 (S.C.C.) — referred to

Friesen v. R., 95 D.T.C. 5551, (sub nom. *Friesen v. Canada)* [1995] 3 S.C.R. 103, (sub nom. *Friesen v. Minister of National Revenue)* 186 N.R. 243, (sub nom. *Friesen v. Minister of National Revenue)* 102 F.T.R. 238 (note), (sub nom. *Friesen v. Canada)* 127 D.L.R. (4th) 193, (sub nom. *Friesen v. Canada)* [1995] 2 C.T.C. 369 (S.C.C.) — referred to

Hills v. Canada (Attorney General), 88 C.L.L.C. 14,011, [1988] 1 S.C.R. 513, 48 D.L.R. (4th) 193, 84 N.R. 86, 30 Admin. L.R. 187 (S.C.C.) — referred to

Kemp Products Ltd., Re (1978), 27 C.B.R. (N.S.) 1 (Ont. S.C.) — distinguished

Machtinger v. HOJ Industries Ltd., 40 C.C.E.L. 1, [1992] 1 S.C.R. 986, (sub nom. *Lefebvre v. HOJ Industries Ltd.; Machtinger v. HOJ Industries Ltd.)* 53 O.A.C. 200, 91 D.L.R. (4th) 491, 7 O.R. (3d) 480n, (sub nom. *Lefebvre v. HOJ Industries Ltd.; Machtinger v. HOJ Industries Ltd.)* 136 N.R. 40, 92 C.L.L.C. 14,022 (S.C.C.) — considered

Malone Lynch Securities Ltd., Re, [1972] 3 O.R. 725, 17 C.B.R. (N.S.) 105, 29 D.L.R. (3d) 387 (Ont. S.C.) — not followed

Mills-Hughes v. Raynor (1988), 19 C.C.E.L. 6, 47 D.L.R. (4th) 381, 25 O.A.C. 248, 38 B.L.R. 211, 68 C.B.R. (N.S.) 179, 63 O.R. (2d) 343 (Ont. C.A.) — considered

R. v. Morgentaler, 157 N.R. 97, 125 N.S.R. (2d) 81, 349 A.P.R. 81, [1993] 3 S.C.R. 463, 107 D.L.R. (4th) 537, 85 C.C.C. (3d) 118, 25 C.R. (4th) 179 (S.C.C.) — considered

R. v. Paul, [1982] 1 S.C.R. 621, 27 C.R. (3d) 193, 67 C.C.C. (2d) 97, 138 D.L.R. (3d) 455, 42 N.R. 1 (S.C.C.) — referred to

R. v. TNT Canada Inc. (1996), 17 C.C.E.L. (2d) 1, 131 D.L.R. (4th) 289, 96 C.L.L.C. 210-015, 87 O.A.C. 326, 27 O.R. (3d) 546 (Ont. C.A.) — considered

R. v. Vasil, [1981] 1 S.C.R. 469, 20 C.R. (3d) 193, 58 C.C.C. (2d) 97, 35 N.R. 451, 121 D.L.R. (3d) 41 (S.C.C.) — referred to

R. v. Z. (D.A.), 16 C.R. (4th) 133, [1992] 2 S.C.R. 1025, 76 C.C.C. (3d) 97, 5 Alta. L.R. (3d) 1, 140 N.R. 327, 131 A.R. 1, 25 W.A.C. 1 (S.C.C.) — referred to

Royal Bank v. Sparrow Electric Corp., 193 A.R. 321, 135 W.A.C. 321, [1997] 2 W.W.R. 457, 46 Alta. L.R. (3d) 87, 208 N.R. 161, 143 D.L.R. (4th) 385, 44 C.B.R. (3d) 1, [1997] 1 S.C.R. 411, (sub nom. *R. v. Royal Bank)* 97 D.T.C. 5089 (S.C.C.) — referred to

Telegram Publishing Co. v. Zwelling (1972), 1 L.A.C. (2d) 1 (Ont. Arb.) — considered

U.F.C.W., Local 617P v. Royal Dressed Meats Inc. (Trustee of) (1989), 76 C.B.R. (N.S.) 86, 70 O.R. (2d) 455, 63 D.L.R. (4th) 603 (Ont. S.C.) — referred to

Verdun v. Toronto Dominion Bank, 94 O.A.C. 211, 203 N.R. 60, [1996] 3 S.C.R. 550, 139 D.L.R. (4th) 415, 28 B.L.R. (2d) 121, 12 C.C.L.S. 139 (S.C.C.) — referred to

Wallace v. United Grain Growers Ltd. (1997), 152 D.L.R. (4th) 1, 219 N.R. 161 (S.C.C.) — referred to

Statutes considered / Législation citée:

Bankruptcy and Insolvency Act/Faillité et l'insolvabilité, Loi sur la, R.S.C./L.R.C. 1985, c. B-3

Generally — referred to

s. 121(1) — considered

Employment Standards Act, R.S.O. 1970, c. 147

s. 13 — referred to

s. 13(2) — considered

Employment Standards Act, 1974, S.O. 1974, c. 112

s. 40(7) — considered

Employment Standards Act, R.S.O. 1980, c. 137

Generally — referred to

s. 7(5) [en. 1986, c. 51, s. 2] — considered

s. 40 [am. 1981, c. 22, s. 1; am. 1987, c. 30, s. 4] — considered

s. 40(1) [rep. & sub. 1987, c. 30, s. 4(1)] — considered

s. 40(2) — referred to

s. 40(5) [rep. & sub. 1981, c. 22, s. 1(1)] — referred to

s. 40(7)(a) [en. 1981, c. 22, s. 1(3)] — considered

s. 40a [en. 1981, c. 22, s. 2(1)] — considered

s. 40a(1) [en. 1981, c. 22, s. 2(1)] — considered

s. 40a(1)(a) [en. 1981, c. 22, s. 2(1)] — referred to

s. 40a(1a) [en. 1987, c. 30, s. 5(1)] — considered

Employment Standards Amendment Act, 1981, S.O. 1981, c. 22

s. 2(1) — considered

s. 2(3) — considered

Interpretation Act, R.S.O. 1980, c. 219

s. 10 — considered

Interpretation Act/Interprétation, Loi d', R.S.O./L.R.O. 1990, c. I.11

s. 10 — considered

s. 17 — considered

Labour Relations and Employment Statute Law Amendment Act, 1995/Relations de travail et l'emploi, Loi de 1995 modifiant des lois en ce qui concerne les, S.O./L.O. 1995, c. 1

s. 74(1) — considered

s. 75(1) — considered

APPEAL by employees of bankrupt employer from decision reported at (1995), 30 C.B.R. (3d) 1, 9 C.C.E.L. (2d) 264, 22 O.R. (3d) 385, (sub nom. *Ontario Ministry of Labour v. Rizzo & Rizzo Shoes Ltd.*) 95 C.L.L.C. 210-020, (sub nom. *Re Rizzo & Rizzo Shoes Ltd. (Bankrupt)*) 80 O.A.C. 201 (C.A.), reversing decision reported at (1991), 11 C.B.R. (3d) 246, 6 O.R. (3d) 441, 92 C.L.L.C. 14,013 (Gen. Div.), reversing disallowance of claim by trustee in bankruptcy.

POURVOI interjeté par les employés d'un employeur failli à l'encontre d'un arrêt publié à (1995), 30 C.B.R. (3d) 1, 9 C.C.E.L. (2d) 264, 22 O.R. (3d) 385, (sub nom. *Ontario Ministry of Labour v. Rizzo & Rizzo Shoes Ltd.*) 95 C.L.L.C. 210-020, (sub nom. *Re Rizzo & Rizzo Shoes Ltd. (Bankrupt)*) 80 O.A.C. 201 (C.A.), infirmant un arrêt publié à (1991), 11 C.B.R. (3d) 246, 6 O.R. (3d) 441, 92 C.L.L.C. 14,013 (Gen. Div.), infirmant le rejet par le syndic d'une preuve de réclamation dans la faillite.

The judgment of the court was delivered by *Iacobucci J.*:

1 This is an appeal by the former employees of a now bankrupt employer from an order disallowing their claims for termination pay (including vacation pay thereon) and severance pay. The case turns on an issue of statutory

interpretation. Specifically, the appeal decides whether, under the relevant legislation in effect at the time of the bankruptcy, employees are entitled to claim termination and severance payments where their employment has been terminated by reason of their employer's bankruptcy.

1. Facts

2 Prior to its bankruptcy, Rizzo & Rizzo Shoes Limited ("Rizzo") owned and operated a chain of retail shoe stores across Canada. Approximately 65% of those stores were located in Ontario. On April 13, 1989, a petition in bankruptcy was filed against the chain. The following day, a receiving order was made on consent in respect of Rizzo's property. Upon the making of that order, the employment of Rizzo's employees came to an end.

3 Pursuant to the receiving order, the respondent, Zittrer, Siblin & Associates, Inc. (the "Trustee") was appointed as trustee in bankruptcy of Rizzo's estate. The Bank of Nova Scotia privately appointed Peat Marwick Limited ("PML") as receiver and manager. By the end of July, 1989, PML had liquidated Rizzo's property and assets and closed the stores. PML paid all wages, salaries, commissions and vacation pay that had been earned by Rizzo's employees up to the date on which the receiving order was made.

4 In November 1989, the Ministry of Labour for the Province of Ontario (Employment Standards Branch) (the "Ministry") audited Rizzo's records to determine if there was any outstanding termination or severance pay owing to former employees under the *Employment Standards Act*, R.S.O. 1980, c. 137, as amended (the "*ESA*"). On August 23, 1990, the Ministry delivered a proof of claim to the respondent Trustee on behalf of the former employees of Rizzo for termination pay and vacation pay thereon in the amount of approximately $2.6 million and for severance pay totalling $14,215. The Trustee disallowed the claims, issuing a Notice of Disallowance on January 28, 1991. For the purposes of this appeal, the relevant ground for disallowing the claim was the Trustee's opinion that the bankruptcy of an employer does not constitute a dismissal from employment and thus, no entitlement to severance, termination or vacation pay is created under the *ESA*.

5 The Ministry appealed the Trustee's decision to the Ontario Court (General Division) which reversed the Trustee's disallowance and allowed the claims as unsecured claims provable in bankruptcy. On appeal, the Ontario Court of Appeal overturned the trial court's ruling and restored the decision of the Trustee. The Ministry sought leave to appeal from the Court of Appeal judgment, but discontinued its application on August 30, 1993. Following the discontinuance of the appeal, the Trustee paid a dividend to Rizzo's creditors, thereby leaving significantly less funds in the estate. Subsequently, the appellants, five former employees of Rizzo, moved to set aside the discontinuance, add themselves as parties to the proceedings, and requested an order granting them leave to appeal. This Court's order granting those applications was issued on December 5, 1996.

2. Relevant Statutory Provisions

6 The relevant versions of the *Bankruptcy Act* (now the *Bankruptcy and Insolvency Act*) and the *Employment Standards Act* for the purposes of this appeal are R.S.C. 1985, c. B-3 (the "*BA*"), and R.S.O. 1980, c. 137, as amended to April 14, 1989 (the "*ESA*") respectively:

> *Employment Standards Act*, R.S.O. 1980, c. 137, as amended:
>
> > **7.--**
> >
> > > (5) Every contract of employment shall be deemed to include the following provision:
> > >
> > > > All severance pay and termination pay become payable and shall be paid by the employer to the employee in two weekly instalments beginning with the first full week following termination of employment and shall be allocated to such weeks accordingly. This provision does not apply to

severance pay if the employee has elected to maintain a right of recall as provided in subsection 40a (7) of the *Employment Standards Act*.

40.-- (1) No employer shall terminate the employment of an employee who has been employed for three months or more unless the employee gives,

(a) one weeks notice in writing to the employee if his or her period of employment is less than one year;

(b) two weeks notice in writing to the employee if his or her period of employment is one year or more but less than three years;

(c) three weeks notice in writing to the employee if his or her period of employment is three years or more but less than four years;

(d) four weeks notice in writing to the employee if his or her period of employment is four years or more but less than five years;

(e) five weeks notice in writing to the employee if his or her period of employment is five years or more but less than six years;

(f) six weeks notice in writing to the employee if his or her period of employment is six years or more but less than seven years;

(g) seven weeks notice in writing to the employee if his or her period of employment is seven years or more but less than eight years;

(h) eight weeks notice in writing to the employee if his or her period of employment is eight years or more,

and such notice has expired.

. . . . .

(7) Where the employment of an employee is terminated contrary to this section,

(a) the employer shall pay termination pay in an amount equal to the wages that the employee would have been entitled to receive at his regular rate for a regular non-overtime work week for the period of notice prescribed by subsection (1) or (2), and any wages to which he is entitled;

. . . . .

40*a* ...

(1a) Where,

(a) fifty or more employees have their employment terminated by an employer in a period of six months or less and the terminations are caused by the permanent discontinuance of all or part of the business of the employer at an establishment; or

(b) one or more employees have their employment terminated by an employer with a payroll of $2.5 million or more,

the employer shall pay severance pay to each employee whose employment has been terminated and who has been employed by the employer for five or more years.

Employment Standards Amendment Act, 1981, S.O. 1981, c. 22

2.--(1) Part XII of the said Act is amended by adding thereto the following section:

> (3) Section 40*a* of the said Act does not apply to an employer who became a bankrupt or an insolvent person within the meaning of the *Bankruptcy Act* (Canada) and whose assets have been distributed among his creditors or to an employer whose proposal within the meaning of the *Bankruptcy Act* (Canada) has been accepted by his creditors in the period from and including the 1st day of January, 1981, to and including the day immediately before the day this Act receives Royal Assent.

Bankruptcy Act, R.S.C. 1985, c. B-3

> **121.** (1) All debts and liabilities, present or future, to which the bankrupt is subject at the date of the bankruptcy or to which he may become subject before his discharge by reason of any obligation incurred before the date of the bankruptcy shall be deemed to be claims provable in proceedings under this Act.

Interpretation Act, R.S.O. 1990, c. I.11

> **10.** Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of any thing that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.
>
> . . . . .
>
> **17.** The repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law.

3. Judicial History

A. Ontario Court (General Division) (1991), 6 O.R. (3d) 441 (Ont. Gen. Div.)

7 Having disposed of several issues which do not arise on this appeal, Farley J. turned to the question of whether termination pay and severance pay are provable claims under the *BA*. Relying on *U.F.C.W., Local 617P v. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86 (Ont. S.C.), he found that it is clear that claims for termination and severance pay are provable in bankruptcy where the statutory obligation to provide such payments arose prior to the bankruptcy. Accordingly, he reasoned that the essential matter to be resolved in the case at bar was whether bankruptcy acted as a termination of employment thereby triggering the termination and severance pay provisions of the *ESA* such that liability for such payments would arise on bankruptcy as well.

8 In addressing this question, Farley J. began by noting that the object and intent of the *ESA* is to provide minimum employment standards and to benefit and protect the interests of employees. Thus, he concluded that the *ESA* is remedial legislation and as such it should be interpreted in a fair, large and liberal manner to ensure that its object is attained according to its true meaning, spirit and intent.

9 Farley J. then held that denying employees in this case the right to claim termination and severance pay would lead to the arbitrary and unfair result that an employee whose employment is terminated just prior to a bankruptcy would be entitled to termination and severance pay, whereas one whose employment is terminated by the bankruptcy itself would not have that right. This result, he stated, would defeat the intended working of the *ESA*.

10 Farley J. saw no reason why the claims of the employees in the present case would not generally be contemplated as wages or other claims under the *BA*. He emphasized that the former employees in the case at bar had not alleged that termination pay and severance pay should receive a priority in the distribution of the estate, but merely that they are provable (unsecured and unpreferred) claims in a bankruptcy. For this reason, he found it inappropriate to make reference to authorities whose focus was the interpretation of priority provisions in the *BA*.

11 Even if bankruptcy does not terminate the employment relationship so as to trigger the *ESA* termination and severance pay provisions, Farley J. was of the view that the employees in the instant case would nevertheless be entitled to such payments as these were liabilities incurred prior to the date of the bankruptcy by virtue of s. 7(5) of the *ESA*. He found that s. 7(5) deems every employment contract to include a provision to provide termination and severance pay following the termination of employment and concluded that a contingent obligation is thereby created for a bankrupt employer to make such payments from the outset of the relationship, long before the bankruptcy.

12 Farley J. also considered s. 2(3) of the *Employment Standards Amendment Act, 1981*, S.O. 1981, c. 22 (the "*ESAA*"), which is a transitional provision that exempted certain bankrupt employers from the newly introduced severance pay obligations until the amendments received royal assent. He was of the view that this provision would not have been necessary if the obligations of employers upon termination of employment had not been intended to apply to bankrupt employers under the *ESA*. Farley J. concluded that the claim by Rizzo's former employees for termination pay and severance pay could be provided as unsecured and unpreferred debts in a bankruptcy. Accordingly, he allowed the appeal from the decision of the Trustee.

B. Ontario Court of Appeal (1995), 22 O.R (3d) 385

13 Austin J.A., writing for a unanimous court, began his analysis of the principal issue in this appeal by focussing upon the language of the termination pay and severance pay provisions of the *ESA*. He noted, at p. 390, that the termination pay provisions use phrases such as "[n]o employer shall terminate the employment of an employee" (s. 40(1)), "the notice required by an employer to terminate the employment" (s. 40(2)), and "[a]n employer who has terminated or proposes to terminate the employment of employees" (s. 40(5)). Turning to severance pay, he quoted s. 40*a*(1)(*a*) (at p. 391) which includes the phrase "employees have their employment terminated by an employer". Austin J.A. concluded that this language limits the obligation to provide termination and severance pay to situations in which the employer terminates the employment. The operation of the *ESA*, he stated, is not triggered by the termination of employment resulting from an act of law such as bankruptcy.

14 In support of his conclusion, Austin J.A. reviewed the leading cases in this area of law. He cited *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725 (Ont. S.C.), wherein Houlden J. (as he then was) concluded that the *ESA* termination pay provisions were not designed to apply to a bankrupt employer. He also relied upon *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1 (Ont. S.C.), for the proposition that the bankruptcy of a company at the instance of a creditor does not constitute dismissal. He concluded as follows at p. 395:

> The plain language of ss. 40 and 40*a* does not give rise to any liability to pay termination or severance pay except where the employment is terminated by the employer. In our case, the employment was terminated, not by the employer, but by the making of a receiving order against Rizzo on April 14, 1989, following a petition by one of its creditors. No entitlement to either termination or severance pay ever arose.

15 Regarding s. 7(5) of the *ESA*, Austin J.A. rejected the trial judge's interpretation and found that the section does not create a liability. Rather, in his opinion, it merely states when a liability otherwise created is to be paid and therefore it was not considered relevant to the issue before the court. Similarly, Austin J.A. did not accept the lower court's view of s. 2(3), the transitional provision in the *ESAA*. He found that that section had no effect upon the intention of the Legislature as evidenced by the terminology used in ss. 40 and 40*a*.

16 Austin J.A. concluded that, because the employment of Rizzo's former employees was terminated by the order of bankruptcy and not by the act of the employer, no liability arose with respect to termination, severance or vacation pay. The order of the trial judge was set aside and the Trustee's disallowance of the claims was restored.

4. Issues

17 This appeal raises one issue: does the termination of employment caused by the bankruptcy of an employer give rise to a claim provable in bankruptcy for termination pay and severance pay in accordance with the provisions of the *ESA*?

5. Analysis

18 The statutory obligation upon employers to provide both termination pay and severance pay is governed by ss. 40 and 40*a* of the *ESA*, respectively. The Court of Appeal noted that the plain language of those provisions suggests that termination pay and severance pay are payable only when the employer terminates the employment. For example, the opening words of s. 40(1) are: "No employer shall terminate the employment of an employee...." Similarly, s. 40*a*(1) begins with the words, "Where...fifty or more employees have their employment terminated by an employer...." Therefore, the question on which this appeal turns is whether, when bankruptcy occurs, the employment can be said to be terminated "by the employer".

19 The Court of Appeal answered this question in the negative, holding that, where an employer is petitioned into bankruptcy by a creditor, the employment of its employees is not terminated "by the employer", but rather by operation of law. Thus, the Court of Appeal reasoned that, in the circumstances of the present case, the *ESA* termination pay and severance pay provisions were not applicable and no obligations arose. In answer, the appellants submit that the phrase "terminated by the employer" is best interpreted as reflecting a distinction between involuntary and voluntary termination of employment. It is their position that this language was intended to relieve employers of their obligation to pay termination and severance pay when employees leave their jobs voluntarily. However, the appellants maintain that where an employee's employment is involuntarily terminated by reason of their employer's bankruptcy, this constitutes termination "by the employer" for the purpose of triggering entitlement to termination and severance pay under the *ESA*.

20 At the heart of this conflict is an issue of statutory interpretation. Consistent with the findings of the Court of Appeal, the plain meaning of the words of the provisions here in question appears to restrict the obligation to pay termination and severance pay to those employers who have actively terminated the employment of their employees. At first blush, bankruptcy does not fit comfortably into this interpretation. However, with respect, I believe this analysis is incomplete.

21 Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Recent cases which have cited the above passage with approval include: *Canada (Procureure générale) c. Hydro-Québec*, *(*sub nom. *R. v. Hydro-Québec)* [1997] 3 S.C.R. 213 (S.C.C.); *Royal Bank v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (S.C.C.); *Verdun v. Toronto Dominion Bank*, [1996] 3 S.C.R. 550 (S.C.C.); *Friesen v. R.*, [1995] 3 S.C.R. 103 (S.C.C.).

22 I also rely upon s. 10 of the *Interpretation Act*, R.S.O. 1980, c. 219, which provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit."

23 Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the *ESA*, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized. I now turn to a discussion of these issues.

24 In *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 (S.C.C.), at p. 1002, the majority of this Court recognized the importance that our society accords to employment and the fundamental role that it has assumed in the life of the individual. The manner in which employment can be terminated was said to be equally important (see also *Wallace v. United Grain Growers Ltd.* (1997), 219 N.R. 161 (S.C.C.). It was in this context that the majority in *Machtinger* described, at p. 1003, the object of the *ESA* as being the protection of "...the interests of employees by requiring employers to comply with certain minimum standards, including minimum periods of notice of termination." Accordingly, the majority concluded, at p. 1003, that, "...an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protection to as many employees as possible, is to be favoured over one that does not."

25 The objects of the termination and severance pay provisions themselves are also broadly premised upon the need to protect employees. Section 40 of the *ESA* requires employers to give their employees reasonable notice of termination based upon length of service. One of the primary purposes of this notice period is to provide employees with an opportunity to take preparatory measures and seek alternative employment. It follows that s. 40(7)(a), which provides for termination pay in lieu of notice when an employer has failed to give the required statutory notice, is intended to "cushion" employees against the adverse effects of economic dislocation likely to follow from the absence of an opportunity to search for alternative employment. (Innis Christie, Geoffrey England and Brent Cotter, *Employment Law in Canada* (2nd ed. 1993), at pp. 572-81.

26 Similarly, s. 40*a*, which provides for severance pay, acts to compensate long-serving employees for their years of service and investment in the employer's business and for the special losses they suffer when their employment terminates. In *R. v. TNT Canada Inc.* (1996), 27 O.R. (3d) 546 (Ont. C.A.), Robins J.A. quoted with approval at pp. 556-57 from the words of D.D. Carter in the course of an employment standards determination in *Telegram Publishing Co. v. Zwelling* (1972), 1 L.A.C. (2d) 1 (Ont. Arb. Bd.), at p. 19, wherein he described the role of severance pay as follows:

> Severance pay recognizes that an employee does make an investment in his employer's business -- the extent of this investment being directly related to the length of the employee's service. This investment is the seniority that the employee builds up during his years of service....Upon termination of the employment relationship, this investment of years of service is lost, and the employee must start to rebuild seniority at another place of work. The severance pay, based on length of service, is some compensation for this loss of investment.

27 In my opinion, the consequences or effects which result from the Court of Appeal's interpretation of ss. 40 and 40*a* of the *ESA* are incompatible with both the object of the Act and with the object of the termination and severance pay provisions themselves. It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Côté, *supra*, an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile (Sullivan, *Construction of Statutes, supra*, at p. 88).

28 The trial judge properly noted that, if the *ESA* termination and severance pay provisions do not apply in circumstances of bankruptcy, those employees 'fortunate' enough to have been dismissed the day before a bankruptcy would be entitled to such payments, but those terminated on the day the bankruptcy becomes final would not be so entitled. In my view, the absurdity of this consequence is particularly evident in a unionized workplace where seniority is a factor in determining the order of lay-off. The more senior the employee, the larger the investment he or she has made in the employer and the greater the entitlement to termination and severance pay. However, it is the more senior personnel who are likely to be employed up until the time of the bankruptcy and who would thereby lose their entitlements to these payments.

29 If the Court of Appeal's interpretation of the termination and severance pay provisions is correct, it would be acceptable to distinguish between employees merely on the basis of the timing of their dismissal. It seems to me that such a result would arbitrarily deprive some employees of a means to cope with the economic dislocation caused by unemployment. In this way the protections of the *ESA* would be limited rather than extended, thereby defeating the intended working of the legislation. In my opinion, this is an unreasonable result.

30 In addition to the termination and severance pay provisions, both the appellants and the respondent relied upon various other sections of the *ESA* to advance their arguments regarding the intention of the legislature. In my view, although the majority of these sections offer little interpretive assistance, one transitional provision is particularly instructive. In 1981, s. 2(1) of the *Employment Standards Amendment Act, 1981*, ("*ESAA*") introduced s.40*a*, the severance pay provision, to the *ESA*. Section 2(2) deemed that provision to come into force on January 1, 1981. Section 2(3), the transitional provision in question provided as follows:

> **2.** ...
>
> > (3) Section 40*a* of the said Act does not apply to an employer who became bankrupt or an insolvent person within the meaning of the *Bankruptcy Act* (Canada) and whose assets have been distributed among his creditors or to an employer whose proposal within the meaning of the *Bankruptcy Act* (Canada) has been accepted by his creditors in the period from and including the 1st day of January, 1981, to and including the day immediately before the day this Act receives Royal Assent.

31 The Court of Appeal found that it was neither necessary nor appropriate to determine the intention of the legislature in enacting this provisional subsection. Nevertheless, the court took the position that the intention of the legislature as evidenced by the introductory words of ss. 40 and 40*a* was clear, namely, that termination by reason of a bankruptcy will not trigger the severance and termination pay obligations of the *ESA*. The court held that this intention remained unchanged by the introduction of the transitional provision. With respect, I do not agree with either of these findings. Firstly, in my opinion, the use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise and one which has often been employed by this Court (see, e.g., *R. v. Vasil*, [1981] 1 S.C.R. 469 (S.C.C.), at p. 487; *R. v. Paul*, [1982] 1 S.C.R. 621 (S.C.C.), at pp. 635, 653 and 660). Secondly, I believe that the transitional provision indicates that the Legislature intended that termination and severance pay obligations should arise upon an employers' bankruptcy.

32 In my view, by extending an exemption to employers who became bankrupt and lost control of their assets between the coming into force of the amendment and its receipt of royal assent, s. 2(3) necessarily implies that the severance pay obligation does in fact extend to bankrupt employers. It seems to me that, if this were not the case, no readily apparent purpose would be served by this transitional provision.

33 I find support for my conclusion in the decision of Saunders J. in *Royal Dressed Meats Inc.*, *supra*. Having reviewed s. 2(3) of the *ESAA*, he commented as follows:

> ...any doubt about the intention of the Ontario Legislature has been put to rest, in my opinion, by the transitional provision which introduced severance payments into the *ESA*...it seems to me an inescapable inference that the legislature intended liability for severance payments to arise on a bankruptcy. That intention would, in my opinion, extend to termination payments which are similar in character.

34 This interpretation is also consistent with statements made by the Minister of Labour at the time he introduced the 1981 amendments to the *ESA*. With regard to the new severance pay provision he stated:

> The circumstances surrounding a closure will govern the applicability of the severance pay legislation in some defined situations. For example, a bankrupt or insolvent firm will still be required to pay severance pay to employees to the extent that assets are available to satisfy their claims.

. . . . .

> ...the proposed severance pay measures will, as I indicated earlier, be retroactive to January 1 of this year. That retroactive provision, however, will not apply in those cases of bankruptcy and insolvency where the assets have already been distributed or where an agreement on a proposal to creditors has already been reached. [Ontario, Legislative Assembly, *Debates*, No. 36, at pp. 1236-37 (June 4, 1981)]

Moreover, in the legislative debates regarding the proposed amendments the Minister stated:

> For purposes of retroactivity, severance pay will not apply to bankruptcies under the Bankruptcy Act where assets have been distributed. However, once this Act receives royal assent, employees in bankruptcy closures will be covered by the severance pay provisions. [Ontario, Legislative Assembly, *Debates*, No. 48, at p. 1699 (June 16, 1981)]

35 Although the frailties of Hansard evidence are many, this Court has recognized that it can play a limited role in the interpretation of legislation. Writing for the Court in *R. v. Morgentaler*, [1993] 3 S.C.R. 463 (S.C.C.), at p. 484, Sopinka J. stated:

> ...until recently the courts have balked at admitting evidence of legislative debates and speeches....The main criticism of such evidence has been that it cannot represent the "intent" of the legislature, an incorporeal body, but that is equally true of other forms of legislative history. Provided that the court remains mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background and the purpose of legislation.

36 Finally, with regard to the scheme of the legislation, since the *ESA* is a mechanism for providing minimum benefits and standards to protect the interests of employees, it can be characterized as benefits-conferring legislation. As such, according to several decisions of this Court, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant (see, e.g., *Abrahams v. Canada (Attorney General)*, [1983] 1 S.C.R. 2 (S.C.C.), at p. 10; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513 (S.C.C.), at p. 537). It seems to me that, by limiting its analysis to the plain meaning of ss. 40 and 40*a* of the *ESA*, the Court of Appeal adopted an overly restrictive approach that is inconsistent with the scheme of the Act.

37 The Court of Appeal's reasons relied heavily upon the decision in *Malone Lynch*, *supra*. In *Malone Lynch*, Houlden J. held that s. 13, the group termination provision of the former *ESA*, R.S.O. 1970, c. 147, and the predecessor to s. 40 at issue in the present case, was not applicable where termination resulted from the bankruptcy of the employer. Section 13(2) of the *ESA* then in force provided that, if an employer wishes to terminate the employment of 50 or more employees, the employer must give notice of termination for the period prescribed in the regulations, "and until the expiry of such notice the terminations shall not take effect." Houlden J. reasoned that termination of employment through bankruptcy could not trigger the termination payment provision, as employees in this situation had not received the written notice required by the statute, and therefore could not be said to have been terminated in accordance with the Act.

38 Two years after *Malone Lynch* was decided, the 1970 *ESA* termination pay provisions were amended by the *Employment Standards Act, 1974*, S.O. 1974, c. 112. As amended, s. 40(7) of the 1974 *ESA* eliminated the requirement that notice be given before termination can take effect. This provision makes it clear that termination pay is owing where an employer fails to give notice of termination and that employment terminates irrespective of whether or not proper notice has been given. Therefore, in my opinion it is clear that the *Malone Lynch* decision turned on statutory provisions which are materially different from those applicable in the instant case. It seems to me that Houlden J.'s holding goes no further than to say that the provisions of the 1970 *ESA* have no application to a bankrupt employer. For this reason, I do not accept the *Malone Lynch* decision as persuasive authority for the Court of Appeal's findings. I note that the courts in *Royal Dressed Meats*, *supra*, and *British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25 (B.C. S.C.), declined to rely upon *Malone Lynch* based upon similar reasoning.

39 The Court of Appeal also relied upon *Re Kemp Products Ltd.*, *supra*, for the proposition that although the employment relationship will terminate upon an employer's bankruptcy, this does not constitute a "dismissal". I note that this case did not arise under the provisions of the *ESA*. Rather, it turned on the interpretation of the term "dismissal" in what the complainant alleged to be an employment contract. As such, I do not accept it as authoritative jurisprudence in the circumstances of this case. For the reasons discussed above, I also disagree with the Court of Appeal's reliance on *Mills-Hughes v. Raynor* (1988), 63 O.R. (2d) 343 (Ont. C.A.), which cited the decision in *Malone Lynch*, *supra* with approval.

40 As I see the matter, when the express words of ss. 40 and 40*a* of the *ESA* are examined in their entire context, there is ample support for the conclusion that the words "terminated by the employer" must be interpreted to include termination resulting from the bankruptcy of the employer. Using the broad and generous approach to interpretation appropriate for benefits-conferring legislation, I believe that these words can reasonably bear that construction (see *R. v. Z. (D.A.)*, [1992] 2 S.C.R. 1025 (S.C.C.)). I also note that the intention of the Legislature as evidenced in s. 2(3) of the *ESSA*, clearly favours this interpretation. Further, in my opinion, to deny employees the right to claim *ESA* termination and severance pay where their termination has resulted from their employer's bankruptcy, would be inconsistent with the purpose of the termination and severance pay provisions and would undermine the object of the *ESA*, namely, to protect the interests of as many employees as possible.

41 In my view, the impetus behind the termination of employment has no bearing upon the ability of the dismissed employee to cope with the sudden economic dislocation caused by unemployment. As all dismissed employees are equally in need of the protections provided by the *ESA*, any distinction between employees whose termination resulted from the bankruptcy of their employer and those who have been terminated for some other reason would be arbitrary and inequitable. Further, I believe that such an interpretation would defeat the true meaning, intent and spirit of the *ESA*. Therefore, I conclude that termination as a result of an employer's bankruptcy does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the *BA* for termination and severance pay in accordance with ss. 40 and 40*a* of the *ESA*. Because of this conclusion, I do not find it necessary to address the alternative finding of the trial judge as to the applicability of s. 7(5) of the *ESA*.

42 I note that subsequent to the Rizzo bankruptcy, the termination and severance pay provisions of the *ESA* underwent another amendment. Sections 74(1) and 75(1) of the *Labour Relations and Employment Statute Law Amendment Act, 1995*, S.O. 1995, c. 1, amend those provisions so that they now expressly provide that where employment is terminated by operation of law as a result of the bankruptcy of the employer, the employer will be deemed to have terminated the employment. However, s. 17 of the *Interpretation Act* directs that, "the repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law." As a result, I note that the subsequent change in the legislation has played no role in determining the present appeal.

6. Disposition and Costs

43 I would allow the appeal and set aside paragraph 1 of the order of the Court of Appeal. In lieu thereof, I would substitute an order declaring that Rizzo's former employees are entitled to make claims for termination pay (including vacation pay due thereon) and severance pay as unsecured creditors. As to costs, the Ministry of Labour led no evidence regarding what effort it made in notifying or securing the consent of the Rizzo employees before it discontinued its application for leave to appeal to this Court on their behalf. In light of these circumstances, I would order that the costs in this Court be paid to the appellant by the Ministry on a party-and-party basis. I would not disturb the orders of the courts below with respect to costs.

Appeal allowed.

Pourvoi accueilli.

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Tab 10

Most Negative Treatment: Check subsequent history and related treatments.

2018 ONCA 313
Ontario Court of Appeal

Schnarr v. Blue Mountain Resorts Limited

2018 CarswellOnt 4786, 2018 ONCA 313, 140 O.R. (3d) 241,
290 A.C.W.S. (3d) 82, 424 D.L.R. (4th) 77, 47 C.C.L.T. (4th) 187

David Schnarr (Plaintiff / Respondent) and Blue Mountain Resorts Limited (Defendant / Appellant)

Elizabeth Woodhouse (Plaintiff / Appellant / Respondent by cross-appeal) and Snow Valley Resorts (1987) Ltd. aka Ski Snow Valley (Barrie), Snow Valley Barrie, Snow Valley Ski Resort, Snow Valley, 717350 Ontario Ltd. (Defendants / Respondents / Appellants by cross-appeal)

Doherty, David Brown, I.V.B. Nordheimer JJ.A.

Heard: February 7-8, 2018
Judgment: March 28, 2018
Docket: CA C63305, C63351

Proceedings: reversing *Schnarr v. Blue Mountain Resorts Ltd.* (2017), [2017] O.J. No. 166, 2017 ONSC 114, 2017 CarswellOnt 373, E.R. Tzimas J. (Ont. S.C.J.); and reversing *Woodhouse v. Snow Valley Resorts (1987) Ltd.* (2017), [2017] O.J. No. 232, 2017 ONSC 222, 2017 CarswellOnt 500, J.R. McCarthy J. (Ont. S.C.J.)

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Peter Pliszka, Zohar Levy, for interveners, Conservation Halton, Credit Valley Conservation, and Toronto Region Conservation
Robert Love, Edona Vila, Samantha Bonanno, for interveners, The Ontario Federation of Snowmobile Clubs and Ontario Cycling Association
Jim Tomlinson, Garett Harper, for intervener, Canadian Defence Lawyers
Thomas Curry, Ahmad Mozaffari, for intervener, Tourism Industry Association of Ontario
Judie Im, Baaba Forson, for intervener, Minister of Government and Consumer Services
Derek Nicholson, for intervener, Ontario Trial Lawyers Association

Subject: Corporate and Commercial; Public; Torts

Headnote

Commercial law --- Trade and commerce — Consumer protection — General principles

Plaintiffs S and W commenced actions against ski resorts, BM and SV, after sustaining injuries — Lift tickets purchased included waivers of liability as permitted under Occupiers' Liability Act (OLA) — S brought R. 21 motion under Rules of Civil Procedure (Rules) and parties agreed there was consumer agreement between S and BM — It was held that waiver under s. 3(3) of OLA partially offended ss. 7(1) and 9(3) of Consumer Protection Act, 2002 (CPA) and as such, waiver, insofar as it purported to waive liability in contract was void and severed from consumer agreement — Similarly, W brought R. 22 of Rules motion and it was held SV's waiver was void in respect of both tort and contract claims; however, court had equitable power to enforce void waiver in consumer agreement pursuant to s. 93(2) of CPA — In both decisions, plaintiffs' claim was accepted that waivers did not exempt ski resorts from statutory obligation under consumer legislation to provide services of "reasonable acceptable quality" — W and BM appealed; SV cross-appealed — BM's appeal and SV's cross-appeal allowed; W's appeal was allowed respecting application of s. 93(2) of CPA — Sections 7 and 9 of CPA fundamentally undermined purpose of s. 3(3) of OLA — Sections under CPA were irreconcilable and conflicted and as such, more specific provision in OLA prevailed over general provisions in CPA.

Statutes --- Interpretation — Miscellaneous

Plaintiffs S and W commenced actions against ski resorts, BM and SV, after sustaining injuries — Through different motions under Rules of Civil Procedure, plaintiffs questioned applicable scope and enforceability of liability waivers executed through purchase of lift tickets and prior to using ski facilities — BM's waiver under s. 3(3) of Occupier's Liability Act (OLA) partially offended ss. 7(1) and 9(3) of Consumer Protection Act, 2002 (CPA) — Similarly, SV's waiver was void in respect of both tort and contract claims; however, court had equitable power to enforce void waiver in consumer agreement pursuant to s. 93(2) of CPA — W and BM appealed; SV cross-appealed — BM's appeal and SV's cross-appeal allowed; W's appeal was allowed respecting application of s. 93(2) of CPA — Based on principles of statutory interpretation, approach allowed both statutes to maintain maximum application and effectiveness — Dealing with each principle, ultimate conclusion was that ss 7 and 9 of CPA do not operate to void otherwise valid waivers under s. 3(3) of OLA — While class of persons is not exhaustive in s. 9(1), CPA does not purport to apply special liability or higher standards of care for actions incidental to role of occupier — Application of special liabilities or higher standards should be read ejusdem generis and restricted to situations similar to enumerated classes in s. 9(1) of CPA — While s. 2(2) of CPA does not include OLA in prescribed list of exempted statutes, presumption is rebuttable — There was no evidence of interplay between CPA and OLA in its legislative drafting and therefore little value in expressio unius est exclusio alterius principle OLA is single, unified statutory duty to take reasonable care to see that entrants and their property are reasonably safe on occupiers' premises — OLA is intended to be exhaustive scheme and its very purpose would be undermined if CPA were allowed to reintroduce another novel contractual duty — OLA deals with ability of occupiers of premises to obtain waivers of liability whereas CPA deals generally with all forms of consumer transactions. OLA deals directly with, and substantially, with activities on premises and this approach carves out consumer transactions, rather than render CPA of no force of effect — It is clear that purposes of OLA was to provide protection to occupiers who permitted persons to come onto their lands for purpose of recreational activities — Fundamental purpose of OLA was defeated by CPA, not through intentional amendment to OLA, but through interpretation of CPA that resulted in indirect and implied amendment.

Table of Authorities

Cases considered by *I.V.B. Nordheimer J.A.*:

BG Checo International Ltd. v. British Columbia Hydro & Power Authority (1993), [1993] 2 W.W.R. 321, [1993] 1 S.C.R. 12, 147 N.R. 81, 75 B.C.L.R. (2d) 145, 99 D.L.R. (4th) 577, 20 B.C.A.C. 241, 35 W.A.C. 241, 14 C.C.L.T. (2d) 233, 5 C.L.R. (2d) 173, 1993 CarswellBC 10, 1993 CarswellBC 1254 (S.C.C.) — considered

Bell ExpressVu Ltd. Partnership v. Rex (2002), 2002 SCC 42, 2002 CarswellBC 851, 2002 CarswellBC 852, 100 B.C.L.R. (3d) 1, [2002] 5 W.W.R. 1, 212 D.L.R. (4th) 1, 287 N.R. 248, 18 C.P.R. (4th) 289, 166 B.C.A.C. 1, 271 W.A.C. 1, 93 C.R.R. (2d) 189, [2002] 2 S.C.R. 559, 2002 CSC 42 (S.C.C.) — considered

Blue Mountain Resorts Ltd. v. Bok (2013), 2013 ONCA 75, 2013 CarswellOnt 1337, 5 C.C.E.L. (4th) 151, (sub nom. *Blue Mountain Resorts Ltd. v. Ontario (Ministry of Labour)*) 114 O.R. (3d) 321, (sub nom. *Blue Mountain Resorts Ltd. v. Ontario (Minister of Labour)*) 302 O.A.C. 124, 359 D.L.R. (4th) 276, [2013] O.L.R.B. Rep. 196 (Ont. C.A.) — followed

Copthorne Holdings Ltd. v. R. (2011), 2011 SCC 63, 2011 CarswellNat 5201, 2011 CarswellNat 5202, 339 D.L.R. (4th) 385, [2012] 2 C.T.C. 29, 2012 D.T.C. 5006 (Fr.), 2012 D.T.C. 5007 (Eng.), (sub nom. *Copthorne Holdings Ltd. v. Minister of National Revenue*) 424 N.R. 132, (sub nom. *Copthorne Holdings Ltd. v. Canada*) [2011] 3 S.C.R. 721 (S.C.C.) — referred to

Dyck v. Manitoba Snowmobile Assn. Inc. (1985), [1985] 1 S.C.R. 589, [1985] 4 W.W.R. 319, 18 D.L.R. (4th) 635, 58 N.R. 144, 35 Man. R. (2d) 22, 32 C.C.L.T. 153, 32 M.V.R. 192, 1985 CarswellMan 180, 1985 CarswellMan 381 (S.C.C.) — considered

Fleming v. Massey (2016), 2016 ONCA 70, 2016 CarswellOnt 924, 128 O.R. (3d) 401, 394 D.L.R. (4th) 647, 344 O.A.C. 279 (Ont. C.A.) — considered

Indalex Ltd., Re (2013), 2013 SCC 6, 2013 CarswellOnt 733, 2013 CarswellOnt 734, D.T.E. 2013T-97, 96 C.B.R. (5th) 171, 354 D.L.R. (4th) 581, 20 P.P.S.A.C. (3d) 1, 439 N.R. 235, 301 O.A.C. 1, 8 B.L.R. (5th) 1, (sub nom. *Sun Indalex Finance LLC v. United Steelworkers)* [2013] 1 S.C.R. 271, 2 C.C.P.B. (2nd) 1 (S.C.C.) — considered

Lévis (Ville) c. Côté (2007), 2007 SCC 14, 2007 CarswellQue 1926, 2007 CarswellQue 1927, (sub nom. *Lévis (City) v. Fraternité des policiers de Lévis Inc.)* 359 N.R. 199, (sub nom. *Lévis (Ville) v. Fraternité des Policiers de Lévis Inc.)* 278 D.L.R. (4th) 577, (sub nom. *Lévis (Ville) v. Fraternité des policiers de Lévis Inc.)* 160 L.A.C. (4th) 1, 35 M.P.L.R. (4th) 1, (sub nom. *Lévis (City) v. Fraternité des policiers de Lévis Inc.)* [2007] 1 S.C.R. 591, 64 Admin. L.R. (4th) 1 (S.C.C.) — referred to

MacKay v. Starbucks Corp. (2017), 2017 ONCA 350, 2017 CarswellOnt 6451, 63 M.P.L.R. (5th) 1, 79 R.P.R. (5th) 171, 413 D.L.R. (4th) 220 (Ont. C.A.) — referred to

Miaskowski (Litigation guardian of) v. Persaud (2015), 2015 ONCA 758, 2015 CarswellOnt 16827, 60 R.P.R. (5th) 1, 393 D.L.R. (4th) 237, (sub nom. *Miaskowski v. Persaud)* 342 O.A.C. 167 (Ont. C.A.) — considered

Miller v. Canada (Attorney General) (2015), 2015 ONSC 669, 2015 CarswellOnt 1145 (Ont. S.C.J.) — considered

R. v. Greenwood (1992), 10 C.R. (4th) 392, 7 O.R. (3d) 1, 70 C.C.C. (3d) 260, 56 O.A.C. 321, 1992 CarswellOnt 67 (Ont. C.A.) — considered

Reference re Broadcasting Act, S.C. 1991 (Canada) (2012), 2012 SCC 68, 2012 CarswellNat 4810, 2012 CarswellNat 4811, 352 D.L.R. (4th) 433, 106 C.P.R. (4th) 241, (sub nom. *Reference re Broadcasting Act)* 437 N.R. 124, [2012] 3 S.C.R. 489 (S.C.C.) — considered

Seidel v. Telus Communications Inc. (2011), 2011 SCC 15, 2011 CarswellBC 553, 2011 CarswellBC 554, 16 B.C.L.R. (5th) 1, (sub nom. *Seidel v. TELUS Communications Inc.)* 329 D.L.R. (4th) 577, [2011] 6 W.W.R. 229, 1 C.P.C. (7th) 221, 412 N.R. 195, 82 B.L.R. (4th) 1, 301 B.C.A.C. 1, 510 W.A.C. 1, [2011] 1 S.C.R. 531 (S.C.C.) — distinguished

Thibodeau c. Air Canada (2014), 2014 SCC 67, 2014 CSC 67, 2014 CarswellNat 4124, 2014 CarswellNat 4125, 74 Admin. L.R. (5th) 1, 377 D.L.R. (4th) 193, (sub nom. *Thibodeau v. Air Canada)* 463 N.R. 231, [2014] 3 S.C.R. 340 (S.C.C.) — followed

Turnbull's Grove Inc. v. Price (2007), 2007 ONCA 408, 2007 CarswellOnt 3494, 58 R.P.R. (4th) 1, (sub nom. *Price v. Turnbull's Grove Inc.)* 225 O.A.C. 1, 85 O.R. (3d) 641 (Ont. C.A.) — referred to

Weller v. Reliance Home Comfort Ltd. Partnership (2012), 2012 ONCA 360, 2012 CarswellOnt 6714, 110 O.R. (3d) 743, 291 O.A.C. 388, 350 D.L.R. (4th) 301 (Ont. C.A.) — distinguished

Statutes considered:

Carriage by Air Act, R.S.C. 1985, c. C-26

Generally — referred to

Consumer Protection Act, 2002, S.O. 2002, c. 30, Sched. A

Generally — referred to

s. 1 "consumer agreement" — considered

s. 2(2) — considered

s. 7 — considered

s. 7(1) — considered

s. 9 — considered

s. 9(1) — considered

s. 9(3) — considered

s. 93 — considered

s. 93(2) — considered

Occupiers' Liability Act, R.S.O. 1990, c. O.2

Generally — referred to

s. 2 — considered

s. 2(2) — considered

s. 3 — considered

s. 3(3) — considered

s. 4(1) — considered

Official Languages Act, R.S.C. 1985, c. 31 (4th Supp.)

Generally — referred to

Ontario Trails Act, 2016, S.O. 2016, c. 8, Sched. 1

Generally — referred to

Residential Tenancies Act, 2006, S.O. 2006, c. 17

Generally — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 21 — referred to

R. 21.01(1)(a) — referred to

R. 22 — referred to

APPEAL by ski resort BM from judgment reported at *Schnarr v. Blue Mountain Resorts Ltd.* (2017), 2017 ONSC 114, 2017 CarswellOnt 373, [2017] O.J. No. 166 (Ont. S.C.J.); APPEAL by plaintiff W and cross-appeal by ski resort SV from judgment reported at *Woodhouse v. Snow Valley Resorts (1987) Ltd.* (2017), 2017 ONSC 222, 2017 CarswellOnt 500, [2017] O.J. No. 232 (Ont. S.C.J.), respecting waiver liabilities and applicability of *Consumer Protection Act, 2002* and *Occupiers' Liability Act*.

***I.V.B. Nordheimer J.A.*:**

1 These two appeals were heard together as they raise common issues. In both cases, the plaintiffs were patrons of the defendant ski resorts who purchased ski tickets. In both cases, those patrons executed the ski resorts' waivers of liability as a condition of their tickets. And in both cases, the patrons were injured on the ski resorts' premises. The patrons sued.

2 On a r. 21 motion under the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 in the case of Mr. Schnarr, the parties agreed that there was a "consumer agreement" (as defined under s. 1 of the *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sched. A ("*CPA*")) between Mr. Schnarr and Blue Mountain Resorts Limited ("Blue Mountain"). On that basis, Tzimas J. held that Blue Mountain's waiver under s. 3(3) of the *Occupiers' Liability Act*, R.S.O. 1990, c. O.2 ("*OLA*") partially offended ss. 7(1) and 9(3) of the *CPA*. She held that Blue Mountain's waiver, insofar as it purported to waive liability in contract, was void and severed from the consumer agreement. In a similar vein, in the case of Ms. Woodhouse on a r. 22 motion, McCarthy J. held that Snow Valley's waiver was void in respect of both tort and contract claims. However, he held that a court nevertheless had the equitable power to enforce a void waiver in a consumer agreement

pursuant to s. 93(2) of the *CPA*. It is important to note that, aside from the agreed statement of facts submitted by the parties, none of the underlying facts have yet been proven in court.

3 Blue Mountain and Ms. Woodhouse appeal. Snow Valley cross-appeals. Foremost, these appeals raise the question of whether the *CPA* or the *OLA* governs the relationship between the parties. Specifically, the appeals present a case of first impression as to whether ss. 7 and 9 of the *CPA* vitiate or void an otherwise valid waiver of liability under s. 3 of the *OLA*, where the party seeking to rely on the waiver is both a "supplier" under the *CPA* and an "occupier" under the *OLA*.

4 In my view, when applied to the instant context, ss. 7 and 9 of the *CPA* fundamentally undermine the purpose of s. 3 of the *OLA*. The statutes are irreconcilable and conflict. As such, and as I shall explain below, the more specific provision in the *OLA* prevails over the general provisions in the *CPA*.[1] I would therefore allow both Blue Mountain's appeal and Snow Valley's cross-appeal for the reasons that follow. On the separate issue of the application of s. 93(2) of the *CPA*, I would also allow Ms. Woodhouse's appeal.

Background Facts — Schnarr v. Blue Mountain Resorts Limited

5 Mr. Schnarr purchased a 2010-2011 season ski pass from Blue Mountain's website on April 29, 2010. As part of his online transaction, Mr. Schnarr executed a Release of Liability Agreement, Waiver of Claims, Assumption of Risk and Indemnity Agreement (the "Blue Mountain waiver").[2]

6 On March 26, 2011, while skiing down a ski run called "Smart Alec", Mr. Schnarr allegedly collided with a piece of debris from a broken ski pole. He lost control, struck a tree, and sustained injuries.

7 The Blue Mountain waiver contained a number of provisions purporting to shield Blue Mountain from certain liabilities and preclude Mr. Schnarr from suing. One heading, set out in bold type in a yellow box with a red border, specifically instructed the customer to "PLEASE READ CAREFULLY!" and cautioned Mr. Schnarr that by executing the document, he was giving up certain legal rights.

8 The waiver specifically provided that in consideration for Blue Mountain accepting his application for a season pass, Mr. Schnarr agreed both to waive any and all claims against the ski area operator and others, and to release them from liability for any damages that he may suffer.

9 On October 13, 2011, Mr. Schnarr commenced an action in negligence against Blue Mountain. Mr. Schnarr claimed general damages in the sum of $200,000 and special damages in the sum of $100,000.

10 On January 4, 2016, Mr. Schnarr amended his statement of claim. Under the heading "Applicable Statutes", he claimed for the first time that the season ski pass was a consumer transaction. He also alleged that Blue Mountain had breached the "reasonably acceptable quality" standard under s. 9(1) of the *CPA*. The particulars of this alleged breach were identical to the alleged breaches of the standard of care in the tort of negligence as advanced in the original statement of claim. In addition, in his amended statement of claim, Mr. Schnarr also pleaded that he was relying on s. 7(1) of the *CPA* to vitiate the entirety of the Blue Mountain waiver. He did not plead any additional or different facts to support his allegation that Blue Mountain failed to provide a reasonably acceptable quality of service.

11 Although the trial was originally scheduled to start in January 2016, Tzimas J. concluded that, due to the amendment of the statement of claim and the novel issue of law raised, the case should first proceed by way of a r. 21 motion. Justice Tzimas ordered a determination of a question of law under r. 21.01(1)(a) based on the pleadings before trial. Justice Tzimas did not receive any evidence other than the parties' agreed statement of facts.

12 On January 6, 2017, Tzimas J. released her reasons on the r. 21 motion. Justice Tzimas held that there was no conflict between the impugned sections of the *CPA* and *OLA*, and that the relevant provisions could be read harmoniously under modern principles of statutory interpretation. She concluded that, by operation of ss. 7(1), 9(1), and 9(3) of the *CPA*, the defendant could not disclaim liability for any breach of the deemed warranty of providing services of a "reasonably

acceptable quality". She went on to determine that Mr. Schnarr would be allowed to advance two distinct causes of action: one for negligence and the second for breach of warranty. She found that the negligence claim would be subject to the Blue Mountain waiver but that the breach of warranty claim would not be subject to that waiver since the portions purporting to waive liability for breach of warranty would be void and severed under ss. 9(3) and (4) of the *CPA*.

13 Blue Mountain appeals from that decision.

Background Facts — Woodhouse v. Snow Valley

14 On December 23, 2008, Ms. Woodhouse went skiing with her husband and grandson at Snow Valley. Ms. Woodhouse purchased a beginner ski package from Snow Valley, which included a lift ticket, equipment rental, and a lesson.

15 The lift ticket itself contained a Release of Liability. Moreover, Ms. Woodhouse was also required to execute a Rental Agreement and Release of Liability on December 23, 2008 when she purchased the beginner ski package (the "Snow Valley waiver"). [3] That document contains a section entitled "Waiver of Claims".

16 The release on the lift ticket and the content of the Snow Valley waiver were never explained by Snow Valley to Ms. Woodhouse. However, prior to attending Snow Valley on December 23, 2008, Ms. Woodhouse reviewed the Snow Valley waiver's wording on Snow Valley's website. Nevertheless, Ms. Woodhouse was neither informed of nor aware of the *CPA* or any rights it afforded her on or prior to December 23, 2008.

17 After signing the Snow Valley waiver, Ms. Woodhouse and her family took a ski lesson on December 23, 2008. After the ski lesson, Ms. Woodhouse and her family used the ski facilities for several hours. Ultimately, while using a tow rope, Ms. Woodhouse allegedly sustained injuries.

18 On May 9, 2012, Ms. Woodhouse commenced an action in negligence for the injuries that she suffered. The parties eventually agreed to bring a r. 22 special case motion that raised five questions of law, all relating to the applicability of the *CPA* to Ms. Woodhouse's injuries allegedly sustained at Snow Valley.

19 On January 13, 2017, McCarthy J. released his reasons on the r. 22 special case motion. He held that the *CPA* applied to the instant case. Consequently, he concluded that the Snow Valley waiver was presumptively void and, therefore, Ms. Woodhouse was entitled to proceed with her claim. Importantly, McCarthy J. held that s. 9 of the *CPA* voided the Snow Valley waiver in respect of both tort and contract claims. Justice McCarthy found that the *OLA*'s provisions did not supersede the *CPA*'s. However, he also held that a court could nonetheless order that Ms. Woodhouse was bound by the Snow Valley waiver by virtue of s. 93(2) of the *CPA*.

20 Ms. Woodhouse appeals from the McCarthy J.'s conclusion regarding the applicability of s. 93(2) of the *CPA*. Snow Valley cross-appeals from the conclusion that s. 9 of the *CPA* voids an otherwise valid waiver under s. 3 of the *OLA*.

Issues on Appeal

21 The parties framed their grounds of appeal in various ways. However, in my view, they can all be grouped into the following broad issues:

(a) Does s. 9 of the *CPA* conflict with s. 3 of the *OLA*, or can the impugned provisions be read harmoniously?

(b) If they conflict, how should each statute be interpreted and what effect should be given to the impugned provisions?

(c) In any event, does s. 93(2) of the *CPA* allow a court to hold a consumer bound to a voided waiver under s. 9(3) of the *CPA*?

Analysis

22 At the outset, I note that the parties agree that the statutory interpretation issues raised by these appeals involve questions of law and thus the standard of review is correctness.

23 With respect to the general principles of statutory interpretation, the Supreme Court has repeatedly reaffirmed the modern approach espoused in E. A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983), at p. 87 that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 (S.C.C.), at para. 26; and *Indalex Ltd., Re*, 2013 SCC 6, [2013] 1 S.C.R. 271 (S.C.C.), at para. 136. I analyze both statutes in greater detail below to explain the relevant scheme and objects of the *OLA* and *CPA*, as well as the legislative intent.

(i) Occupiers' Liability Act

24 I begin with the origins of the *OLA*. The *OLA* came into force in 1980. It was enacted following the Ontario Law Reform Commission's 1972 *Report on Occupiers' Liability*, which recommended that the common law duty of care owed by occupiers [4] be replaced with one generalized statutory duty.

25 That recommendation came into effect with the passage of the *OLA*. It is evident from the provisions of the *OLA* that the legislation was intended to establish a single primary duty of care that an occupier would owe to persons entering upon their premises. Section 3 of the *OLA* also prescribes a default standard of care that requires an occupier to take such care as is reasonable in the circumstances to keep entrants and their property reasonably safe on the premises. The breach of that statutory standard of care would make the occupier liable for injuries sustained by those entrants. As Lewis N. Klar and Cameron Jeffries say in their text, *Tort Law*, 6th ed. (Toronto: Thomson Reuters, 2017), at p. 723:

> It seems irrefutable that the legislation was intended to be exclusive and comprehensive, in so far as the liability of occupiers is concerned.

26 This intention is made clear by s. 2 of the *OLA* which reads:

> Subject to section 9, this Act applies in place of the rules of the common law that determine the care that the occupier of premises at common law is required to show for the purpose of determining the occupier's liability in law in respect of dangers to persons entering on the premises or the property brought on the premises by those persons.

27 The two critical sections of the *OLA*, for the purpose of these appeals, are ss. 3 and 4. I refer to the following portions of those two sections:

> 3(1) An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises.
>
> (2) The duty of care provided for in subsection (1) applies whether the danger is caused by the condition of the premises or by an activity carried on on the premises.
>
> (3) The duty of care provided for in subsection (1) applies except in so far as the occupier of premises is free to and does restrict, modify or exclude the occupier's duty.
>
> 4(1) The duty of care provided for in subsection 3(1) does not apply in respect of risks willingly assumed by the person who enters on the premises, but in that case the occupier owes a duty to the person to not create a danger with the deliberate intent of doing harm or damage to the person or his or her property and to not act with reckless disregard of the presence of the person or his or her property.

28 When considering the purpose of the *OLA*, it is of some importance to recognize that part of the rationale for including s. 4 in the statute was to encourage private landowners to voluntarily make their property available for recreational activities by limiting their liability. This was made clear in the *Discussion Paper on Occupiers' Liability and Trespass to Property* issued by the Ministry of the Attorney General in May 1979. It was also referred to by Allen M. Linden and Bruce Feldthusen in their text, *Canadian Tort Law*, 10th ed. (Toronto: LexisNexis Canada, 2015), at]§18.66:

> This provision was included for the purpose of protecting the interests of the agricultural community and to promote the availability of land for recreational activities. The Ontario Law Reform Commission's draft Act did not contain this particular section.
>
> [Citation omitted.]

29 Moreover, although s. 3(1) of the *OLA* prescribes the primary duty and standard of care, the *OLA* also expressly preserves situations where a higher obligation or standard may apply because of specific legislation or the common law under s. 9(1):

> Nothing in this Act relieves an occupier of premises in any particular case from any higher liability or any duty to show a higher standard of care that in that case is incumbent on the occupier by virtue of any enactment or rule of law imposing special liability or standards of care on particular classes of persons including, but without restricting the generality of the foregoing, the obligations of,
>
> (a) innkeepers, subject to the *Innkeepers Act*;
>
> (b) common carriers;
>
> (c) bailees.

30 Thus, while the Legislature left to itself the right to establish a higher liability or duty of care for occupiers in specific situations, it did not see fit to amend the *OLA* to include obligations under the *CPA*. Moreover, as I will explain in my reasons below, the potentially "higher" obligations under s. 9 of the *CPA* cannot be read into this section.

(ii) Consumer Protection Act

31 I now turn to the origins of the *CPA*. The *CPA* was enacted in 2002. It was adopted to modernize consumer law in Ontario. Prior to the enactment of the *CPA*, consumer protection was found in nine different statutes. The purpose of the *CPA* was to consolidate those statutes and update the law to provide protections for newer businesses and newer forms of transactions that were entering the marketplace.

32 Two sections of the *CPA* are of particular importance to these appeals. One is s. 7(1) which reads:

> The substantive and procedural rights given under this Act apply despite any agreement or waiver to the contrary.

The other is s. 9 which reads in relevant parts:

> 9(1) The supplier is deemed to warrant that the services supplied under a consumer agreement are of a reasonably acceptable quality.
>
> [. . .]
>
> (3) Any term or acknowledgement, whether part of the consumer agreement or not, that purports to negate or vary any implied condition or warranty under the *Sale of Goods Act* or any deemed condition or warranty under this Act is void.

> (4) If a term or acknowledgement referenced in subsection (3) is a term of the agreement, it is severable from the agreement and shall not be evidence of circumstances showing an intent that the deemed or implied warranty or condition does not apply.

33 With respect to these sections, I should note that there is no disagreement between the parties that the plaintiffs are consumers, the defendants are suppliers, and that the contracts that they entered into are consumer agreements.

34 Prior to the enactment of the *CPA*, the Ministry of Consumer and Commercial Relations (now the Ministry of Government and Consumer Services, the "Ministry") circulated a consultation paper entitled "Consumer Protection for the 21 st Century". It explained the reasoning behind the proposed enactment of the *CPA*. Two salient facts can be drawn from that consultation paper.

35 First, Proposal 4(a) at p. 9 of the consultation paper points out that "consumer law should not apply to transactions already governed under regulatory regimes that adequately address consumer protection." The paper expands on this point, at pp. 9-10:

> Although any transaction in which individuals pay for anything is in some sense a consumer transaction, there are <u>several areas in which other specialized legal regimes apply instead of consumer law</u> [. . .] <u>The Ministry is not proposing that general consumer law apply to these sectors.</u>
>
> The proposed broader definition of consumer transactions would also call into question its application to areas that are already regulated by industry- and sector-specific legislation . . .
>
> In such cases, having two applicable legal regimes could be confusing, both for the public and the regulated sector. Similarly, having two regulatory bodies creates duplication . . .
>
> [Emphasis added.]

36 Second, the consultation paper discusses all of the industry and sector specific concerns that drove the goal of introducing new consumer protection legislation. Yet there is no commentary at any point in the consultation paper that identifies problems with the current state of legislation relating to occupiers, or problems with consumer transactions involving occupiers insofar as they provide their premises for the use of consumers engaging in recreational activities.

37 Indeed, on a fair reading of the consultation paper and the *CPA* itself, it is evident that the principal concern was with respect to financial transactions, and the potential for scams to operate to the detriment of consumers. There is nothing to suggest that changing the existing framework governing liability for personal injuries sustained by persons availing themselves of premises for recreational activities was in any way an objective of the *CPA*.

38 Mr. Schnarr and Ms. Woodhouse, and the intervener Ministry, point to the fact that the *CPA* exempts certain statutes under s. 2(2) and the *OLA* is not one of them. The thrust of this argument is based on *expressio unius est exclusio alterius*. However, as I will explain in my reasons below, the principle that things are implicitly excluded when others are expressly enumerated is not an absolute rule. Key to this analysis is the fact that when one looks at the types of exemptions provided by the *CPA*, both in s. 2(2) and in O. Reg. 17/05, it is clear that they are primarily directed at financial transactions and professional services. They are not directed at the type of activities covered by the *OLA*.

39 There is nothing in the background to the passage of the *CPA*, or in the provisions of the *CPA* itself, that would suggest that it was intended to regulate duties of care of the type stipulated by the *OLA*, or that it was intended to regulate liability arising from the use of premises that are subject to the *OLA*. This conclusion is consistent with the consultation paper, which makes it clear that it was not the intention of the *CPA* to apply to areas that were "already regulated by industry- and sector-specific legislation."

40 Having set out the background objects of the *CPA* and the *OLA*, I turn now to analyze whether they conflict.

(a) Does s. 9 of the CPA conflict with s. 3 of the OLA?

41 The Supreme Court set out the principles of statutory interpretation with respect to the analysis of conflicting statutes in *Thibodeau c. Air Canada*, 2014 SCC 67, [2014] 3 S.C.R. 340 (S.C.C.), at paras. 88ff. In that case, Air Canada failed to provide services in French on some international flights as required under the *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.). The applicant applied to the Federal Court for a remedy of damages but Air Canada contended that the *Carriage by Air Act*, R.S.C. 1985, c. C-26 precluded such liability. In analyzing whether a conflict existed between the two statutes, the Supreme Court held at para. 92:

> First, courts take a restrictive approach to what constitutes a conflict in this context. Second, courts find that there is a conflict only when the existence of the conflict, in the restrictive sense of the word, cannot be avoided by interpretation. Overlap on its own, does not constitute conflict in this context, so that even where the ambit of two provisions overlaps, there is a presumption that they both are meant to apply, provided that they can do so without producing absurd results. This presumption may be rebutted if one of the provisions was intended to cover the subject matter exhaustively. Third, only where a conflict is unavoidable should the court resort to statutory provisions and principles of interpretation concerned with which law takes precedence over the other.

42 I recognize that the above rules of statutory interpretation urge an approach that avoids a finding that two statutes conflict. This approach is premised upon the "presumption of perfection". [5] However, those interpretive rules still recognize that conflicts will arise. For example, courts have held that a conflict between two statutes arises where:

> (a) provisions are so inconsistent or "repugnant" to each other that they are "incapable of standing together" (*Reference re Broadcasting Act, S.C. 1991 (Canada)*, 2012 SCC 68, [2012] 3 S.C.R. 489 (S.C.C.), at paras. 41-45);
>
> (b) the application of one provision must implicitly or explicitly preclude the application of another (*Lévis (Ville) c. Côté*, 2007 SCC 14, [2007] 1 S.C.R. 591 (S.C.C.), at paras. 48-49); or
>
> (c) two pieces of legislation are "directly contradictory or where their concurrent application would lead to unreasonable or absurd results" (*Lévis*, at para. 47 and *Thibodeau*, at para. 95).

43 In this case, as I have already alluded to, there is a clear and direct conflict between the *OLA* and the *CPA* — and it is an unavoidable one. The *OLA* permits an occupier to obtain a waiver of liability. The *CPA* precludes a supplier from obtaining a waiver of liability. In other words, what the *OLA* permits, the *CPA* prohibits.

44 The problem with the presumption of perfection is, of course, that it ignores the practical realities in which legislation is enacted. As Ruth Sullivan says in her text, *Sullivan on the Construction of Statutes*, 6th ed. (Toronto: LexisNexis Canada, 2014), at 11.32:

> This analysis ignores the realities of the way legislation is made and the way the statute book evolves. It ignores, for example, the fact that legislative schemes are developed, introduced and implemented by different departments with different legislative priorities. It ignores the tight timelines and political pressures under which much legislation is drafted.

45 That observation has direct application to the situation here. The *OLA* is administered by the Ministry of Tourism, Culture and Sport. The *CPA* is administered by the Ministry of Government and Consumer Services. The two statutes were enacted by two different governments more than twenty years apart. Further, as I mentioned above, there is nothing in the consultation paper relating to the *CPA*, or otherwise in the record before this court, that suggests that, in enacting the *CPA*, any consideration was given to the *OLA* or to the impact that any of the provisions in the *CPA* might have on the *OLA*.

46 Mr. Schnarr and Ms. Woodhouse try to avoid the reality of a conflict between the statutes by submitting that there is a distinction between the ability of a party to sue either in contract or in tort. On that point, with due respect to Tzimas J., suggesting that the waiver is valid with respect to the tortious negligence claims, but invalid with respect to the contractual warranty claims, is a distinction without a difference. In this regard, Mr. Schnarr and Ms. Woodhouse relied heavily on the decision in *BG Checo International Ltd. v. British Columbia Hydro & Power Authority*, [1993] 1 S.C.R. 12 (S.C.C.). With respect, that decision does not support their position because they mischaracterize the nature of the issue that was engaged in that case. There is no doubt that the decision in *BG Checo* holds that a party has the choice whether to sue in contract or in tort. Indeed, they may decide to sue in both. No one disputes that principle.

47 In this case, however, we are not dealing solely with duties arising from tort or contract. Here we are dealing with a duty of care imposed by statute: *MacKay v. Starbucks Corp.*, 2017 ONCA 350, 413 D.L.R. (4th) 220 (Ont. C.A.), at paras. 10 and 46. It is the *OLA*'s statutorily imposed duty that all occupiers must meet, regardless of whether the occupier has a relationship with an injured party that is founded in contract or in tort. The decision in *BG Checo* does not assist Mr. Schnarr and Ms. Woodhouse in this regard. Indeed, it arguably assists Blue Mountain and Snow Valley because the decision recognizes that parties can contractually alter the rights that might otherwise be imposed upon them by the common law. As LaForest and McLachlin JJ. said, at p. 27:

> The rule is not that one cannot sue concurrently in contract and tort where the contract limits or contradicts the tort duty. It is rather that the tort duty, a general duty imputed by the law in all the relevant circumstances, must yield to the parties' superior right to arrange their rights and duties in a different way.

48 The *OLA* permits an occupier to "restrict, modify or exclude" the duty imposed by the statute regardless of whether a claim is founded in contract or in tort. The waivers in the instant appeals dealt with both Blue Mountain's and Snow Valley's contractual and tort obligations. The effort to avoid a conflict between the statutes on the basis that the *OLA* deals with tort liability and the *CPA* deals with contractual liability is not only artificial, it does not reflect the fact that the duty of care originates from the statute itself, nor does it take into account that the statute allows for the modification of the duty and liability arising therefrom. Moreover, adopting such a restricted interpretation of s. 3(3) of the *OLA* would go against the development trends in private law. As the majority noted in *BG Checo*, at p. 21, "the law should move towards the elimination of unjustified differences between the remedial rules applicable to the two actions [tort versus contract], thereby reducing the significance of the existence of the two different forms of action".

49 Indeed, I agree with Tzimas J.'s observation, at para. 99 of her reasons:

> On their face, the statutes take different approaches to waivers. This is so because they have very different legislative purposes. Waivers in the OLA are designed to shield occupiers. The rejection of waivers in the CPA is designed to shield consumers. A conflict in the application of both statutes arises when consumers clash with suppliers who are also occupiers.

50 In my view, despite Mr. Schnarr's and Ms. Woodhouse's best efforts to advance the contrary proposition, there can be no reasonable conclusion other than that the two statutes conflict when one attempts to apply them to occupiers under the *OLA* who also happen to be suppliers under the *CPA*. Simply put, under the *OLA*, an occupier can obtain a waiver of liability (within limits as defined by the common law) [6] from any person coming onto their premises. However, that same occupier, if they are also a supplier under the *CPA*, cannot obtain an equivalent waiver. This, despite the fact that the factual foundation for both tort and contract causes of action are the same. A plain reading of the amended statements of claim allows for no other conclusion.

51 As the instant appeals amply demonstrate, the result is a clear conflict. On the one hand, Blue Mountain and Snow Valley have lawful waivers that would exclude their liability for the injuries suffered by Mr. Schnarr and Ms. Woodhouse, respectively, and yet they are told that those waivers are of no effect by virtue of the *CPA*. It is of no practical comfort to Blue Mountain and Snow Valley to be told that their waivers protect them from the negligence claims but not from the

warranty claims. The result for the ski resorts is the same. They will be held liable for something that they thought they had lawfully protected themselves against. In my view, such a result is both a direct contradiction and an absurd result.

(b) If the CPA and the OLA conflict, how should the conflict be resolved?

52 The principles of statutory interpretation urge an approach that allows both statutes to maintain their maximum application and effectiveness. The principles affecting the analysis with respect to which statute should take precedence include:

(i) where a class of things is modified by general wording that expands the class, the general wording is usually restricted to things of the same type as the listed items (*ejusdem generis*);

(ii) when one or more things of a class are expressly mentioned, others of the same class are excluded (*expressio unius est exclusio alterius)*;

(iii) the exhaustiveness doctrine;

(iv) the provisions of a general statute must yield to those of a special one (*generalia specialibus non derogant*); and

(v) the absurdity doctrine.

53 I will discuss each in turn.

Class of things

54 Section 9(1) of the *OLA* provides that the statute does not restrict the imposition of a higher liability or standard of care upon occupiers. It provides innkeepers, common carriers, and bailees as examples of where a higher liability or standard of care would apply even if those classes of persons are simultaneously occupiers. The class of persons is not exhaustive in s. 9(1). However, in my view, the type of situations that would impose a "special liability or standards of care" on occupiers under s. 9(1) should be read *ejusdem generis* and be restricted to situations that are similar to the enumerated examples.

55 Indeed, the situations in which Ontario courts have imposed a higher standard of care upon an occupier are squarely analogous to the enumerated classes in s. 9(1). For example, in *Miaskowski (Litigation guardian of) v. Persaud*, 2015 ONCA 758, 393 D.L.R. (4th) 237 (Ont. C.A.), at para. 40, this court held that occupiers who are also landlords remain subject to the duties imposed on landlords under the *Residential Tenancies Act, 2006*, S.O. 2006, c. 17. And in *Miller v. Canada (Attorney General)*, 2015 ONSC 669 (Ont. S.C.J.), at para. 24, Leach J. held that the Crown's duty to take reasonable and adequate measures to protect an inmate from a reasonably foreseeable risk of injury and predictable dangers supplemented the Crown's duties under the *OLA* as an owner and occupier of penitentiaries.

56 The *CPA* does not purport to apply a special liability or higher standard of care for actions that are incidental to the role of an occupier. Rather, the *CPA* seeks to regulate the entirely separate category of consumer transactions between a supplier and consumer. As such, reading the section pursuant to the principle of *ejusdem generis*, it is clear that the application of any special liabilities or higher standards imposed by the *CPA* were not meant to be preserved under s. 9(1) of the *OLA*.

Express mention

57 As alluded to above, the fact that s. 2(2) of the *CPA* and its subordinate regulations do not include the *OLA* in its prescribed list of exemptions is not the end of the matter. The interpretive rule that the express mention of one thing means the implied exclusion of another is rebuttable, and has not been accepted by the courts where the proposed interpretation disregards the underlying objectives of the statute: *Copthorne Holdings Ltd. v. R.*, 2011 SCC 63, [2011] 3

S.C.R. 721 (S.C.C.), at para. 111. Indeed, this court has cautioned against overreliance on the maxim: *Fleming v. Massey*, 2016 ONCA 70, 128 O.R. (3d) 401 (Ont. C.A.), at paras. 41-43.

58 In these appeals, there is no evidence in the record that in drafting the *CPA* and the *OLA*, the Legislature turned its mind to the interplay of these two statutes. There is no basis for expecting an express reference to the *OLA* in the *CPA*'s exemptions. As such, there is little value to the *expressio unius* argument in these appeals and it provides no basis to infer that the Legislature intended for the *CPA* to supersede the *OLA*.

Exhaustiveness

59 As mentioned above, the *OLA* was a statutory scheme that replaced the common law with respect to occupiers' liability. Significantly, it replaced the different common law standards of care applicable to entrants on premises (including contractual entrants) with a single, unified statutory duty to take reasonable care to see that entrants and their property are reasonably safe on the occupiers' premises. Furthermore, the *OLA* expressly allows for the restriction, modification, or exclusion of the statutory duty.

60 In my view, the *OLA* was therefore intended to be an exhaustive scheme at least in relation to the liability of occupiers to entrants on their premises flowing from the maintenance or care of the premises. The very purpose of this legislative scheme would be undermined if the *CPA* were allowed to reintroduce another novel contractual duty that purports to subject occupiers to an obligation to warrant that their premises are of a "reasonably acceptable quality". As such, the fact that s. 9 of the *CPA* undermines the very purpose of the *OLA* is a factor that militates towards holding that the *OLA* supersedes the *CPA*.

Specific overrules general

61 I appreciate that determining whether legislation is general or specific can be a difficult, and perhaps a somewhat theoretical, exercise. Indeed, it may very well be driven by the vantage point of the observer who is asked to make the determination. The arguments made by the parties in these appeals reflect that divergence.

62 However, in my view, in this factual situation, the *OLA* must be reasonably seen as dealing directly with the core issue, that is, the ability of occupiers of premises to obtain waivers of liability. In contrast, the *CPA* deals generally with all forms of consumer transactions. Buying a ski pass is but one of a myriad of consumer transactions to which the *CPA* could apply. The *OLA*, on the other hand, deals directly, and substantially, with activities on premises (as defined), including the operation of recreational activities on premises. Indeed, as I have explained above, part of the rationale for permitting occupiers to obtain waivers of liability was to promote the use of their properties by others for those very activities.

63 Adopting this approach does not invalidate the *CPA* or otherwise render it of no force or effect. Rather, this result simply recognizes that the *OLA* carves out consumer transactions that relate to activities covered by the *OLA* from the application of the *CPA*. Put another way, to the extent that an occupier engages with members of the public for the use of the occupier's premises in return for payment, and thus creates a consumer agreement, the provisions of the *CPA* do not apply to that agreement. At the same time, insofar as parties who are occupiers engage with members of the public and create consumer transactions that do not relate to "persons entering on premises or the property brought on the premises by those persons" (*OLA*, s. 2), then the *CPA* would still apply to those consumer transactions.

64 This result is consistent with the approach taken in *R. v. Greenwood* (1992), 7 O.R. (3d) 1, 70 C.C.C. (3d) 260 (Ont. C.A.) where, in commenting on the application of the principle of *generalia specialibus non derogant*, Griffiths J.A. said, at p. 266:

> Applying this maxim of construction, the provisions of the special statute are not construed as repealing the general statute, but as providing an exception to the general.

Avoiding absurdity

65 The application of the principle that the specific overrules the general, along with the exhaustiveness principle in these appeals is also consistent with the objective of avoiding an absurdity, which is what I view the positions adopted by the motion judges below to result in. It is clear that one of the purposes of the *OLA* was to provide protection to occupiers who permitted persons to come onto their lands for the purpose of recreational activities. The result of the decisions below is that one of the fundamental purposes of the *OLA* is defeated, not through an intentional amendment to the *OLA*, but through an interpretation of the *CPA* that results in an indirect and implied amendment.

66 I am reinforced in my conclusion in this regard by the actions of the Legislature in 2016 when it enacted the *Ontario's Trails Act, 2016*, S.O. 2016, c. 8, Sched. 1. This legislation, among other things, amended the *OLA* to provide protection to occupiers who permitted their premises to be used by members of the public for recreational trails, including hiking, portaging, or snowmobiling trails. These amendments resulted from concerns expressed by landowners of being exposed to liability as a result of allowing access to trails on their land. Volunteer non-profit clubs and associations taking care of those trails also voiced similar concerns.

67 The Minister of Tourism, Culture and Sport explained the purpose of the legislation at the time that it was being debated. He said, in part:

> One of the key pieces to this legislation is increasing the number of trail users by adding clarity to the Occupiers' Liability Act. That's an important piece that we think needs to be put in place here in Ontario. We know that trail tourism in the province of Ontario is part of a larger tourism sector in the province, which is a $28-billion; sector.
>
> [. . .]
>
> Currently there exists some legal ambiguity around what standard of care is owed to the users of trails. For example, if an ATV club charges membership fees for coordinating rides on a portion of an Ontario trail network, it is legally questionable what level of care is required from the business and from the owner of the trail. If Bill 100 is passed, it will clarify legislation, encouraging further participation between businesses and the owners of trails.

68 It is difficult to accept that the Legislature went through the exercise of amending the *OLA* for the purpose of clarifying the liability of occupiers, and to encourage them to open their property for use by members of the public, all to have it rendered of no force or effect because of the existence of the *CPA*. Indeed, the fact that the Legislature, in this instance, amended the *OLA* to address liability issues surrounding the recreational use of property, with no mention of or reference to the *CPA*, strikes me as clear evidence that the Legislature did not view the *CPA* as having any role to play in this area.

69 The conclusion that the *CPA* does not operate within the sphere of activities governed by the *OLA* does not undercut the effectiveness of the *CPA*, nor does it offend public policy. Rather, it allows for the commercial flexibility necessary to promote the goal of encouraging landowners to permit their premises to be used for recreational activities. This objective was noted by the Supreme Court in *BG Checo*, where La Forest and McLachlin JJ. said, at p.27:

> This principle is of great importance in preserving a sphere of individual liberty and commercial flexibility. Thus if a person wishes to engage in a dangerous sport, the person may stipulate in advance that he or she waives any right of action against the person who operates the sport facility: *Dyck v. Manitoba Snowmobile Assn. Inc.*, [1985] 1 S.C.R. 589 (S.C.C.).

70 I note that, in *Dyck*, the court held that there were no grounds of public policy that would lead to the striking down of a waiver of claims clause.

71 This conclusion also does not offend the principle that consumer protection legislation should be interpreted generously. That principle only applies where the legislation operates validly. It does not apply to expand the jurisdiction

of consumer protection legislation to occupy an area that is already covered by other specific legislation. Decisions such as *Seidel v. Telus Communications Inc.*, 2011 SCC 15, [2011] 1 S.C.R. 531 (S.C.C.) and *Weller v. Reliance Home Comfort Ltd. Partnership*, 2012 ONCA 360, 110 O.R. (3d) 743 (Ont. C.A.) do not assist in determining the central point at issue in these appeals.

72 Finally, this conclusion is also consistent with the principle that broad language in legislation may be given a restricted interpretation where necessary in order to avoid an absurdity. As Blair J.A. said in *Blue Mountain Resorts Ltd. v. Bok*, 2013 ONCA 75, 114 O.R. (3d) 321 (Ont. C.A.), at para. 51:

> It is also consistent with the principle that broad language in a statute may be given a somewhat restricted interpretation where necessary in order to avoid absurdity and to give the words their appropriate meaning, having regard to their context, the purpose of the Act, and the intention of the Legislature.

73 As such, I would conclude that ss. 7 and 9 of the *CPA* do not operate to void otherwise valid waivers executed under s. 3(3) of the *OLA*.

(c) Does s. 93(2) of the CPA allow a court to hold a consumer bound to a voided waiver under s. 9(3)?

74 Ms. Woodhouse's appeal raises a separate issue with respect to McCarthy J.'s conclusion that s. 93(2) of the *CPA* might be used as a mechanism to hold a consumer to a waiver of liability, even if s. 9(3) of the *CPA* voided the waiver. While Tzimas J. did not make any direct finding on this issue, I believe a fair reading of her reasons suggests that she reached the opposite conclusion. While it is technically unnecessary for me to address this issue in light of my conclusions above, I will deal with it for the sake of completeness, especially since the issue was fully argued by the parties. I believe that the issue can be dealt with briefly.

75 Section 93 of the *CPA* reads:

> > (1) A consumer agreement is not binding on the consumer unless the agreement is made in accordance with this Act and the regulations.
> >
> > (2) Despite subsection (1), a court may order that a consumer is bound by all or a portion or portions of a consumer agreement, even if the agreement has not been made in accordance with this Act or the regulations, if the court determines that it would be inequitable in the circumstances for the consumer not to be bound.

76 In concluding that the court could rely on s. 93(2) to hold a consumer to a waiver of liability, notwithstanding that such waiver would be void under s. 9 of the *CPA*, McCarthy J. said, at para. 43 of his reasons:

> I conclude therefore, that in situations where a consumer agreement contains terms or acknowledgments rendered presumptively void by operation of s. 9(3) and where the parties cannot agree to sever those offending terms from the consumer agreement under s. 9(4), the court may exercise its jurisdiction to sever the offending terms of the consumer agreement. It may do so as part of its s. 93(2) inquiry into whether it would be inequitable in the circumstances for the consumer not to be bound by the original agreement, including those terms and acknowledgments that would be void but for the equitable jurisdiction of the court.

77 In my view, the motion judge erred in so concluding. The purpose behind s. 93(2) is to avoid situations where a consumer, who has received the benefit of a consumer agreement, attempts to retain those benefits without performing his or her side of the agreement because of a technical breach of the *CPA*. Section 93(2) is not intended to permit the court to hold a consumer to a consumer agreement that violates one of the basic tenets of the *CPA*, especially when the provision is void.

78 In that regard, it is important to observe, and give effect to, the exact wording of s. 9(3) of the *CPA*. It reads:

> Any term or acknowledgement, whether part of the consumer agreement or not, that purports to negate or vary any implied condition or warranty under the *Sale of Goods Act* or any deemed condition or warranty under this Act is void.

79 Two points can be taken from that wording. One is that it applies to any term or acknowledgment whether it is part of the consumer agreement or not. Thus, s. 9(3) has a very broad reach. It is clear that it was intended to catch any attempt to negate or vary the deemed warranty provided by s. 9(1) of the *CPA*, even if the attempt is outside of the consumer agreement itself. The other is that s. 9(3) renders any such term or acknowledgement void. A term that is void is a term that is a nullity. It is different in kind from a term that is voidable. A term that is void has no legal force or effect and there is nothing to be saved by a curative provision: *Turnbull's Grove Inc. v. Price*, 2007 ONCA 408, 85 O.R. (3d) 641 (Ont. C.A.), at paras. 34-37.

80 Adopting a purposive interpretation of the *CPA*, there is nothing that would suggest that the Legislature intended that, notwithstanding the direct language used in s. 9(3), courts would be able to hold a consumer to a waiver of the deemed warranty provided by s. 9(1) of the *CPA*. Indeed, it would be hard to conceive of a factual situation where it would be equitable to do so in light of the fundamental purpose of the *CPA*.

81 I conclude therefore that s. 93(2) cannot be used to give effect to a waiver that is voided by s. 9(3) of the *CPA*.

Conclusion

82 The two appeals and the cross-appeal are all allowed. The orders below are set aside. Mr. Schnarr is bound by the Blue Mountain waiver and Ms. Woodhouse is bound by the release in her lift ticket and the Snow Valley waiver. This is so regardless of whether their claims are in tort or for breach of warranty. The proceedings are remitted back to the Superior Court of Justice to proceed in accordance with these reasons.

83 The parties may make written submissions on the matter of costs. Blue Mountain and Snow Valley shall file their submissions within 10 days of the release of these reasons. Mr. Schnarr and Ms. Woodhouse shall file their submissions within 10 days thereafter. No reply submissions are to be filed without leave of the court. None of the costs submissions shall exceed five pages in length.

84 There will be no order for costs either in favour of or against any of the interveners.

***Doherty J.A.*:**

I agree.

***David Brown J.A.*:**

I agree.

Appeals and cross-appeal allowed.

Appendix A — Blue Mountain Waiver

RELEASE OF LIABILITY AGREEMENT, WAIVER OF CLAIMS, ASSUMPTION OF RISKS AND INDEMNITY AGREEMENT
BY AGREEING TO THE TERMS OF THIS DOCUMENT YOU WILL WAIVE CERTAIN LEGAL RIGHTS, INCLUDING THE RIGHT TO SUE
PLEASE READ CAREFULLY!

1. **TO WAIVE ANY AND ALL CLAIMS** that I have or may in the future have against the **SKI AREA OWNERS AND OPERATORS** and Blue Mountain Ski Club (1940)Inc., and the Terrain Park sponsor and its affiliates and their respective directors, officers, employees, agents, representatives, successors and assigns (all of whom are hereinafter collectively referred to as "THE RELEASEES"), and **TO RELEASE THE RELEASEES** from any and all liability for any loss, damage, expense or injury including death that I may suffer, or that my next of kin may suffer resulting from either my use of or my presence on the Facilities or travel beyond the ski area boundary, DUE TO ANY CAUSE WHATSOEVER, INCLUDING NEGLIGENCE, BREACH OF CONTRACT, OR BREACH OF ANY STATUTORY OR OTHER DUTY OF CARE, INCLUDING ANY DUTY OF CARE OWED UNDER THE **OCCUPIERS' LIABILITY ACT**, ON THE PART OF THE RELEASEES, AND ALSO INCLUDING THE FAILURE ON THE PART OF THE RELEASEES TO SAFEGUARD OR PROTECT ME FROM THE RISKS, DANGERS AND HAZARDS OF SKIING AND SNOWBOARDING REFERRED TO ABOVE;

Appendix B — Snow Valley Waiver

The "Fine Print" ... PLEASE READ CAREFULLY!
By signing this document you will waive certain rights including the right to sue.

RENTAL AGREEMENT

1. I accept full responsibility for the care of the rental equipment ("the Equipment") listed on this form and I agree to replace at FULL RETAIL VALUE any equipment damaged or not returned. OR, I choose to purchase insurance to cover damage to the Equipment. Initial
2. I have made no misrepresentations in regards to my height, weight, age or skier/snowboarder type. (This information is required in order to properly adjust the ski boot/binding settings.) Initial
3. I understand that the rental technicians are able to answer any questions I may have as to the proper use of the Equipment. Initial

ASSUMPTION OF RISKS

1. I am aware that skiing/snowboarding/skiboarding (snowblading) involves risks, dangers and hazards and that injuries are a common and ordinary occurrence of the sport. I understand that the ski boot/binding system will not release at all times or under all circumstances, that it is not possible to predict every situation in which the system will release, and that the system is no guarantee that the user will not be injured. I understand that as the snowboard/skiboard boot/binding system is a non-release system it will not reduce the risk of injury during a fall and is therefore no guarantee of my safety. I freely accept and fully assume all risks, dangers, and hazards associated with the use of the Equipment.
2. I am aware that Snow Valley Resorts (1987) Ltd. has for rent or sale snow sport helmets. While I understand that snow sport helmets are intended to reduce the risk of serious head injury, I understand and agree that no helmet can eliminate or prevent this, nor can a helmet eliminate or prevent injury to the neck or spinal cord. I understand that this helmet must fit properly to maximize its performance including use of the chin strap and acknowledge that it has been properly fit by the provider. If the helmet experiences any impact I agree to return it to the shop for inspection. I agree to notify the provider if this helmet is involved in an accident of any kind.
3. As a condition of my use of the ski area facilities I assume all risk of personal injury, death or property loss resulting from any cause whatsoever including but not limited to the inherent risks of skiing, snowboarding, and ski boarding, the use of ski lifts, collision with natural or manmade objects or other skiers or snowboarders, travel within or beyond the ski area boundaries, or negligence, breach of statutory duty of care or breach of the Occupiers' Liability Act on the part of Snow Valley Resorts (1987) Ltd., its employees and agents.

WAIVER OF CLAIMS

I HEREBY AGREE: 1. TO WAIVE ANY AND ALL CLAIMS that I have or may have in the future against Snow Valley Resorts (1987) Ltd. and the manufacturer and distributor of the Equipment and their directors, officers, employees, agents and representatives (all of whom are hereinafter collectively referred to as "the Releasees") and 2. TO RELEASE THE RELEASEES from any and all liability for any loss, damage, injury, or expense that I may suffer, or that my next of kin may suffer as a result of or arising out of any aspect of my use of the Equipment, DUE TO ANY CAUSE WHATSOEVER, INCLUDING NEGLIGENCE, BREACH OF CONTRACT, OR BREACH OF WARRANTY ON THE PART OF THE RELEASEES in respect of the design, manufacture, selection, installation, maintenance, or adjustment of the Equipment, or in respect of the provision of or the failure to provide any warnings, directions, instructions or guidance as to the use of the Equipment. 3. That Snow Valley Resorts (1987) Ltd., its employees and agents, shall not be liable for any such personal injury, death or property loss and releases Snow Valley Resorts (1987) Ltd., its employees and agents and waives all claims with respect thereto. 4. This Agreement shall be governed by and interpreted in accordance with the laws of the Province of Ontario and any litigation involving the parties to this Agreement shall be brought within Ontario.

5. [illegible] this agreement, I am waiving certain legal rights which I or my heirs [illegible]

Footnotes

1 This principle is captured by the Latin maxim *generalia specialibus non derogant*.

2 Relevant portions of the Blue Mountain waiver are reproduced in Appendix A to these reasons.

3 Relevant portions of the Snow Valley waiver are reproduced in Appendix B to these reasons.

4 The common law standard of care for occupiers varied depending on whether the person entering the premises was an invitee, licensee, trespasser, or contractual entrant.

5 Sometimes also referred to as the "presumption of coherence".

6 See Department of Justice, *Report on Occupiers' Liability* (Ontario: Ontario Law Reform Commission, 1972), at pp. 14-16 where the report states "the words 'where an occupier is free to' [under s. 3(3)] are used to ensure that an occupier's power to extend, restrict, modify or exclude his duty shall be no greater than it was under common law."

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Tab 11

Most Negative Treatment: Check subsequent history and related treatments.

2017 ONCA 1014
Ontario Court of Appeal

Ernst & Young Inc. v. Essar Global Fund Limited

2017 CarswellOnt 20162, 2017 ONCA 1014, 139 O.R. (3d) 1, 286 A.C.W.S. (3d) 658, 420 D.L.R. (4th) 23, 54 C.B.R. (6th) 173, 76 B.L.R. (5th) 171

Ernst & Young Inc. in its capacity as Monitor of all of the following: Essar Steel Algoma Inc., Essar Tech Algoma Inc., Algoma Holdings B.V., Essar Steel Algoma (Alberta) ULC, Cannelton Iron Ore Company and Essar Steel Algoma Inc. USA (Plaintiff / Respondent) and Essar Global Fund Limited, Essar Power Canada Ltd., New Trinity Coal, Inc., Essar Ports Algoma Holding Inc., Algoma Port Holding Company Inc., Port of Algoma Inc., Essar Steel Limited and Essar Steel Algoma Inc. (Defendants / Appellants / Respondent)

R.A. Blair, S.E. Pepall, K. van Rensburg JJ.A.

Heard: August 15-17, 2017
Judgment: December 21, 2017
Docket: CA C63581/C63588

Proceedings: affirming *Ernst & Young Inc. v. Essar Global Fund Ltd.* (2017), 137 O.R. (3d) 438, 46 C.B.R. (6th) 107, 66 B.L.R. (5th) 189, 2017 CarswellOnt 4049, 2017 ONSC 1366, Newbould J. (Ont. S.C.J. [Commercial List]); additional reasons at *Ernst & Young Inc. v. Essar Global Fund Ltd et al* (2017), 50 C.B.R. (6th) 148, 2017 ONSC 4017, 2017 CarswellOnt 12508, Newbould J. (Ont. S.C.J.); and refusing leave to appeal *Ernst & Young Inc. v. Essar Global Fund Ltd et al* (2017), 50 C.B.R. (6th) 148, 2017 ONSC 4017, 2017 CarswellOnt 12508, Newbould J. (Ont. S.C.J.); additional reasons to *Ernst & Young Inc. v. Essar Global Fund Ltd.* (2017), 137 O.R. (3d) 438, 46 C.B.R. (6th) 107, 66 B.L.R. (5th) 189, 2017 CarswellOnt 4049, 2017 ONSC 1366, Newbould J. (Ont. S.C.J. [Commercial List])

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Clifton P. Prophet, Nicholas Kluge, Delna Contractor, for Respondent, Ernst & Young Inc. in its capacity as Monitor of Essar Steel Algoma Inc. et al.
Eliot N. Kolers, Patrick Corney, for Respondent, Essar Steel Algoma Inc.
Peter H. Griffin, Monique Jilesen, Kim Nusbaum, for Appellants, GIP Primus, L.P. and Brightwood Loan Services LLC

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

Headnote

Business associations --- Specific matters of corporate organization — Shareholders — Shareholders' remedies — Relief from oppression — Standing to apply — Miscellaneous

E Global acquired A Ltd. through its subsidiaries in 2007 — A Ltd. owned steel production operations and, in late 2013, was faced with liquidity crisis — Its investments were managed by E Capital — In 2016, order was granted authorizing Monitor appointed under Companies' Creditors Arrangement Act (CCAA) to commence and continue proceedings under s. 241 of the Canada Business Corporations Act (CBCA) for oppression against A Ltd.'s parent, E Global and other companies owned directly or indirectly by E Global (collectively E Group) — Action arose in context of recapitalization of A Ltd. and transaction between A Ltd. and Port of Algoma Inc. (Portco), two companies indirectly owned by E Global, in which A Ltd.'s port facilities in Sault Ste. Marie were conveyed to Portco (Port Transaction) —

Trial judge found Port Transaction and other conduct of E Global to be oppressive and granted remedy designed to address that oppression — E Global and some members of E Group, together with GIP, who were arm's length lenders who loaned Portco US$150 million to effect transaction appealed on several grounds, including that Monitor lacked standing to bring oppression claim — Appeal dismissed — Monitor could be complainant under CBCA and should have been made one, however, it would only occur on rare occasions at CCAA supervising judge's discretion — CCAA supervising judge was justified in providing authorization as prima facie case was established; Monitor had reviewed and reported to court on related party transactions; oppression action served to remove insurmountable obstacle to restructuring and Monitor could efficiently advance oppression claim representing stakeholders who were not organized as group and who were similarly affected by alleged oppressive conduct.
Business associations --- Specific matters of corporate organization — Shareholders — Shareholders' remedies — Relief from oppression — Oppressive conduct — Miscellaneous
E Global acquired A Ltd. through its subsidiaries in 2007 — A Ltd. owned steel production operations and, in late 2013, was faced with liquidity crisis — Its investments were managed by E Capital — In 2016, order was granted authorizing Monitor appointed under Companies' Creditors Arrangement Act to commence and continue proceedings under s. 241 of the Canada Business Corporations Act for oppression against A Ltd.'s parent, E Global and other companies owned directly or indirectly by E Global (collectively E Group) — Action arose in context of recapitalization of A Ltd. and transaction between A Ltd. and Port of Algoma Inc. (Portco) two companies indirectly owned by E Global, in which A Ltd.'s port facilities in Sault Ste. Marie were conveyed to Portco (Port Transaction) — Trial judge found Port Transaction and other conduct of E Global to be oppressive and granted remedy designed to address that oppression — E Global and some members of E Group, together with GIP, who were arm's length lenders who loaned Portco US$150 million to effect transaction appealed on basis trial judge erred in tailoring remedy — Appeal dismissed — Trial judge had broad latitude to fashion oppression remedy based on facts before him — Trial judge properly identified need to avoid overly broad remedy and varying transaction as he did was one such way — Trial judge's remedy removed Portco's control rights and after GIP was paid, restored Port to the ownership of A Ltd. — Remedy was responsive to oppressive conduct unlike award of damages — Further, remedy granted preserved security GIP had bargained for and therefore GIP did not suffer any prejudice as result of remedy — Regarding issue of set-off, trial judge's subsequent ruling was full answer to GIP's submissions and ensured that GIP would not suffer any prejudice as result of remedy granted in response to E Global's oppressive conduct.
Business associations --- Specific matters of corporate organization — Shareholders — Shareholders' remedies — Derivative actions — At common law — Miscellaneous
E Global acquired A Ltd. through its subsidiaries in 2007 — A Ltd. owned steel production operations and, in late 2013, was faced with liquidity crisis — Its investments were managed by E Capital — In 2016, order was granted authorizing Monitor appointed under Companies' Creditors Arrangement Act to commence and continue proceedings under s. 241 of the Canada Business Corporations Act for oppression against A Ltd.'s parent, E Global and other companies owned directly or indirectly by E Global — Action arose in context of recapitalization of A Ltd. and transaction between A Ltd. and Port of Algoma Inc. (Portco), two companies indirectly owned by E Global, in which A Ltd.'s port facilities in Sault Ste. Marie were conveyed to Portco (Port Transaction) — Trial judge found Port Transaction and other conduct of E Global to be oppressive and granted remedy designed to address that oppression — E Global, along with some companies directly or indirectly owned by E Global, together with GIP, who were arm's length lenders who loaned Portco US$150 million to effect transaction appealed on several grounds including alleged harm was to A Ltd. and appropriate redress was derivative action — Appeal dismissed — Court affirmed principles that derivative action and oppression remedy were not mutually exclusive and that there may be circumstances giving rise overlapping derivative actions and oppression remedies where harm was done both to corporation and to stakeholders in their separate stakeholder capacities — Question was whether impugned conduct was "oppressive" and, if so, whether stakeholder suffered harm in its capacity as stakeholder as result of that conduct.
Business associations --- Specific matters of corporate organization — Shareholders — Shareholders' remedies — Relief from oppression — Oppressive conduct — Corporate governance
Business judgment rule — E Global acquired A Ltd. through its subsidiaries in 2007 — A Ltd. owned steel production operations and, in late 2013, was faced with liquidity crisis — Its investments were managed by E Capital — In 2016,

order was granted authorizing Monitor appointed under Companies' Creditors Arrangement Act to commence and continue proceedings under s. 241 of the Canada Business Corporations Act for oppression against A Ltd.'s parent, E Global and other companies owned directly or indirectly by E Global (collectively E Group) — Action arose in context of recapitalization of A Ltd. and transaction between A Ltd. and Port of Algoma Inc. (Portco), two companies indirectly owned by E Global, in which A Ltd.'s port facilities in Sault Ste. Marie were conveyed to Portco (Port Transaction) — Trial judge found Port Transaction and other conduct of E Global to be oppressive and granted remedy designed to address that oppression — E Global and some members of E Group, together with GIP, who were arm's length lenders who loaned Portco US$150 million to effect transaction appealed — Appeal dismissed — There was evidence of subjective expectations before trial judge, who also drew reasonable inferences from evidence and circumstances that existed at A Ltd. that supported expectations Monitor relied upon — Trial judge did not err in his analysis of wrongful conduct and harm as there was recognition that stakeholders were neither party to nor involved in amended plan of arrangement proceedings — Trial judge made his finding of wrongful conduct on totality of E Global's conduct regarding recapitalization and Port Transaction — Trial judge had not misunderstood E Global's contribution to recaptalization — Causal connection between E Global's Equity Commitment and Port Transaction was factual matter and trial judge's factual finding was supported by evidence — Trial judge also correctly described business judgment rule however appellate court added rule shielded business decisions from court intervention only where they were made prudently and in good faith, and rule's protection was available only to extent that Board of Directors' actions actually evidenced their business.

Bankruptcy and insolvency --- Practice and procedure in courts — Costs — Award of costs — General principles

A Ltd. owned steel production operations and, in late 2013, was faced with liquidity crisis — Its investments were managed by E Capital — In 2016, order was granted authorizing Monitor appointed under Companies' Creditors Arrangement Act to commence and continue proceedings under s. 241 of the Canada Business Corporations Act for oppression against A Ltd.'s parent, E Global and other companies owned directly or indirectly by E Global — GIP, who were arm's length lenders, sought costs against monitor on partial indemnity scale of $750,156.18 on basis that relief sought by monitor at various times in one form or another would have affected GIP security — Monitor acknowledged that if only position taken by GIP was scope of relief, they were entitled to costs but GIP took broader attack, including whether monitor had standing to bring action, contending they had veto provision in was commercially reasonable and fair value of transaction was established, none of which was established — GIP appealed oppression decision and requested appellate court order that it was error to find that monitor was proper complainant or to find oppression of A Ltd. and thus it was contended that GIP could not say it was wholly successful — Court was not privy to GIP`s strategy in filing its appeal and issues had been decided at first instance but may be appealed — In circumstances, success was divided between monitor and GIP and no order was made to costs — GIP applied for leave to appeal costs award — Application dismissed — There was no basis on which to interfere with costs award of trial judge as there was no error in principle in trial judge's exercise of discretion.

Bankruptcy and insolvency --- Practice and procedure in courts — Miscellaneous

Held:

Table of Authorities

Cases considered by *S.E. Pepall J.A.*:

BCE Inc., Re (2008), 2008 CarswellQue 12595, 2008 CarswellQue 12596, 71 C.P.R. (4th) 303, 52 B.L.R. (4th) 1, (sub nom. *Aegon Capital Management Inc. v. BCE Inc.)* 383 N.R. 119, (sub nom. *Aegon Capital Management Inc. v. BCE Inc.)* 301 D.L.R. (4th) 80, 2008 SCC 69, (sub nom. *BCE Inc. v. 1976 Debentureholders)* [2008] 3 S.C.R. 560 (S.C.C.) — considered

Brant Investments Ltd. v. KeepRite Inc. (1991), 1 B.L.R. (2d) 225, 3 O.R. (3d) 289, 45 O.A.C. 320, 80 D.L.R. (4th) 161, 1991 CarswellOnt 133 (Ont. C.A.) — referred to

CW Shareholdings Inc. v. WIC Western International Communications Ltd. (1998), 160 D.L.R. (4th) 131, 1998 CarswellOnt 1891, 38 B.L.R. (2d) 196, 39 O.R. (3d) 755, 61 O.T.C. 81 (Ont. Gen. Div. [Commercial List]) — referred to

Essar Steel Algoma Inc. et al Re (2017), 2017 ONSC 3930, 2017 CarswellOnt 12528, 53 C.B.R. (6th) 321 (Ont. S.C.J.) — referred to

Fedel v. Tan (2010), 2010 ONCA 473, 2010 CarswellOnt 4658, 83 C.C.E.L. (3d) 60, 70 B.L.R. (4th) 157, 101 O.R. (3d) 481, 264 O.A.C. 144 (Ont. C.A.) — followed

Ford Motor Co. of Canada v. Ontario (Municipal Employees Retirement Board) (2006), 2006 CarswellOnt 13, 12 B.L.R. (4th) 189, 206 O.A.C. 61, 263 D.L.R. (4th) 450, 79 O.R. (3d) 81 (Ont. C.A.) — considered

Hamilton v. Open Window Bakery Ltd. (2003), 2004 SCC 9, 2003 CarswellOnt 5591, 2003 CarswellOnt 5592, 40 B.L.R. (3d) 1, 235 D.L.R. (4th) 193, 316 N.R. 265, 184 O.A.C. 209, 2004 C.L.L.C. 210-025, 70 O.R. (3d) 255 (note), [2004] 1 S.C.R. 303, 70 O.R. (3d) 255, 2004 CSC 9 (S.C.C.) — referred to

Indalex Ltd., Re (2013), 2013 SCC 6, 2013 CarswellOnt 733, 2013 CarswellOnt 734, D.T.E. 2013T-97, 96 C.B.R. (5th) 171, 354 D.L.R. (4th) 581, 20 P.P.S.A.C. (3d) 1, 439 N.R. 235, 301 O.A.C. 1, 8 B.L.R. (5th) 1, (sub nom. *Sun Indalex Finance LLC v. United Steelworkers)* [2013] 1 S.C.R. 271, 2 C.C.P.B. (2nd) 1 (S.C.C.) — considered

Ivaco Inc., Re (2006), 2006 CarswellOnt 6292, 56 C.C.P.B. 1, 2006 C.E.B. & P.G.R. 8218 (headnote only), 25 C.B.R. (5th) 176, 83 O.R. (3d) 108, 275 D.L.R. (4th) 132, 26 B.L.R. (4th) 43 (Ont. C.A.) — considered

J.S.M. Corp. (Ontario) Ltd. v. Brick Furniture Warehouse Ltd. (2008), 2008 ONCA 183, 2008 CarswellOnt 1348, 41 B.L.R. (4th) 51, 234 O.A.C. 59, 67 R.P.R. (4th) 1 (Ont. C.A.) — considered

Korea Data Systems Co. v. Chiang (2009), 2009 ONCA 3, 2009 CarswellOnt 28, 49 C.B.R. (5th) 1, (sub nom. *Chiang (Trustee of) v. Chiang)* 93 O.R. (3d) 483, (sub nom. *Chiang (Trustee of) v. Chiang)* 305 D.L.R. (4th) 655, 78 C.P.C. (6th) 110, (sub nom. *Mendlowitz & Associates Inc. v. Chiang)* 257 O.A.C. 64 (Ont. C.A.) — referred to

Malata Group (HK) Ltd. v. Jung (2008), 2008 ONCA 111, 2008 CarswellOnt 699, 89 O.R. (3d) 36, 233 O.A.C. 199, 290 D.L.R. (4th) 343, 44 B.L.R. (4th) 177 (Ont. C.A.) — considered

Naneff v. Con-Crete Holdings Ltd. (1995), 23 O.R. (3d) 481, 85 O.A.C. 29, 23 B.L.R. (2d) 286, 1995 CarswellOnt 1207 (Ont. C.A.) — referred to

Nortel Networks Corp., Re (October 3, 2012), Doc. Toronto 09-CL-7950 (Ont. S.C.J. [Commercial List]) — considered

Northland Properties Ltd., Re (1988), 69 C.B.R. (N.S.) 266, 29 B.C.L.R. (2d) 257, 73 C.B.R. (N.S.) 146, 1988 CarswellBC 531 (B.C. S.C.) — considered

Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp. (2003), 2003 CarswellOnt 5210, (sub nom. *Olympia & York Developments Ltd. (Bankrupt) v. Olympia & York Realty Corp.)* 180 O.A.C. 158, 46 C.B.R. (4th) 313, 42 B.L.R. (3d) 14, 68 O.R. (3d) 544 (Ont. C.A.) — considered

Pente Investment Management Ltd. v. Schneider Corp. (1998), 1998 CarswellOnt 4035, 113 O.A.C. 253, (sub nom. *Maple Leaf Foods Inc. v. Schneider Corp.)* 42 O.R. (3d) 177, 44 B.L.R. (2d) 115 (Ont. C.A.) — considered

Philip's Manufacturing Ltd., Re (1992), 67 B.C.L.R. (2d) 385, 12 C.B.R. (3d) 145, 1992 CarswellBC 489 (B.C. C.A.) — considered

R. v. Palmer (1979), [1980] 1 S.C.R. 759, 30 N.R. 181, 14 C.R. (3d) 22, 17 C.R. (3d) 34 (Fr.), 50 C.C.C. (2d) 193, 106 D.L.R. (3d) 212, 1979 CarswellBC 533, 1979 CarswellBC 541 (S.C.C.) — followed

Rea v. Wildeboer (2015), 2015 ONCA 373, 2015 CarswellOnt 7602, 384 D.L.R. (4th) 747, 37 B.L.R. (5th) 101, 126 O.R. (3d) 178, 335 O.A.C. 161 (Ont. C.A.) — distinguished

Reference re Companies' Creditors Arrangement Act (Canada) (1934), 16 C.B.R. 1, [1934] S.C.R. 659, [1934] 4 D.L.R. 75, 1934 CarswellNat 1 (S.C.C.) — referred to

Sengmueller v. Sengmueller (1994), 17 O.R. (3d) 208, 69 O.A.C. 312, 111 D.L.R. (4th) 19, 25 C.P.C. (3d) 61, 2 R.F.L. (4th) 232, 1994 CarswellOnt 375 (Ont. C.A.) — followed

Ted Leroy Trucking Ltd., Re (2010), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, (sub nom. *Century Services Inc. v. Canada (A.G.))* [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1 (S.C.C.) — considered

U.S. Steel Canada Inc., Re (2016), 2016 ONCA 662, 2016 CarswellOnt 14104, 39 C.B.R. (6th) 173, 402 D.L.R. (4th) 450, 61 B.L.R. (5th) 1 (Ont. C.A.) — considered

UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc. (2002), 2002 CarswellOnt 2096, 214 D.L.R. (4th) 496, 32 C.C.P.B. 120, 27 B.L.R. (3d) 53, 19 C.C.E.L. (3d) 203 (Ont. S.C.J. [Commercial List]) — referred to

UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc. (2004), 2004 CarswellOnt 691, (sub nom. *UPM-Kymmene Corp. v. Repap Enterprises Inc.*) 183 O.A.C. 310, 42 B.L.R. (3d) 34, 32 C.C.E.L. (3d) 68, 40 C.C.P.B. 114, 250 D.L.R. (4th) 526 (Ont. C.A.) — referred to

Woodward's Ltd., Re (1993), 77 B.C.L.R. (2d) 332, 100 D.L.R. (4th) 133, 1993 CarswellBC 75 (B.C. S.C.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 13 — considered

Canada Business Corporations Act, R.S.C. 1985, c. C-44

Generally — referred to

s. 192 — considered

s. 238 — considered

s. 238 "complainant" (d) — considered

s. 239 — considered

s. 241 — considered

s. 241(1) — considered

s. 241(2) — considered

s. 241(3) — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 11 — considered

s. 11.7(1) [en. 1997, c. 12, s. 124] — considered

s. 23 — considered

s. 23(1)(c) — considered

s. 23(1)(k) — considered

APPEAL by certain defendants from judgment reported at *Ernst & Young Inc. v. Essar Global Fund Ltd et al* (2017), 2017 ONSC 1366, 2017 CarswellOnt 4049, 46 C.B.R. (6th) 107, 66 B.L.R. (5th) 189, 137 O.R. (3d) 438 (Ont. S.C.J. [Commercial List]), respecting ruling on oppression claim; APPLICATION by arm's length lender for leave to appeal order reported at *Ernst & Young Inc. v. Essar Global Fund Ltd et al* (2017), 2017 ONSC 4017, 2017 CarswellOnt 12508, 50 C.B.R. (6th) 148, 71 B.L.R. (5th) 324 (Ont. S.C.J.), respecting costs.

***S.E. Pepall J.A.*:**

1 This appeal concerns a successful oppression action brought pursuant to s. 241 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 (the "*CBCA*"). It involves the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the

"*CCAA*") restructuring proceedings of the respondent, Essar Steel Algoma Inc. ("Algoma") [1] , one of Canada's largest integrated steel mills and the respondent, Ernst & Young Inc., the court-appointed Monitor.

2 The supervising *CCAA* judge authorized the Monitor to commence an action for oppression against Algoma's parent, the appellant Essar Global Fund Limited ("Essar Global"), and the remaining appellants, other companies owned directly or indirectly by Essar Global (the "Essar Group"). The action arose in the context of a recapitalization of Algoma and a transaction between Algoma and Port of Algoma Inc. ("Portco"), two companies indirectly owned by Essar Global, in which Algoma's port facilities in Sault Ste. Marie (the "Port") were conveyed to Portco.

3 Portco is a single purpose company established by Essar Global. As Portco's name suggests, it currently controls the Sault Ste. Marie Port. Portco obtained control in November 2014 in a transaction between Algoma, Portco, and Essar Global (the "Port Transaction"). The Port Transaction effectively provided Portco with the ability to veto any change in control of Algoma's business. The interveners below and appellants on appeal, GIP Primus, L.P. and Brightwood Loan Services LLC (collectively "GIP"), are arm's length lenders who loaned Portco US$150 million to effect the transaction.

4 The trial judge found the Port Transaction and other conduct of Essar Global to be oppressive and granted a remedy that was designed to address that oppression. Essar Global and some of the members of the Essar Group, together with GIP, appeal from that judgment. The appellants advance a number of arguments, many of them factual, in support of their appeal. The appellants' two principal legal submissions are first, that the Monitor lacked standing to bring an oppression claim and second, that the alleged harm was to Algoma and that therefore the appropriate redress was a derivative action.

5 For the reasons that follow, I would dismiss the appeal.

A. FACTS

(1) Algoma's Operations

6 The City of Sault Ste. Marie sits on the shore of St. Mary's River, a waterway that links Lake Superior to Lake Huron at the heart of the Great Lakes, close to the Canada/U.S. border. The steel production operations that are owned by Algoma have been the primary employer and economic engine of the City since construction of the steel mill in 1901. Not surprisingly, the City's Port, which is situated next to Algoma's buildings and facilities, is integral to the steel operations. Indeed, Algoma is the Port's primary customer and its employees have traditionally run the Port operations. Raw materials used to produce steel are shipped to the Port and the steel that is produced is shipped to market from the Port. The relationship is one of mutual dependence.

7 Unfortunately, Algoma was in and out of *CCAA* protection proceedings both in 1991 and in 2001. In late 2013, Algoma faced another liquidity crisis and restructured under the *CBCA* in 2014. The recent *CCAA* filing occurred on November 9, 2015.

(2) The Essar Group

8 Essar Global is a Cayman Islands limited liability company and the ultimate parent of the respondent Algoma, which it acquired through its subsidiaries in 2007. Essar Global is also the parent of the appellants Portco, Essar Power Canada Ltd., New Trinity Coal Inc., Essar Ports Algoma Holding Inc., Algoma Port Holding Company Inc., and Essar Steel Limited. Its investments are managed by Essar Capital Limited ("Essar Capital"), which is based in London, England. These companies are part of the Essar Group, a multinational conglomerate that was founded in India by two brothers, Sashi and Ravi Ruia. Members of the Ruia family are the beneficial owners of the Essar Group.

(3) Algoma's Recapitalization

9 In late 2013, Algoma was facing a liquidity crisis. Algoma anticipated being unable to meet a coupon payment due to unsecured bondholders in June 2014, and its US$346 million term loan was to mature in September 2014. Although Essar Global had been injecting substantial funds into Algoma, it was hesitant to advance further cash to Algoma. Algoma decided to consider mechanisms to restructure and reduce its debt and therefore embarked on a recapitalization project.

10 At the time of the discussions relating to the recapitalization, Algoma's Board of Directors consisted of five appointees affiliated with the Ruia family or the Essar Group, and three independent directors. In early January 2014, the Board of Directors placed responsibility for Algoma's recapitalization efforts in the hands of Essar Global and Essar Capital employees. Algoma personnel had no day-to-day control over the recapitalization project.

11 Although the three independent directors had begun expressing concerns about their roles on the Board as early as the fall of 2013, in the face of Algoma's serious financial challenges, their concerns became more acute. Specifically, they were concerned that their requests for timely, full disclosure of information and full participation in the strategic decisions of the Board had not been properly taken into account by the other Board members. On January 19, 2014, the three sent a memo to the Board proposing the establishment of an independent committee to work with outside financial advisors to evaluate options and alternatives for Algoma's recapitalization. The Board held a meeting on February 11, 2014, and rejected this proposal by a vote of four to three, the three being the independent directors. In response, one of the three independent directors resigned. The other two initially remained on the Board.

12 On February 17, 2014, one of the remaining independent directors, Thomas Dodds, wrote to Prashant Ruia seeking a meeting. Prashant Ruia was then the vice-chair of Algoma's Board, the son of one of the founders of Essar Group, and a director of Essar Capital. Mr. Dodds wrote:

> If your expectation of [the Algoma] Board is to simply be a formality and our role as independent directors is to essentially "rubberstamp" shareholder and management decisions, we are not prepared to continue serving as directors.
>
> As you know, Directors and particularly independent directors have a legal, fiduciary responsibility to all the stakeholders of the Company starting with the Company first, followed by the shareholders, employees, community and others. This Director responsibility may on occasion conflict with the objectives of the shareholder who may, understandably, be more interested in matters of import to themselves. Most of the time there will be no conflict between the responsibilities of the Directors, objectives of the shareholder and that of the Company stakeholders as broadly defined. However, there are other occasions when they do.
>
> What we as independent directors have experienced in the last few Board meetings is a complete disregard for any discussion or wholesome debate on alternatives to re-financing or contingency planning at [Algoma].
>
> . . .
>
> In addition when we ask questions, or propose alternatives, we are asked to wait a while for additional information and told that everything will work out.
>
> We cannot discharge our responsibilities under such an environment.

13 The two remaining independent directors resigned on February 21 and May 5, 2014, respectively. In his resignation letter, Mr. Dodds explained his rationale, stating:

> I lacked confidence that I was receiving information and engaged in decision-making in the same manner as those Board members who are directly affiliated with the company or its parent.

14 The trial judge found, at para. 15 of his reasons, that the four directors who voted against the independent committee were "Essar-affiliated directors", that it was clear that the Ruia family did not want an independent committee, and that the Essar-affiliated directors voted accordingly.

15 The trial judge also found that the recapitalization and the Port Transaction were run by Joe Seifert, Chief Investment Officer of Essar Capital. The trial judge rejected the contention that Mr. Seifert was merely an advisor to the Board that independently made all of the critical decisions. Rather, Essar Global and Essar Capital, led by Mr. Seifert, directed and made decisions relating to the recapitalization and the Port Transaction. As the trial judge noted at para. 49, the evidence was "overwhelming" that Essar Global and Essar Capital were "calling the shots".

(4) Restructuring Support Agreement

16 Essar Global engaged Barclays Capital, an investment bank, to pursue alternative financing structures for Algoma on behalf of Essar Global. Barclays introduced GIP to Mr. Seifert of Essar Capital. In May 2014, representatives of Essar Global, GIP, and Barclays met to discuss Algoma's infrastructure assets and potential asset disposition transactions. They discussed the possibility of a transaction in which Algoma might sell its Port assets to a new corporate entity to generate cash proceeds, but not for the purpose of recapitalizing Algoma. Rather, the proceeds would flow upstream to Essar Global. In light of Algoma's prior insolvencies, GIP thought it important that a separate corporate entity distinct from Algoma be established to hold the Port assets. By the end of June 2014, Algoma had an exclusivity agreement with GIP regarding GIP's loan to finance the Port Transaction.

17 Soon after entering into the exclusivity agreement with GIP, on July 24, 2014, Algoma entered into a Restructuring Support Agreement (the "RSA") with Essar Global and an *ad hoc* committee of Algoma's unsecured noteholders. The RSA set out the principal terms of a restructuring. It provided for a reduction of Algoma's debt through the exchange of the unsecured notes in return for the payment of a percentage of their original principal amount and the issuance of new notes. The note restructuring would be implemented through a court-approved *CBCA* Plan of Arrangement. As a condition of the RSA and pursuant to an Equity Commitment Letter dated July 23, 2014, Essar Global agreed to acquire equity in Algoma for cash in the minimum amount of US$250 million and subject to a maximum of US$300 million. The trial judge found that Essar Global never intended to honour this obligation.

18 The Equity Commitment Letter provided a remedy in the event of a breach. The Plan of Arrangement contained a release of any claim arising out of the Equity Commitment Letter in favour of Essar Global, the noteholders, and the other corporations participating in the Arrangement.

19 It was a condition of the proposed Plan of Arrangement that Essar Global would comply with its RSA obligation to provide the aforementioned cash equity infusion. However, as early as March 28, 2014, representatives of the Ruia family had made it clear that they did not have US$250 million for equity. Efforts were made to reduce Essar Global's contribution. In late July 2014, one of the Ruia representatives wrote that ideally the equity contribution would be kept to US$150 to US$160 million.

20 Nonetheless, an application for approval of the Plan of Arrangement was made to the court. The recapitalization contemplated by the RSA was approved as an arrangement under s. 192 of the *CBCA* on September 15, 2014.

21 Beginning in October 2014, roadshow presentations were made to market the securities being offered through the recapitalization. However the transaction marketed did not accord with the transaction contemplated by the RSA. First, the roadshow presentation described an Essar Global cash equity contribution in Algoma of less than US$100 million, not the US$250 to US$300 million described in the RSA. Second, the presentation provided for the cash to be generated from the sale of the Port by Algoma. The RSA did not allow for such a sale absent the noteholders' consent. No such consent had been obtained. In addition, the proceeds of any sale were to be used to reduce Algoma's debt.

22 The roadshow was unsuccessful and investors failed to subscribe for the securities marketed. The lead bookrunner attributed this failure to the perception among investors that the transaction described in the roadshow presentation contemplated an insufficient contribution of equity into Algoma by Essar Global.

23 And so it was that Algoma was left without the cash to repay or refinance its debt.

24 Ultimately, the RSA was amended on November 6, 2014, such that Essar Global contributed US$150 million rather than the cash contribution of between US$250 and US$300 million originally contemplated by the Equity Commitment Letter. The amended RSA went on to provide that upon fulfillment of this revised contribution, Essar Global was deemed to have satisfied all of its obligations under the Equity Commitment Letter. The releases contained in the original filing were repeated in the amended Plan of Arrangement.

25 As subsequently discussed, in light of the amended RSA, an amended Plan of Arrangement was approved on November 10, 2014.

(5) Port Transaction

26 The Port Transaction closed on November 14, 2014. In summary, Algoma sold to Portco the Port assets consisting of the Port buildings, the plant, and machinery, but not the land. Algoma leased the realty to Portco for a term of 50 years. Portco agreed to provide Port cargo handling services in return for a monthly payment from Algoma to Portco. Algoma agreed to provide to Portco the services necessary to operate the Port in return for a monthly payment from Portco that would be less than the monthly payment paid by Algoma to Portco for cargo handling services.

27 Turning to the details of the Port Transaction, Algoma and Portco entered into a Master Sale and Purchase Agreement ("MSPA"). Under the MSPA:

(i) Algoma conveyed to Portco all of the fixed assets owned and used by Algoma in relation to the Port, and agreed to lease the realty to Portco;

(ii) Portco agreed to pay Algoma US$171.5 million to be satisfied by:

- a cash payment by Portco of US$151.66 million; and

- the issuance of an unsecured promissory note in the amount of US$19.84 million payable in full on November 13, 2015.

28 To fund these obligations, Portco obtained a US$150 million term loan from GIP. GIP Primus, L.P. lent US$125 million, while Brightwood Loan Services LLC lent US$25 million. This term loan was secured by all of Portco's current and future real and personal property and supported by two guarantees in favour of GIP: one from Essar Global, and another from Algoma Port Holding Company Inc., Portco's direct parent.

29 Pursuant to the MSPA, Algoma and Portco executed five additional documents: a promissory note, a lease, a Shared Services Agreement, an Assignment of Material Contracts Agreement, and a Cargo Handling Agreement.

(i) Promissory Note

30 The promissory note was for US$19.84 million payable by Portco to Algoma. Portco immediately assigned its obligations under the promissory note to Essar Global. Essar Global therefore became the obligor under the note and Algoma released Portco from its obligation. As of the date of the trial, the promissory note remained unpaid. At para. 27 of a subsequent decision released on June 26, 2017, the trial judge granted a declaration that any amounts owing to Algoma under the promissory note given by Portco to Algoma have been set-off against amounts owing by Algoma to

Portco under the Cargo Handling Agreement: [*Essar Steel Algoma Inc. et al Re*] 2017 ONSC 3930, 53 C.B.R. (6th) 321 (Ont. S.C.J.). The decision allows for set-off against Portco, but preserves GIP's right to repayment.

(ii) Lease

31 Under the lease, Portco leased from Algoma the Port lands, roads, and outdoor storage space for a 50-year term. Portco prepaid Algoma the rent for the entire 50-year period. The present value of this leasehold interest was stated to be US$154.8 million. Algoma maintained responsibility for all maintenance, repairs, insurance, and property taxes.

(iii) Shared Services Agreement

32 Under the Shared Services Agreement, Algoma was to be responsible for providing all the services necessary for Portco to fulfill its obligations under the Cargo Handling Agreement. These services were to be provided by Algoma employees, not Portco employees. Portco agreed to pay Algoma US$11 million annually subject to escalation at the rate of 3 percent per annum beginning in 2016.

(iv) Assignment of Material Contracts

33 Under the Assignment of Material Contracts Agreement, Algoma provided a covenant in favour of GIP, which precluded Algoma from selling or assigning any material contract relating to the Port, including the Cargo Handling Agreement except by way of security granted to its other third party lender.

(v) Cargo Handling Agreement

34 Under the Cargo Handling Agreement, Portco agreed to provide Algoma with cargo handling services for an initial 20-year term with automatic renewal for successive three-year periods unless either party gave written notice of termination to the other. Algoma agreed to pay Portco based on tonnage with a minimum monthly assured volume of US$3 million. In other words, Algoma was obliged to pay a minimum of US$36 million annually to Portco for 20 years subject to an escalation in price of 1 percent per annum commencing in 2016. Therefore, while Algoma was entitled to US$11 million annually under the Shared Services Agreement, it had to pay Portco at least US$36 million annually under the Cargo Handling Agreement, such that Portco would receive an annual revenue stream from Algoma of US$25 million. This amount was intended to service GIP's term loan at US$25 million a year. However, GIP's loan had a term of eight years, and therefore Portco would have the full benefit of the US$25 million for at least 12 years of the initial 20-year term of the Cargo Handling Agreement, and potentially for 42 years if the Agreement was not terminated.

35 Section 15.2 of the Cargo Handling Agreement also contained a change of control clause that stated that the "Agreement may not be assigned by either Party without the prior written consent of the other Party." This provision became particularly contentious because it effectively gave Portco — and therefore Portco's parent, Essar Global — a veto over any party acquiring Algoma in the *CCAA* proceedings.

36 Although inclusion of the change of control provision in the Cargo Handling Agreement was driven by GIP, the trial judge found that it was effectively for the benefit of Essar Global, as it gave Portco a veto. Furthermore, the trial judge noted at para. 117 that Essar Global had in fact relied on s. 15.2 to its benefit, by holding out its change of control rights to dissuade competing bidders for Algoma in the restructuring process while Essar Global continued to express its own interest as a prospective bidder.

37 In discussing the financial ramifications of the Shared Services Agreement and the Cargo Handling Agreement, the trial judge observed at para. 26 of his reasons:

> When the costs of operating the Port (shared services) are netted from the cargo handling charges, the result is that Algoma will pay approximately $25 million per year to Portco, which is the amount required by Portco to service the Term Loan each year. That amount of $25 million for 20 years comes to $500 million, far more than the amount needed to repay the $150 million GIP loan.

38 Duff & Phelps assessed the fair value of the Portco Transaction as ranging between US$150.9 million and US $174.2 million with a midpoint of US$161.7 million. However, this assessment failed to take into account the change of control provision in the Cargo Handling Agreement. Deloitte LLP reviewed Duff & Phelps' assessment and concluded it was reasonable. [2]

(6) Final Recapitalization

39 Ultimately the recapitalization of Algoma consisted of the following transactions:

(a) Algoma issued US$375 million in senior secured notes pursuant to an offering memorandum;

(b) Algoma entered into a new US$50 million senior secured asset-based revolving credit facility and a new US$375 million term loan;

(c) Algoma's unsecured noteholders were paid a portion of their principal and were issued new junior secured notes;

(d) Algoma completed the Port Transaction;

(e) Essar Global contributed US$150 million in cash in exchange for common equity, and also contributed US$150 million in debt forgiveness; and

(f) All other Algoma lenders were repaid in full.

40 In addition, GIP entered into a secured term loan for US$150 million with Portco, secured by a GSA over all of Portco's assets. It also received guarantees — one from Essar Global and one from Algoma Port Holding Company Inc. — guaranteeing Portco's liabilities. In November 2014, the transactions in furtherance of Algoma's recapitalization, including the Port Transaction, were approved unanimously by Algoma's Board of Directors after receiving advice and on the recommendation of Algoma's management. By this time, the Board consisted of four directors: Mr. Kishore Mirchandani, who became a director on June 23, 2014; Mr. Naresh Kothari, who became a director on August 24, 2014; the Board's chair, Mr. Jatinder Mehra of Essar Global; and Algoma's CEO, Mr. Kalyan Ghosh. Mr. Ghosh, and Mr. Rajat Marwah, Algoma's CFO, both testified that they supported the Port Transaction not because it was ideal, but because there was no other option given Essar Global's failure to capitalize Algoma as it had committed to do.

41 As mentioned, the approved Plan of Arrangement that included the original RSA had to be amended in light of the revised equity contribution. A *CBCA* Plan of Arrangement incorporating the recapitalization and authorizing the amendment of the September 2014 approval order was granted by Morawetz J. on November 10, 2014.

42 Based on the materials before this court, it would appear that the Port Transaction was not mentioned or brought to Morawetz J.'s attention. In this regard, the trial judge found that there was no reference to the Port Transaction in the affidavits filed in support of the amendment to the Plan of Arrangement. The Port Transaction is not mentioned in that order or in any endorsement.

43 The outcome of the Port Transaction was that all Port assets were transferred from Algoma to Portco, the Port lands were leased to Portco for 50 years, and Portco obtained change of control rights. Portco paid Algoma US$151,660,501.50 in cash, provided the US$19,840,000 promissory note, and was obliged to pay Algoma US$11 million per annum under the Shared Services Agreement. In turn, Algoma was obliged to pay Portco US$36 million per annum for an initial term of 20 years under the Cargo Handling Agreement, subject to renewal, netting Portco US$25 million per annum as against the Shared Services Agreement payments. Meanwhile, under the revised RSA, Essar Global contributed cash of US$150 million to Algoma rather than the original cash commitment of US$250 to US$300 million.

(7) Insolvency Protection Proceedings

44 On November 9, 2015, Newbould J. granted an order placing Algoma, Essar Tech Algoma Inc., Algoma Holdings B.V., Essar Steel Algoma (Alberta) ULC, Cannelton Iron Ore Company, and Essar Steel Algoma Inc. USA (the "*CCAA* Applicants") under *CCAA* protection. As mentioned, he appointed Ernst & Young Inc. as the Monitor. The order contained various paragraphs addressing the rights and obligations of the Monitor, including a direction to perform such duties as were required by the Court. On November 20, 2015, Morawetz J. granted an Amended and Restated Initial Order that, among other things, directed the Monitor to review and report to the Court on any related party transactions (expressly including the Port Transaction).

45 During the *CCAA* proceedings, on February 10, 2016, a sales and investment solicitation process ("SISP") for Algoma's business and property was approved by the Court. Essar North America, a subsidiary of Essar Global, submitted a bid but was disqualified in April 2016 under the terms of the SISP because it failed to provide sufficient evidence of financial ability to purchase. In May and July of 2016, Essar Global persisted in its efforts to be the purchaser of the *CCAA* Applicants. On May 10, 2016, counsel to Portco, who was also counsel to Essar Global, wrote to counsel for Algoma to highlight matters of particular concern in connection with the *CCAA* process. The letter stated that any prospective bidder was to be told of the consent or veto right:

> Portco and [Algoma] are party to a Cargo Handling Agreement pursuant to which [Algoma] has committed to long-term use of the port. Portco, has, of course, a keen interest in any successor to [Algoma] as counterparty to that agreement and would like it to be clear to prospective bidders that, pursuant to the terms of the Cargo Handling Agreement, Portco has a consent right in the event of any assignment by [Algoma] of the agreement or a change of control of [Algoma].
>
> Again please confirm that this has been made clear to prospective bidders.

46 On June 20, 2016, the Monitor filed its Thirteenth Report, which described the Portco Transaction and indicated that there may be grounds for further review of that transaction. The Monitor noted that the renegotiated equity commitment resulted in Essar Global contributing the sum of US$150 million in equity rather than US$250 to US$300 million, and that the Portco Transaction transferred control of one of Algoma's most critical assets, the Port, to Essar Global. The Monitor stated that it remained "particularly concerned about the effect on the completion of a restructuring transaction of the restrictions on assignment in the Portco Transaction documents."

47 On September 26, 2016, Deutsche Bank AG, who led the Debtor-in-Possession ("DIP") Lenders of Algoma and also represented the interests of potential bidders in the *CCAA* process, applied for an order empowering the Monitor to commence certain proceedings and make certain investigations.[3] On September 26, 2016, Newbould J. granted an order authorizing the Monitor to commence and continue proceedings under s. 241 of the *CBCA* in relation to related party transactions, including but not limited to the Port Transaction.

48 The action proceeded on an accelerated timetable due to the progress of the *CCAA* restructuring.[4] On October 20, 2016, the Monitor commenced proceedings claiming oppression pursuant to s. 241 of the *CBCA* against Essar Global and others in the Essar Group including Portco. It pleaded that by reason of its role as a court officer directed to commence the oppression proceedings and to oversee the interests of all stakeholders of Algoma, it was a complainant within the meaning of ss. 238 and 241 of the *CBCA*.

49 It alleged that since June 2007, the Essar Group had exercised *de facto* control over Algoma and had engaged in a course of conduct that consistently preferred the interests of the Essar Group and in particular, Essar Global, to those of Algoma and its stakeholders. This included the transfer to the Essar Group of long-term control over, and a valuable equity interest in, Algoma's Port facilities, an irreplaceable and core strategic asset of Algoma. The value of control over the Port to Algoma and its stakeholders was immeasurable, since Algoma's business could not function without access to the Port.

50 The Monitor pointed out that the Essar Group obtained its control and equity interest in the Port through a cash contribution of less than US$4.7 million. It pleaded that the US$150 million raised as part of the Port Transaction came from third party lenders, namely GIP, and was money raised against the security and value of the Port facilities, an asset of Algoma, as well as a promissory note that remained unpaid, and a guarantee from Essar Global. The Monitor also stressed that the control obtained by the Essar Group was not only over the Port facilities, but extended to any sale of the Algoma business such that Essar Global had an indirect veto on transactions involving Algoma's enterprise. Essar Global also obtained a right to substantial payments under the Cargo Handling Agreement.

51 The oppression occasioned was exacerbated by the fact that the borrowed monies raised through the transaction were a substitution for monies Essar Global had promised to contribute as equity in Algoma.

52 The Monitor also argued that s. 15.2 of the Cargo Handling Agreement itself constituted oppression, because it was for the long-term benefit of Essar Global and not in the interests of Algoma's non-shareholder stakeholders. The Monitor took the position that the provision gave Portco and Essar Global a veto over any party acquiring Algoma in the *CCAA* process, thus negatively affecting the sales process. The Monitor also argued that the change of control provision was not necessary for the protection of GIP because it had its own change of control rights under its credit agreement.

53 In addition, the Monitor pleaded that the oppression and prejudice to creditors was continuing as Essar Global and other related companies had insisted that bidders for Algoma's business under the SISP, which was approved by the court on February 11, 2016, be advised of Portco's consent rights under the change of control clause in the Cargo Handling Agreement.

54 Essar Global and the remaining defendants filed their defence rejecting the Monitor's allegations, describing the action as "an improper and ill-conceived leverage tactic". They asserted that the litigation was an attempt to attack the Port Transaction for the benefit of other bidders under the sales process, including the DIP Lenders. They pleaded that the Monitor had no standing, the claim was improperly pleaded, an oppression remedy seeking to unwind or claim damages in respect of the Port Transaction was unavailable at law, and in any event there was no oppression, prejudice, or unfairness.

55 Portco's lenders, GIP, were granted intervener status as parties on December 22, 2016. They noted that they were *bona fide*, arm's length, and independent commercial parties and no cause of action or wrongful conduct was asserted by the Monitor against them. Nonetheless, the Monitor was seeking remedies that eviscerated the security held by them. They asserted that the Monitor did not have standing and could not establish any oppressive conduct in any event. Moreover, the structure of the Port Transaction was transparent to all of Algoma's stakeholders. Lastly, even if the court granted a remedy to the Monitor, it had no jurisdiction to prejudice the interests of GIP. The Monitor subsequently amended its statement of claim to modify the language on the relief claimed relating to the indebtedness and security interests in favour of GIP.

56 Various procedural motions were brought. Others who are not before this court intervened: Deutsche Bank AG; the Ad Hoc Committee of Algoma's Noteholders; Algoma Retirees; and two locals from the union United Steelworkers, Locals 2724 and 2251. The Essar Group and GIP brought motions to strike on the basis that the Monitor lacked standing and later also sought an order for particulars. On December 1, 2016, Newbould J. ordered that the standing motions be dealt with at the trial scheduled for January 30, 2017. On January 5, 2017, he urged the Monitor to give as many particulars as it could regarding the relief it might seek.

57 On January 30, 2017, Essar Capital served a motion for an order re-opening the SISP and to make information available to Essar Global to allow it to consider submitting a bid. Newbould J. dismissed the request. At para. 114 of his reasons, the trial judge found that Essar Global was still interested in purchasing the assets of Algoma.

58 The action proceeded to a five-day trial before Newbould J. commencing on January 31, 2017.

B. TRIAL JUDGMENT

59 The trial judge organized his reasons for decision under six principal headings: the Monitor's standing; who directed the recapitalization and the Port Transaction; reasonable expectations and were they violated; the business judgment rule; and the appropriate remedy. I will summarize his conclusions on each issue.

(1) Monitor's Standing

60 As mentioned, both Essar Global and GIP challenged the Monitor's standing as a complainant under the oppression provisions of the *CBCA*. They also argued that only persons directly damaged by the oppressive conduct could bring the action and that this action was in substance a derivative claim by Algoma. The trial judge rejected these arguments.

61 He found that the stakeholders harmed were Algoma's trade creditors, pensioners, retirees, and employees. At para. 32, he noted that Algoma owed CDN$911.9 million as of the date of the Port Transaction to a group of creditors including trade creditors, pensioners, retirees, and the City of St. Sault Marie.

62 The trial judge acknowledged at para. 34 that normally a monitor, who is a court officer, is to be neutral and not take sides. However, there are exceptions. Under s. 23(1)(k) of the *CCAA*, a monitor must carry out any function in relation to the debtor that the court may direct. At para. 35, the trial judge also pointed to the *CCAA* proceedings of Nortel Networks Corp. as a precedent: *Nortel Networks Corp., Re* (October 3, 2012), Doc. Toronto 09-CL-7950 (Ont. S.C.J. [Commercial List]). In those proceedings, a monitor was authorized to act as a litigant after all of Nortel's directors and senior executives had resigned.

63 Moreover, the trial judge observed that determining whether someone is a complainant under s. 238 of the *CBCA* is a discretionary decision. In *Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.* (2003), 68 O.R. (3d) 544 (Ont. C.A.), this court confirmed that a trustee in bankruptcy acting on behalf of the creditors of a bankrupt estate could be a complainant within the meaning of s. 238. In so doing, the court noted the need for flexibility to ensure that the remedial purpose of the oppression provisions is achieved. The trial judge saw no reason why the principle of collective action — which posits that it is more efficient for creditors to pursue their claims in a bankruptcy collectively with a trustee acting as their representative rather than individually — should not be followed in the present *CCAA* proceeding. At para. 37, he concluded that the Monitor had taken the action as an adjunct to its role in facilitating a restructuring and was therefore a proper complainant.

64 To respond to Essar Global and GIP's arguments that the claim was properly a derivative action and that no person had been personally harmed beyond Algoma, at para. 40 the trial judge relied on *Rea v. Wildeboer*, 2015 ONCA 373, 126 O.R. (3d) 178 (Ont. C.A.), at para. 27. There, Blair J.A. commented that the derivative action and the oppression remedy are not mutually exclusive. Although on the facts of *Wildeboer*, Blair J.A. had struck out a statement of claim pleading the oppression remedy, the trial judge distinguished *Wildeboer* on the basis that the relief sought was for the benefit of the corporation and there was no allegation that individualized personal interests were affected by the alleged wrongful conduct.

(2) Essar Global Directed the Recapitalization and the Portco Transaction

65 The trial judge observed that in some respects, it did not matter who made the decisions regarding the recapitalization and the Port Transaction — if the conduct was oppressive, relief could be granted. Nonetheless, he found at para. 49, that the evidence was "overwhelming" that Essar Global and Essar Capital were "calling the shots."

66 At para. 52, he accepted the evidence of Mr. Ghosh and Mr. Marwah that they did not negotiate the economic terms of the refinancing or the Port Transaction. Nor was either involved in the renegotiation of the RSA.

67 The trial judge relied on other evidence, including Algoma's annual Business Plan dated February 3, 2014, to support his factual findings. He also considered evidence of the witnesses. He found at paras. 56-57 that some of the witnesses

had been evasive, including: Rewant Ruia, the Ruia family's lead in the Essar Group's North American operations; Mr. Seifert,; and Rajiv Saxena, the Executive Director of Essar Steel India Ltd.

68 After reviewing the evidence, the trial judge noted at para. 58 that he was satisfied that Mr. Seifert, who represented the Essar Group's interests, had primary responsibility for pursuing the recapitalization negotiations and Algoma's refinancing via the Port Transaction. He concluded at para. 60:

> I am satisfied that representatives of Essar Global including Essar Capital carried out the Recapitalization and Portco Transaction negotiations and made the critical decisions. Algoma management were handed the economic terms of the Recapitalization and Port Transaction and implemented them from an operational perspective. Algoma management did not negotiate the terms. Their role was to support the negotiations with regard to non-economic, primarily operational, issues.

(3) Reasonable Expectations and their Violation

69 The trial judge identified the two-step process to determine whether a violation of reasonable expectations has occurred under s. 241 of the *CBCA*, which is described at para. 68 of *BCE Inc., Re*, 2008 SCC 69, [2008] 3 S.C.R. 560 (S.C.C.): (i) does the evidence support the reasonable expectation asserted by the complainant; and (ii) does the evidence establish that the reasonable expectation was violated by conduct that is oppressive, unfairly prejudicial, or unfairly disregards a relevant interest?

70 He described the reasonable expectations asserted by the Monitor as relating to the loss by Algoma of a critical asset and the change of control clause in the Cargo Handling Agreement. He stated at para. 64:

> The Monitor contends that the reasonable expectations of the creditors of Algoma, including the trade creditors, employees, pensioners and retirees, were that Algoma would not deal with its core assets like the Port in such a way as it would lose long-term control and value over those assets to a related party on terms that permitted the related party to veto or thwart Algoma's ability to do significant transactions or restructure, as was done in this case.

71 At para. 67, the trial judge did not accept that the expectations of creditors such as the employees, pensioners, and retirees were governed only by their agreements with Algoma. Furthermore, the evidence, including the inferences drawn from the circumstances that existed at Algoma in 2014, supported the expectations relied upon by the Monitor. He noted at para. 73 that stakeholders have a reasonable expectation of fair treatment and this was particularly so in Sault Ste. Marie, where Algoma is of critical importance to the local economy and relied upon greatly by trade creditors and employees.

72 He concluded at para. 75 that:

> [T]he reasonable expectations of the trade creditors, the employees, pensioners and retirees of Algoma were that Algoma would not deal with a critical asset like the Port in such a way as to lose long-term control over such a strategic asset to a related party on terms that permitted the related party to veto and control Algoma's ability to do significant transactions or restructure and which gave unwarranted value to the third party.

73 The trial judge held that the reasonable expectations of the trade creditors, employees, pensioners, and retirees were violated in two principal ways: first, the Port Transaction itself; and second, the change of control veto provided to Portco, and thus Essar Global, in the Port Transaction.

74 The Port Transaction was caused by Essar Global's breach of both the RSA and the Equity Commitment Letter. Because the lease of the land from Algoma to Portco was for 50 years and Essar Global was in a position to terminate the Cargo Handling Agreement after 20 years, Algoma would be at Essar Global's mercy for the duration of these agreements. The trial judge found at para. 78 that the transfer of the Port assets to Portco was driven by GIP's desire for

a "bankruptcy remote" special purpose vehicle. GIP was aware of Algoma's previous insolvencies and would only lend to a new entity that held the Port assets and that was separate from Algoma.

75 The Port Transaction and the GIP secured loan to Portco would not have been necessary had Essar Global lived up to its obligations under the RSA and the Equity Commitment Letter under which Essar Global had pledged a cash investment of US$250 to US$300 million. The trial judge found at para. 82 that Essar Global had no intention of living up to its promises and had acted in bad faith in this regard. The content of the roadshow presentations reflected the discordance with the RSA. The alternative transaction in the roadshow presentations contemplated cash being contributed to the recapitalization through the sale of the Port. That these presentations failed was partially attributable, as the trial judge found at para. 82, to Essar Global's insufficient contribution of cash equity into Algoma.

76 The trial judge concluded that Essar Global's decision not to fund Algoma according to the terms of the Equity Commitment Letter made it necessary to carry out the Port Transaction. GIP's loan of US$150 million reduced the amount of cash equity Essar Global promised to advance to Algoma. Essar Global's failure to inject cash equity into Algoma as agreed was the root cause of the Port Transaction and the transfer of control. This was, as the trial judge concluded at para. 89, an exercise in bad faith. Had an independent committee of Algoma's Board of Directors been struck, Essar may have been held to its bargain rather than looking to third party financing from GIP under the Port Transaction structure. The Board's failure to examine alternatives to effect Algoma's recapitalization indicated a lack of regard for the interests of Algoma's stakeholders.

77 Additionally, the long-term value given to Essar Global by the Port Transaction was itself oppressive (although in stating this, the trial judge noted that the Monitor did not pursue its claim that the Port assets were transferred to Portco at an undervalue).

78 As for the release in the amended RSA, the trial judge observed that it was a release of any claim arising out of the Equity Commitment Letter. The trial judge found at para. 100 that the Monitor was not making a claim under that Letter, nor was it asking that Essar Global provide the equity it had promised in that commitment. Rather, Essar Global's failure to live up to its commitment was part of the factual circumstances to be taken into account in considering whether Algoma's stakeholders were treated fairly under the Port Transaction.

79 The trial judge also observed that when the court approved the amended Plan of Arrangement under the amended RSA, it did not have knowledge of the Port Transaction. There was no reference to the Port Transaction in the affidavits filed in support of the amendment to the Plan of Arrangement; there was no finding relating to the release of Essar Global; the trade creditors, the employees, pensioners and retirees were not parties to the motion approving the amended RSA; and the order was obtained without opposition.

80 Ultimately he concluded that the Port Transaction was itself unfairly prejudicial to, and unfairly disregarded, the interests of Algoma's trade creditors, employees, pensioners, and retirees.

(4) Change of Control Provision

81 The trial judge determined at para. 104 that the change of control provision gave effective control to Portco (*i.e.* Essar Global) over who may acquire the Algoma business. Any buyer of Algoma or its business would need to be assigned the Cargo Handling Agreement so that it could operate the steel mill. Therefore the veto under this clause was effectively a veto over any change of control of the Algoma business.

82 Although the evidence indicated that the change of control provision was included for GIP's protection, the trial judge found that this end could have been achieved in other ways. For example, as the trial judge pointed out at para. 110, the parties could have included a provision in the Assignment of Material Contracts Agreement that prevented a change of control of Algoma without GIP's explicit consent. Such an alternative might have been considered had there been a committee of independent directors with advisors independent of Essar Global. But, as the trial judge concluded

at para. 111, the reality was that there was no pushback on the change of control provision that was implemented, and which gave Portco/Essar Global a veto.

83 The trial judge concluded at para. 113 that the change of control provision was of considerable value to Essar Global. Furthermore, as mentioned, the trial judge stated at para. 117 that Essar Global had in fact relied on s. 15.2 to its benefit by holding out its change of control rights to dissuade competing bidders for Algoma in the restructuring process while Essar Global continued to express its own interest as a prospective bidder.

84 The May 10, 2016 letter from Portco's counsel, which sought confirmation from Algoma's counsel that prospective bidders would be advised of Portco's rights, exemplified this. In the letter, Essar Global effectively held out its consent to any change of control right to dissuade competing bidders for Algoma in the restructuring process while it continued to express its own interest as a prospective bidder. The trial judge observed at para 115 that: "[I]t is clear that the dictate of Portco through its solicitors that prospective purchasers should be made aware of the change of control provision was successful".

85 The trial judge also observed that the evidence established that Portco's right to refuse assignment of the Cargo Handling Agreement was a material impediment to restructuring Algoma as Algoma could not survive without access to the Port. He concluded that the change of control provision in favour of Portco in the Cargo Handling Agreement was unfairly prejudicial to, and unfairly disregarded, the interests of Algoma's trade creditors, employees, pensioners, and retirees.

(5) The Business Judgment Rule

86 The trial judge also determined that the business judgment rule, which accords deference to a business decision of a Board of Directors so long as the decision lies within a range of reasonable alternatives, did not provide a defence to Essar Global. The Board had not followed advice that it insist Essar Global comply with its commitments under the RSA and the Equity Commitment Letter. As the trial judge stated at para. 123, the result of this was the Port Transaction, which was:

> [A]n exercise in self-dealing in that Algoma's critical Port asset was transferred out of Algoma to a wholly owned subsidiary of Essar Global with a change of control provision that benefitted Essar Global at a time that a future insolvency was a possibility.

87 Moreover, there was no evidence that the Board even considered whether protection to GIP could be provided in the absence of the change of control provision in favour of Portco and hence Essar Global. This failure was unreasonable.

(6) Remedy

88 The trial judge stated at para. 136 that if there were no less obtrusive way to remedy the oppression, he would have ordered that Portco's shares be transferred to Algoma. However, mindful that a remedy for oppression should be approached with a scalpel, he instead relied on s. 241(3) of the *CBCA* to order a variation of the Port Transaction. He accordingly deleted s. 15.2 of the Cargo Handling Agreement and inserted a provision in the Assignment of Material Contracts Agreement, which provided that, if GIP becomes the equity owner of Portco, its consent would be required for a change of control of Algoma. He rejected the suggestion that either GIP or Essar Global were taken by surprise by this relief.

89 He also addressed the imbalance created by the 50-year term of the lease between Algoma and Portco as against the 20-year term of the Cargo Handling Agreement (with automatic renewal for successive three year periods, barring either party's termination). As the Port was critical to Algoma's operation and survival, Algoma's ability under the Cargo Handling Agreement to refuse an extension after 20 years was illusory and, in reality, the renewal provision was one-sided in favour of Essar Global.

90 He concluded at para. 144 that the payments under the Cargo Handling Agreement were an unreasonable benefit in favour of Essar Global. If the Agreement lasted only the initial 20-year term, Portco/Essar Global would receive US $300 million after GIP's loan was paid off. If the Agreement was not terminated before the end of its 50 year life, Portco/Essar Global would receive an additional US$750 million for the last 30 years.

91 Accordingly, the trial judge ordered that the lease, the Cargo Handling Agreement, and the Shared Services Agreement be amended to provide Algoma with the option to terminate any of these three agreements once GIP's loan matured and was paid. If Portco elected not to renew after 20 years, or any of the three-year extensions, those three agreements would terminate, and Algoma would then owe Portco US$4.2 million plus interest.

92 The trial judge decided at para. 147 that the appropriate place for Portco to assert its claims for a declaration that the US$19.8 million promissory note had been paid as a result of set-off and for amounts owing under the Cargo Handling Agreement was in the ongoing *CCAA* proceedings.

(7) Costs

93 Lastly, following the release of the judgment, Essar Global agreed to pay costs of CDN$1.17 million to the Monitor. The trial judge then ordered Essar Global to pay Algoma CDN$1.5 million in costs and ordered that no costs be payable by the Monitor or by or to GIP.

C. ISSUES

94 There are eight issues to be addressed:

1. Did the Monitor lack standing to be a complainant under s. 238 of the *CBCA*?

2. Could the claim of the Monitor only be brought as a derivative action under s. 239 of the *CBCA* rather than an oppression action under s. 241 of the *CBCA*?

3. Did the trial judge err in his analysis of reasonable expectations?

4. Did the trial judge err in his analysis of wrongful conduct and harm?

5. Did the trial judge err in tailoring a remedy?

6. Was there procedural unfairness?

7. Should the fresh evidence be admitted?

8. Should leave to appeal costs be granted to GIP and the costs award varied?

D. ANALYSIS

(1) Standing of the Monitor

95 Essar Global submits that the Monitor is not a proper complainant given the conflict between it and the stakeholders it represents. The trial judge failed to consider whether the Monitor could avoid conflicts.

96 GIP supports the position of Essar Global. It states that the trial judge erred in assuming that the court's broad jurisdiction under the *CCAA* could be combined with the equally broad jurisdiction under the *CBCA* to create a super remedy that would interfere with the contractual rights of non-offending third parties. A trustee in bankruptcy is a representative of the creditors of the bankrupt. A monitor owes duties to all stakeholders, not just creditors. Its duty to Essar Global as sole shareholder of Algoma cannot be reconciled with the Monitor's oppression claim against it. Also,

Algoma can be directed to make the Cargo Handling Agreement payments to GIP directly and therefore the Monitor owed a fiduciary duty to GIP.

97 In addressing this issue, I will first discuss the evolution of the role of a monitor. I will then discuss who can be a complainant under the *CBCA* oppression provisions. Lastly, I will consider whether in the particular circumstances of this case, the trial judge was correct in concluding that the Monitor could have standing to bring an oppression action.

(a) The Purpose of CCAA Restructurings

98 As has been repeatedly described, the *CCAA* was originally enacted in 1933 to respond to the ravages of the Great Depression and to allow large corporations with outstanding bonds and debentures to restructure their debt in a court-supervised process through plans of arrangement or compromise negotiated with their creditors.

99 As outlined by Deschamps J. in *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.) [hereinafter Century Services], the *CCAA* fell into disuse after amendments in 1953 that limited its application to companies issuing bonds. Courts breathed new life into the statute in the early 1980s in response to an economic recession, and the *CCAA* became the primary vehicle through which major restructurings were attempted. Amendments to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*"), introduced in 1992, allowed insolvent debtors to make proposals to creditors under that statute, and were expected to supplant the *CCAA*. However, the *CCAA* continues to be employed as the vehicle of choice to restructure large corporations, particularly where flexibility is needed in the restructuring process: Roderick J. Wood, *Bankruptcy & Insolvency Law*, 2nd ed. (Toronto: Irwin Law, 2015), at pp. 336-337; and *Century Services*, at para. 13.

100 The corporate restructuring process at the heart of the *CCAA* "provide[s] a constructive solution for all stakeholders when a company has become insolvent": *Indalex Ltd., Re*, 2013 SCC 6, [2013] 1 S.C.R. 271 (S.C.C.), at para. 205. There are a number of justifications for why such a process is desirable. The traditional justification for *CCAA*-enabled restructurings, as explained by Duff C.J. shortly after the statute's enactment, was to rescue financially-distressed corporations without forcing them to first declare bankruptcy: *Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659 (S.C.C.), at p. 661.

101 The restructuring process can also allow creditors to obtain a higher recovery than may otherwise be available to them through bankruptcy or other liquidation proceedings, by preserving the corporate entity or the value of its business as a going concern: Wood, at pp. 338-339. Additionally, restructuring proceedings can provide an opportunity to evaluate the root of a corporation's financial difficulties, and develop strategies to achieve a turnaround, whether the best option be a full restructuring, or a liquidation of the corporation within the restructuring regime: Wood, at p. 340.

102 The benefits of the restructuring process are not limited to creditors. Even early commentary lauded restructurings as promoting the public interest by salvaging corporations that supply goods or services important to the economy, and that employ large numbers of people: see Stanley E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 Can. Bar Rev. 587, at p. 593. This view remains applicable today, with restructurings "justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation": *Century Services*, at para. 18.

103 To summarize, by enabling the restructuring process, the *CCAA* can achieve multiple objectives. It permits corporations to rehabilitate and maintain viability despite liquidity issues. It allows for the development of business strategies to preserve going-concern value. It seeks to maximize creditor recovery. It can serve to preserve employment and trade relationships, protecting non-creditor shareholders and the communities within which the corporation operates: see Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed. (Toronto: Thomson Reuters, 2013), at pp. 13-17. The flexibility inherent in the restructuring process permits a broad balancing of these objectives and the multiple stakeholder interests engaged when a corporation faces insolvency.

104 It is against this background that the role of a monitor must be considered.

(b) The Role of the Monitor

105 Originally, the *CCAA* was a very slim statute and made no mention of a monitor. Born of the court's inherent jurisdiction, the term "monitor" was first used in *Northland Properties Ltd., Re* (1988), 29 B.C.L.R. (2d) 257 (B.C. S.C.). In that case, an interim receiver was appointed whose role was described at p. 277 as that of a monitor or watchdog. As a watchdog, the monitor could "observe the conduct of management and the operation of the business while a plan was being formulated": A.J.F. Kent and W. Rostom, "The Auditor as Monitor in CCAA Proceedings: What is the Debate?" (2008), online: Mondaq www.mondaq.com. The monitor was thus a court-appointed officer.

106 The 1997 amendments to the *CCAA* gave legislative recognition to the role of the monitor and made the appointment mandatory. The 2007 amendments to the *CCAA* expanded the description of the monitor's role and responsibilities. In essence, its minimum powers are set out in the Act and they may be augmented through the exercise of discretion by the court, typically the *CCAA* supervising judge. This framework is reflected in s. 23 of the *CCAA*, which enumerates certain duties and functions of a monitor. Paragraph 23(1)(k) directs that a monitor shall carry out "any other functions in relation to the company that the court may direct." Its express duties under s. 23(1)(c) include making, or causing to be made, any appraisal or investigation that the monitor "considers necessary to determine with reasonable accuracy the state of the company's business and financial affairs and the cause of its financial difficulties or insolvency". It is then to file a report on its findings.

107 Not surprisingly, as with the *CCAA* itself, the role of the monitor has evolved over time. As stated by David Mann and Neil Narfason in their article entitled "The Changing Role of the Monitor" (2008) 24 Bank. & Fin. L. Rev. 131, at p. 132:

> Born out of invention, the role has developed from one of passive observer to one of active participant. The monitor has enhanced communication, mediated disputes, provided input into plans of reorganization, and provided expert advice in complex affairs. As the business community has become more sophisticated and global, so too has the monitor — taking on larger mandates, often times involving complex, cross-border restructurings.

108 Examples of the use of expanded powers for a monitor are found in *Philip's Manufacturing Ltd., Re* (1992), 67 B.C.L.R. (2d) 385 (B.C. C.A.), where the British Columbia Court of Appeal ordered a monitor to report on the causes of financial problems of the company and report on improper payments made to management, shareholders and directors, and in *Woodward's Ltd., Re* (1993), 77 B.C.L.R. (2d) 332 (B.C. S.C.), where Tysoe J. (as he then was) held that a monitor was to review all transactions and conveyances for fraud, preferences, or other reviewable features and act in a similar manner to a trustee in bankruptcy.

109 Under s. 11.7(1) of the *CCAA*, a monitor must be a licensed trustee in bankruptcy, and as such, under s. 13 of the *BIA*, is subject to the supervision of the Office of the Superintendent of Bankruptcy. The monitor is to be the eyes and the ears of the court and sometimes, as is the case here, the nose. The monitor is to be independent and impartial, must treat all parties reasonably and fairly, and is to conduct itself in a manner consistent with the objectives of the *CCAA* and its restructuring purpose. In the course of a *CCAA* proceeding, a monitor frequently takes positions; indeed it is required by statute to do so. See for example s. 23 of the *CCAA* that describes certain duties of a monitor.

110 Of necessity, the positions taken will favour certain stakeholders over others depending on the context. Again, as stated by Messrs. Kent and Rostom:

> Quite fairly, monitors state that creditors and the Court currently expect them to express opinions and make recommendations. . . . [T]he expanded role of the monitor forces the monitor more and more into the fray. Monitors have become less the detached observer and expert witness contemplated by the Court decisions, and more of an active participant or party in the proceedings.

(c) A Monitor as Complainant in an Oppression Action

111 Turning to the issue of a monitor and an oppression action, there is some difference in academic opinion on the suitability of the oppression remedy in insolvency proceedings. Professor Stephanie Ben-Ishai has argued that the remedy should be unavailable for use once the debtor has entered a court-supervised reorganization under the *BIA* or the *CCAA*.[5] Professor Janis Sarra has countered that the oppression remedy continues to be an important corporate law remedy that should be available in such proceedings.[6] I do not understand the appellants to be taking the former position; rather they simply argue that the Monitor has no standing.

112 Section 238 of the *CBCA* defines a complainant as:

> (a) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,
>
> (b) a director or an officer or a former director or officer of a corporation or any of its affiliates,
>
> (c) the Director, or
>
> (d) any other person who, in the discretion of a court, is a proper person to make an application under this Part.

For the purposes of this analysis, s. 238(d) is the relevant subsection.

113 Section 241*of* the *CBCA* describes the oppression remedy:

> (1) A complainant may apply to a court for an order under this section.
>
> (2) If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates
>
> > (a) any act or omission of the corporation or any of its affiliates effects a result,
> >
> > (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
> >
> > (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner
>
> that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.

114 The question here is whether the trial judge erred in concluding that the Monitor had standing to be a complainant. There are two elements to this analysis: can a monitor be a complainant under the *CBCA*; and should the Monitor have been a complainant in this case? I would answer both questions affirmatively.

115 As is clear from s. 238(d) of the *CBCA*, a court exercises its discretion in determining who may be a complainant, and this discretion is broad. There has been much jurisprudence on who qualifies as a complainant. In *Olympia & York*, a trustee in bankruptcy, acting on behalf of the creditors of the bankrupt estate, was entitled to be a complainant in an oppression action involving an oppressive agreement between the debtor and a non-arm's length party. As this court said in that case at para. 45:

> . . . the trustee is neither automatically barred from being a complainant nor automatically entitled to that status. It is for the judge at first instance to determine in the exercise of his or her discretion whether in the circumstances of the particular case, the trustee is a proper person to be a complainant.

116 Admittedly, a monitor differs from a trustee in bankruptcy in that the latter represents the interests of the creditors whereas the monitor has a broader mandate. However, like a trustee in bankruptcy, a monitor is neither automatically barred from being a complainant nor automatically entitled to that status.

117 Section 241 speaks of *a* proper person, not *the* proper person, therefore allowing for discretion to be exercised in the face of more than one proper person. The appellants did not direct us to any authority saying that a monitor could not be a complainant. Paragraph 23(1)(k) of the *CCAA* expressly provides that a monitor shall carry out any functions in relation to the company that the court may direct. Moreover, s. 23(1)(c) directs a monitor to conduct any investigation that the monitor considers necessary to determine the state of the company's business and financial affairs. It does not strain credulity that this responsibility will frequently place a monitor at odds with the shareholders or other stakeholders.

118 Additionally, there is nothing in the *CCAA* itself to suggest that a monitor cannot be authorized to act as a complainant. Indeed, the broad language of s. 11 of the *CCAA*, which permits a supervising court to "make any order it considers appropriate in the circumstances", is permissive of such orders. As this court and the Supreme Court have made clear, the broad language of s. 11 "should not be read as being restricted by the availability of more specific orders": *U.S. Steel Canada Inc., Re*, 2016 ONCA 662, 39 C.B.R. (6th) 173 (Ont. C.A.), at para. 79, citing *Century Services*, at para. 70. Courts can, and sometimes should, make "creative orders" in the context of *CCAA* proceedings: *U.S. Steel*, at paras. 80, 86-87.

119 Generally speaking, the monitor plays a neutral role in a *CCAA* proceeding. To the extent it takes positions, typically those positions should be in support of a restructuring purpose. As stated by this court in *Ivaco Inc., Re* (2006), 83 O.R. (3d) 108 (Ont. C.A.), at paras. 49-53, a monitor is not necessarily a fiduciary; it only becomes one if the court specifically assigns it a responsibility to which fiduciary duties attach.

120 However, in exceptional circumstances, it may be appropriate for a monitor to serve as a complainant. In my view, this is one such case.

121 Here, in para. 37(c) of the Amended and Restated Initial *CCAA* Order dated November 20, 2015, the Monitor was directed to investigate whether there were potential related party transactions that should be reviewed. It then reported back to the supervising *CCAA* judge that there were, and on that basis the *CCAA* judge authorized the Monitor to commence proceedings under s. 241 of the *CBCA*. The Monitor proceeded with the oppression action in the interests of the restructuring consistent with the objectives of the *CCAA*. The trial judge ultimately found that aspects of the Port Transaction, such as the change of control clause in the Cargo Handling Agreement that gave Essar Global control over who can be a buyer of the Algoma business, were oppressive and also harmful to the restructuring process. The Monitor took the action as an "adjunct to its role in facilitating a restructuring".

122 Moreover, it cannot be said that the Monitor was a fiduciary. Indeed, the appellants did not say this in their pleadings, opening submissions, or closing submissions before the trial judge. The remedy granted by the trial judge was directed at the oppression and removed an insurmountable barrier to a successful restructuring. In addition, it was brought in the face of Essar Global demonstrating a continuous desire to acquire Algoma and, as evident from the letter sent by its counsel, a desire to discourage others from doing so.

123 It will be a rare occasion that a monitor will be authorized to be a complainant. Factors a *CCAA* supervising judge should consider when exercising discretion as to whether a monitor should be authorized to be a complainant include whether:

(i) there is a *prima facie* case that merits an oppression action or application;

(ii) the proposed action or application itself has a restructuring purpose, that is to say, materially advances or removes an impediment to a restructuring; and

(iii) any other stakeholder is better placed to be a complainant.

These factors are not exhaustive, and none of them is necessarily dispositive; they are simply factors to consider.

124 In the circumstances that presented themselves here, the *CCAA* supervising judge was justified in providing authorization. A *prima facie* case had been established; the Monitor had reviewed and reported to the court on related party transactions; the oppression action served to remove an insurmountable obstacle to the restructuring; and the Monitor could efficiently advance an oppression claim, representing a conglomeration of stakeholders, namely the pensioners, retirees, employees, and trade creditors, who were not organized as a group and who were all similarly affected by the alleged oppressive conduct.

125 Quite apart from meeting the aforementioned criteria, I would also observe that as the presiding judge in the *CCAA* proceeding and the trial judge, Newbould J. had insight into the dynamics of the restructuring and was well positioned to supervise all parties including the Monitor to ensure that no unfairness or unwarranted impartiality occurred.

126 Lastly, I do accept the appellants' position that the *Nortel* proceedings relied upon by the trial judge in support of his conclusion were quite different from this case. In *Nortel*, the monitor's powers were expanded by an order authorizing the Monitor to exercise any powers properly exercisable by a Board of Directors of Nortel or its subsidiaries. But this expansion was a response to the resignations of the Boards of Nortel and its subsidiaries, not, as here, a response to the results of investigations the Monitor had been directed to pursue. That said, the case does illustrate the need to avoid rigid definition of a monitor's role and responsibilities.

127 In conclusion, I would not give effect to the appellants' submission that the trial judge erred in granting the Monitor standing to pursue an action for oppression.

(2) Derivative or Oppression Action

128 In addition to attacking the standing of the Monitor to bring the action, the appellants also submit that the Monitor was precluded from bringing the action in the form of an oppression remedy proceeding pursuant to s. 241 of the *CBCA*. In their view, the action could only have been brought as a derivative action pursuant to s. 239 of that *Act*. They say the claim asserted is a corporate claim belonging to Algoma, if anyone, and the stakeholders, on whose behalf the Monitor asserts the claim, were not harmed directly or personally but only derivatively through harm done to Algoma. I disagree.

129 In support of their submission, the appellants rely heavily on the decision of this Court in *Wildeboer*. This case is not *Wildeboer*, however.

130 In *Wildeboer*, "insiders" who controlled the corporation had misappropriated many millions of dollars from the corporation. The *sole claim* advanced by the complainant minority shareholder by way of oppression remedy was for the return of the misappropriated funds *to the corporation*. There was *no claim* asserted by the complainant, of any kind, *for a personal remedy qua shareholder*. As the court noted at para. 45, "[t]he substantive remedy claimed is the disgorgement of all the ill-gotten gains back to Martinrea [the corporation in question]."

131 The *Wildeboer* decision must be read in that context. It does not stand for the proposition that in all cases where there has been a wrong done to the corporation, the action must be brought as a derivative action. Consistent with a number of other authorities, this court expressly re-affirmed the principles that the derivative action and the oppression remedy are not mutually exclusive and that there may be circumstances giving rise to overlapping derivative actions and oppression remedies where harm is done both to the corporation and to stakeholders in their separate stakeholder capacities. This is clear from para. 26:

> I accept that the derivative action and the oppression remedy are not mutually exclusive. Cases like *Malata* [*Malata Group (HK) Ltd. v. Jung*, 2008 ONCA 111, 89 O.R. (3d) 36] and *Jabalee* [*Jabalee v. Abalmark Inc.*, [1996] O.J. No.

2609 (C.A.)] make it clear that there are circumstances where the factual underpinning will give rise to both types of redress and in which a complainant will nonetheless be entitled to proceed by way of oppression. Other examples include: *Ontario (Securities Commission) v. McLaughlin*, [1987] O.J. No. 1247 (Ont. H.C.); *Deluce Holdings Inc. v. Air Canada* (1992), 12 O.R. (3d) 131 (Ont. Gen. Div. [Commercial List]); *Covington Fund Inc. v. White*, [2000] O.J. No. 4589 (Ont. S.C.J.), aff'd [2001] O.J. No. 3918 (Ont. Div. Ct.); *Waxman v. Waxman*, [2004] O.J. No. 1765 (C.A.), at para. 526, leave to appeal refused, (2005), [2004] S.C.C.A. No. 291 (S.C.C.).

132 Or, as Armstrong J.A. put it in *Malata Group (HK) Ltd. v. Jung* [2008 CarswellOnt 699 (Ont. C.A.)], at para. 30:

> [T]here is not a bright line distinction between the claims that may be advanced under the derivative action section of the Act and those that may be advanced under the oppression remedy provisions.

133 In short, there will be circumstances in which a stakeholder suffers harm in the stakeholder's capacity as stakeholder, from the same wrongful conduct that causes harm to the corporation. In my opinion — unlike in *Wildeboer*, where the harm alleged was solely harm to the corporation — this case falls into the overlapping category.

134 For the purposes of this analysis, it is the nature of the claim put forward by the claimants, on whose behalf the Monitor was pursuing the oppression remedy, that must be examined. As the trial judge noted at para. 31, the Monitor initially cast quite widely the net of stakeholders affected by the Port Transaction and on whose behalf it was claiming a remedy. By the time of the hearing, however, the net's reach had been narrowed to Algoma's trade creditors, employees, pensioners, and retirees.

135 In oppression remedy parlance, the nub of the exercise lies in determining whether the claimant has identified a "reasonable expectation" and shown that it has been violated by wrongful conduct that is "oppressive" (in the broad sense contemplated by the *Act*) *of the interests of the claimant*: see *BCE*. The Monitor asserted at the hearing, and the trial judge found at para. 75:

> [T]hat the reasonable expectations of the trade creditors, the employees, pensioners and retirees of Algoma were that Algoma would not deal with a critical asset like the Port in such a way as to lose long-term control over such a strategic asset to a related party on terms that permitted the related party to veto and control Algoma's ability to do significant transactions or restructure and which gave unwarranted value to the third party.

136 It was alleged, and the trial judge found, that these reasonable expectations had been violated both by aspects of the Port Transaction itself, and by the change of control veto provided to Portco, and thus Essar Global, in the Port Transaction.

137 The appellants argue that the reasonable expectations asserted relate only to harm done to Algoma. The trial judge disagreed, as do I. As he concluded at para. 37:

> Aspects of the Port Transaction, such as the change of control clause in the Cargo Handling Agreement that gives the parent control over who can be a buyer of the Algoma business, are harmful to a restructuring process <u>and negatively impact creditors</u>. [Emphasis added]

138 On this basis, at para. 40, the trial judge distinguished *Wildeboer* because the Monitor was asserting "that the personal interests of the creditors ha[d] been affected."

139 The appellants place considerable emphasis on certain language contained in *Wildeboer* to the effect that, in circumstances where there may be overlapping derivative and oppression claims, the wrong must both harm the corporation and must also affect the claimant's "individualized personal interests". They interpret these comments as mandating not only that each claimant must suffer an identifiable individual harm but also that this harm must be different from other individualized personal harms suffered by others in their same class.

140 For example, the appellants rely on certain aspects of the following comments by this court at paras. 29, 32-33 of *Wildeboer*:

> On my reading of the authorities, in the cases where an oppression claim has been permitted to proceed even though the wrongs asserted were wrongs to the corporation, those same wrongful acts have, for the most part, also directly affected the complainant in a manner that was different from the indirect effect of the conduct on similarly placed complainants.
>
> . . .
>
> The appellants are not asserting that their personal interests as shareholders have been adversely affected in any way other than the type of harm that has been suffered by all shareholders as a collectivity. Mr. Rea — the only director plaintiff — does not plead that the Improper Transactions have impacted his interest *qua* director.
>
> Since the creation of the oppression remedy, courts have taken a broad and flexible approach to its application, in keeping with the broad and flexible form of relief it is intended to provide. However, the appellants' open-ended approach to the oppression remedy in circumstances where the facts support a derivative action on behalf of the corporation misses a significant point: the impugned conduct must harm the complainant personally, not just the body corporate, *i.e.*, the collectivity of shareholders as a whole.

141 While pertinent to the *Wildeboer* context, some of the foregoing language, when read in isolation and out of context, may be misconceived when it comes to a more general application. However, I do not read *Wildeboer* as precluding an oppression remedy in respect of individuals forming a homogenous group of stakeholders — for example, trade creditors, employees, retirees, or pensioners — simply because each of them, separately, may have suffered the same type of individualized harm.

142 Instead, I read the reference at para. 29 to the complainant being directly affected "in a manner that was different from the indirect effect of the conduct on similarly placed complainants" to be another way of capturing the notion expressed in paras. 32-33 that the individualized harm is to be distinct from conduct harming only "the body corporate, *i.e.*, the collectivity of shareholders as a whole."

143 Were the appellants correct in their submissions, as counsel for the Monitor points out, this court would not have upheld an oppression remedy on behalf of *all* shareholders of a company that had suffered harm as a result of a non-market executive compensation contract: see *UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.* (2002), 214 D.L.R. (4th) 496 (Ont. S.C.J. [Commercial List]), aff'd (2004), 42 B.L.R. (3d) 34 (Ont. C.A.), at para. 153. Nor would it have upheld an oppression remedy claim on behalf of *a class* of shareholders who were harmed as a result of the existence of a transfer pricing regime that was disadvantageous to the company, as it did in *Ford Motor Co. of Canada v. Ontario (Municipal Employees Retirement Board)* (2006), 79 O.R. (3d) 81 (Ont. C.A.). *Wildeboer* contains no suggestion that these authorities are no longer good law; nor would it have done.

144 The same may be said, in my view, about a group of creditors who have suffered similar harm from a corporate wrong that affects both their interests as creditors and the interests of the corporation. While the oppression remedy is not available as redress for a simple contractual breach (such as the failure to pay a debt), it has long been held to be available, in appropriate circumstances, to creditors whose interests "have been compromised by unlawful and internal corporate manoeuvres against which the creditor cannot effectively protect itself": *J.S.M. Corp. (Ontario) Ltd. v. Brick Furniture Warehouse Ltd.*, 2008 ONCA 183, 41 B.L.R. (4th) 51 (Ont. C.A.), at para. 66. See also: *Fedel v. Tan*, 2010 ONCA 473, 101 O.R. (3d) 481 (Ont. C.A.), at para. 56.

145 The question is whether the impugned conduct is "oppressive" (in the broad sense contemplated by the *CBCA*) and, if so, whether the stakeholder has suffered harm in its capacity as a stakeholder as a result of that conduct.

146 Moreover, the circumstances that presented themselves emphasize the need for flexibility in the availability of the oppression remedy. The court and the Monitor were faced with *prima facie* evidence of oppression including bad faith and self-dealing. There was *prima facie* evidence of personal harm to the pensioners, employees, retirees, and trade creditors. While leave of the court is required for a derivative action, in substance, in the context of a *CCAA* proceeding, court supervision is present, thereby neutralizing the need for the derivative action procedural safeguard of leave.

147 I would also note that GIP argues that the decision not to bring this action by way of derivative action may have been a strategic decision made because Algoma was contractually prohibited from seeking to set aside or vary the contracts arising from the Port Transaction, including the Cargo Handling Agreement and the lease. If anything, this argument supports the conclusion that it was appropriate for this action to be brought as an oppression claim.

148 In conclusion, at law, the Monitor was at liberty to bring an action for oppression. I will now turn to the issue of reasonable expectations.

(3) Reasonable Expectations

149 Essar Global and GIP submit that the trial judge erred in his analysis of reasonable expectations. They argue that there was no evidence of any subjectively held expectations, that the trial judge did not consider whether the expectations were objectively reasonable, and that he failed to consider factors identified in *BCE*.

150 The Monitor and Algoma respond by saying that the existence of reasonable expectations is a question of fact that can be proved by direct evidence or by the drawing of reasonable inferences. In this case, the trial judge properly considered the evidence that was before him to conclude that the pensioners, employees, retirees, and trade creditors held expectations that had been violated and that those expectations were objectively reasonable.

151 In his analysis, the trial judge correctly identified the two prongs of the oppression inquiry identified by the Supreme Court at para. 68 of *BCE*: (i) does the evidence support the reasonable expectation asserted by a claimant; and (ii) does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice", or "unfair disregard" of a relevant interest?

152 In identifying these two prongs, at paras. 58-59, the Supreme Court made two preliminary observations:

> First, oppression is an equitable remedy. It seeks to ensure fairness — what is "just and equitable". It gives a court broad, equitable jurisdiction to enforce not just what is legal but what is fair. . . . It follows that courts considering claims for oppression should look at business realities, not merely narrow legalities.
>
> Second, like many equitable remedies, oppression is fact-specific. What is just and equitable is judged by the reasonable expectations of the stakeholders in the context and in regard to the relationships at play. Conduct that may be oppressive in one situation may not be in another. [Citations omitted.]

153 As also stated in *BCE* at para. 71:

> Actual unlawfulness is not required to invoke s. 241; the provision applies "where the impugned conduct is wrongful, even if it is not actually unlawful." The remedy is focused on concepts of fairness and equity rather than on legal rights. In determining whether there is a reasonable expectation or interest to be considered, the court looks beyond legality to what is fair, given all the interests at play.

154 Evidence of an expectation "may take many forms depending on the facts of the case": *BCE*, at para. 70. The "actual expectation of a particular stakeholder is not conclusive": *BCE*, at para. 62. Furthermore, a stakeholder's reasonable expectation of fair treatment "may be readily inferred", because fundamentally all stakeholders are entitled to expect fair treatment: *BCE*, at paras. 64, 70. Once the expectation at issue is identified, the focus of the inquiry is on whether it has been established that the particular expectation was reasonably held: *BCE*, at para. 70.

155 The Monitor particularized the reasonable expectations in issue. It stated that the stakeholders had reasonable expectations that the Essar Group would not cause Algoma to engage in transactions for their benefit to the detriment of Algoma and its stakeholders, cause Algoma to transfer long-term control over an irreplaceable and core strategic asset of Algoma (*i.e.* the Port) to the Essar Group, and, among other things, provide the Essar Group with a veto. The source and content of the expectations were stated by the Monitor to include commercial practice, the nature of Algoma, and past practice. These particulars would all feed an expectation of fair treatment.

156 Based on the reasonable expectations particularized by the Monitor, as already noted, the trial judge found at para. 75 that:

> [T]he reasonable expectations of the trade creditors, the employees, pensioners and retirees of Algoma were that Algoma would not deal with a critical asset like the Port in such a way as to lose long-term control over such a strategic asset to a related party on terms that permitted the related party to veto and control Algoma's ability to do significant transactions or restructure and which gave unwarranted value to the third party.

157 There was evidence of subjective expectations before the trial judge. For example, at para. 65 of his reasons, the trial judge considered the evidence of subjective expectations of two trade creditors explaining that they were unaware of the Port Transaction and would not have expected an outcome in which Algoma no longer had full control over the Port facility.

158 The trial judge also drew reasonable inferences from the evidence and circumstances that existed at Algoma in 2014 in support of the expectations relied upon by the Monitor, as he was entitled to do: see *Ford Motor*, at para. 65. In that regard, he noted that Algoma had gone through a number of insolvencies and restructurings since the early 1990s. Given the cyclical nature of the steel business, it was reasonable for the stakeholders to expect a restructuring in the future. The reasonableness of this restructuring-related expectation was confirmed by GIP's insistence on a "bankruptcy remote" structure for its loan "given the fluctuating prices of steel and Algoma's history of insolvencies", as GIP said in its factum.

159 Based on the evidence of subjective expectations and the reasonable inferences the trial judge drew from the record, it cannot be said that there was no evidence supporting the trial judge's conclusion that a future restructuring was not reasonably foreseeable.

160 The trial judge also concluded that it was objectively reasonable for the stakeholders to expect, as he noted at para. 73, that Algoma would not lose its ability to restructure absent the consent of Essar Global — particularly in Sault Ste. Marie, where Algoma is the major industry on which trade creditors and employees rely. Put differently, it would not be reasonable to expect that the shareholder would have the right to veto any restructuring in a *CCAA* proceeding in which it was not an applicant and have the right to prefer its own interests over those of others such as the retirees, pensioners, trade creditors, and employees. Contrary to the assertions of the appellants, the trial judge expressly considered those issues.

161 Similarly, Essar Global submits that the foreseeability of another insolvency was contradicted by Mr. Marwah's affidavit evidence on the application for approval of the Plan of Arrangement, where he deposed that he believed that Algoma would be solvent. I would not give effect to this argument, as the trial judge's conclusion on the foreseeability of the insolvency is a factual finding, based on his review of the record as a whole. Essar Global has not demonstrated that this finding is subject to any palpable and overriding error.

162 The appellants' complaint that the trial judge failed to consider any of the factors identified in *BCE* is also misplaced. In that decision, the Supreme Court stated at para. 62:

> As denoted by "reasonable", the concept of reasonable expectations is objective and contextual. . . . In the context of whether it would be "just and equitable" to grant a remedy, the question is whether the expectation is reasonable

> having regard to the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations.

163 Essar Global's argument that the trial judge did not turn his mind to the *BCE* factors ignores the trial judge's explicit reasons on this point. At para. 68 of his decision, the trial judge referred to the factors identified by the Supreme Court as "useful" in determining whether an expectation was reasonable. These factors include: i) general commercial practice; ii) the nature of the corporation; iii) the relationship between the parties; iv) past practice; v) steps the claimant could have taken to protect itself; vi) representations and agreements; and vii) the fair resolution of conflicting interests between corporate stakeholders.

164 The trial judge correctly noted that, due to the fact-specific nature of the inquiry into reasonable expectations, not all listed factors must be satisfied in any particular case. I agree with his conclusion. The *BCE* factors are "not hard and fast rules", but are merely intended to "guide the court in its contextual analysis": Dennis H. Peterson and Matthew J. Cumming, *Shareholder Remedies in Canada*, 2nd ed. (Toronto: LexisNexis, 2017), at]§17.47.

165 Nonetheless, the trial judge did consider a number of the *BCE* factors based on the facts before him. For instance, at para. 68, he concluded that Algoma's prior sale of a non-critical asset, relating to factor iv), past practice, was not helpful in determining reasonable expectations. This was because the sale of a non-critical asset differs from the sale of a critical asset, as in the Port Transaction. Also under the rubric of past practices, he considered Algoma's prior insolvencies and restructuring proceedings. He concluded that while it was reasonable for stakeholders to expect that significant corporate changes might be necessary for Algoma in the future, it was not reasonable for them to expect that Algoma would lose its ability to restructure without the prior agreement of its parent, Essar Global.

166 As the trial judge's reasons reveal, he specifically considered the *BCE* factors and made findings on the objective reasonableness of the expectations at issue. I endorse the comments of the Monitor found at para. 80 of its factum:

> In this case, Justice Newbould found that the employees, retirees, and trade creditors all had a reasonable expectation that Essar Group would not engineer a transaction that deprived Algoma of a key strategic asset, rendering it incapable of restructuring or engaging in significant transactions without the approval of Essar Global, for minimal cash consideration in circumstances where there had been no consideration of alternative transactions. This was entirely supported by the entirety of the record adduced at trial.

167 This was essentially a factual exercise. There was conflicting evidence before the triaI judge. However it was for the trial judge to weigh the evidence and make factual findings. That is what he did. Based on the record before him, those factual findings were available to him. He considered both subjective expectations and whether the expectations were objectively reasonable. I see no reason to interfere.

168 I therefore reject the appellants' submissions on reasonable expectations.

(4) Wrongful Conduct and Harm

169 Essar Global also takes issue with the trial judge's conclusion that Essar Global's conduct was wrongful and harmful.

170 First, Essar Global submits that the trial judge inappropriately relied on the Equity Commitment Letter. It argues that the court approved the amended Plan of Arrangement that released Essar Global from any claim relating to the Equity Commitment Letter, and that reliance on a released obligation in connection with the wrongful conduct requirement of oppression was an impermissible collateral attack on the approval order.

171 I disagree. I can state no more clearly than the trial judge did at para. 100 of his reasons:

> The Monitor is not making a claim under the Equity Commitment Letter or asking that Essar Global provide the equity it agreed to provide in that commitment. Nor is the Monitor asking that the release be set aside. The Monitor

contends, and I agree, that the failure of Essar Global to fund as agreed in the RSA and Equity Commitment Letter is a part of the factual circumstances to be taken into account in considering whether the affected stakeholders who were not party to the agreements were treated fairly by the Port Transaction.

172 An amended Plan of Arrangement became necessary when Essar Global did not provide the promised equity contribution, the roadshow presentations were unsuccessful, and the Port Transaction was the only available means to generate sufficient cash for Algoma.

173 I also note that the trial judge recognized that the trade creditors, the employees, pensioners and retirees were not parties to nor did they play any role in the amended Plan of Arrangement proceedings. Although the release was in both the original RSA and the amended RSA, it would appear that there was no express reference to the Port Transaction being part of the Plan of Arrangement, nor was there any mention of it in any endorsement or the order approving the amended Plan of Arrangement.

174 In addition, the trial judge did not make his finding of wrongful conduct based on Essar Global's breach of the Equity Commitment Letter. Rather, he found that the totality of Essar Global's conduct regarding the Recapitalization and Port Transaction satisfied the wrongful conduct requirement.

175 Taken in context, the trial judge made no error in his treatment of the release in favour of Essar Global.

176 Second, Essar Global submits that the trial judge made factual errors relating to Essar Global's cash contributions. In particular, it submits that he erred in concluding that the cash Essar Global did advance in the recapitalization, namely US$150 million rather than the US$250 to US$300 million that was originally promised, was generated by the Port Transaction when it was not. They also complain that he erred in granting an oppression remedy when the Equity Commitment Letter provided for a limited remedy in the event of a breach.

177 The reasons of the trial judge on Essar Global's cash contribution are admittedly somewhat confusing. In para. 20 of his reasons, he states that Essar Global's revised cash contribution under the amended RSA was "to be funded largely not by Essar Global but by a loan from third party lenders to Portco of $150 million." Reading that paragraph in isolation might lend credence to the appellants' submission. That said, having regard to the record before him and reading the reasons as a whole, I am not persuaded that the trial judge misunderstood Essar Global's contribution to the recapitalization.

178 The relevant contributions made to Algoma in November 2014 consisted of:

• US$150 million in cash from Essar Global under the amended RSA;

• US$150 million in debt reduction in the form of loan forgiveness for certain loans owed by Algoma to members of the Essar Group under the amended RSA; and

• US$150 million in cash generated from the Port Transaction.

179 Essar Global only provided Algoma with US$150 million in cash equity, not the US$250 to 300 million in cash equity it had originally promised. The debt forgiveness would not assist Algoma in addressing its impending liquidity issues in the same way a cash injection would. Additionally, as the trial judge noted at para. 88, the US$150 million in debt reduction related to loans at the bottom of Algoma's capital structure, and therefore this reduction was of "questionable value" to Algoma at the time.

180 Algoma, the Monitor and Essar Global all provided the trial judge with written submissions describing the cash equity contribution as consisting of US$150 million in cash from Essar Global and US$150 million in cash from the Port Transaction. The contributions were also repeatedly referenced in the record. For example, the affidavit of Mr. Seifert — which the trial judge considered in great detail — clearly sets out Essar Global's cash contribution to Algoma and the

US$150 million in cash paid by Portco to Algoma under the Port Transaction as separate transactions. Similarly, these contributions are described as separate transactions in the affidavits of Messrs. Marwah and Ghosh.

181 The trial judge's reasons establish that he understood that there were two separate cash payments made to Algoma — one made by Essar Global in satisfaction of its commitments under the amended RSA and one made by Portco under the Port Transaction. He also understood that these cash payments were made in addition to Essar Global's forgiveness of US$150 million debt owed to it by Algoma.

182 Specifically, at para. 85, the trial judge noted that in October 2014, after the original RSA had been executed, Essar Global contemplated reducing the amount of its cash contribution promised under the RSA and the Equity Commitment Letter. The roadshow presentation prepared regarding Algoma's capitalization showed that Essar Global proposed to contribute less than US$100 million of *cash* rather than the US$250-$300 million required. He obviously understood that there was to be a cash component to Essar Global's contribution separate and apart from the proceeds of the Port Transaction.

183 In addition, at para. 88, the trial judge noted that the Port Transaction "*reduced* the amount of cash equity previously promised by Essar Global to be advanced to Algoma" (emphasis added). This shows that the trial judge understood that the proceeds from the Port Transaction were not *replacing* Essar Global's promised cash contribution. The trial judge recognized that the cash equity contribution of US$150 million and the debt reduction of US$150 million were insufficient to successfully refinance Algoma, and using the Port Transaction proceeds was the only way to generate the additional US$150 million in cash necessary. The trial judge highlighted at para. 96 that Algoma's CEO, Mr. Ghosh, had indicated that "he had had to agree to the Port Transaction" as it was the "only way" to refinance Algoma, since Essar Global's contribution was only "bringing in $150 million".

184 Even if the appellants were correct in this regard, which I do not accept, on their analysis, they themselves admit that Essar Global's contribution was short by US$50 million.

185 No matter the correct figure, Essar Global's conduct created a situation where Algoma had no choice but to accept the Port Transaction. There was no palpable and overriding error in the trial judge's understanding of the recapitalization requirements.

186 In any event, the reduction in Essar Global's cash contribution was only one aspect of Essar Global's overall conduct considered by the trial judge. He did not conclude that the cash equity reduction was itself the oppressive act. Accordingly, again, any factual error regarding Essar Global's actual cash contribution was not a palpable and overriding error.

187 As mentioned, Essar Global also asserts that the remedy for breach contained in the Equity Commitment Letter precluded any oppression remedy. No one was suing for breach of the Equity Commitment Letter. Rather, it formed part of the context that included a failure to explore alternatives, the Port Transaction itself, control rights that were proffered as a disincentive to other bidders and that erased any possibility of a successful restructuring, all in disregard of the expectations of the pensioners, employees, retirees, and trade creditors.

188 Third, although not identified as a ground of appeal nor advanced as such in their factum, in oral argument, the appellants submitted that the alleged breach of the Equity Commitment Letter did not cause Algoma to enter the Port Transaction.

189 Essar Global contends that the trial judge made factual errors in finding a causal connection between Essar Global's equity commitment and the Port Transaction. It argues that the Port Transaction was a key component of the recapitalization before the execution of the Equity Commitment Letter.

190 At trial, the trial judge rejected Essar Global's argument, finding at para. 87 that the Port Transaction was contemplated as a possible transaction when first introduced in May 2014, but that the transaction was not a certainty.

He accurately noted that the first Plan of Arrangement that was approved by the Court required Essar Global to comply with its cash funding commitment of US$250 to US$300 million pursuant to the Equity Commitment Letter and that the Port Transaction was not a part of that plan. He found that the Port Transaction had to be carried out because of Essar Global's decision not to fund Algoma according to the terms of the Equity Commitment Letter.

191 The causal connection between Essar Global's equity commitment and the Port Transaction is a factual matter and the trial judge's factual finding was supported by the evidence.

192 Furthermore, the Port Transaction that was floated in May 2014 was an entirely different transaction, in which the proceeds of sale would flow upstream to Essar Global and would not be used to recapitalize Algoma. Moreover, the RSA prohibited a related party transaction without noteholder consent, and the proceeds of any sale in excess of US$2 million had to be used to reduce Algoma's debt.

193 I am not persuaded that the trial judge made any palpable and overriding error in his finding.

194 Fourth, Essar Global submits that the trial judge erred in disregarding the business judgment rule, which should have applied to prevent judicial second-guessing of the Board's decisions.

195 The trial judge correctly described the business judgment rule relying on para. 40 of *BCE*:

> In considering what is in the best interests of the corporation, directors may look to the interests of, *inter alia*, shareholders, employees, creditors, consumers, governments and the environment to inform their decisions. Courts should give appropriate deference to the business judgment of directors who take into account these ancillary interests, as reflected by the business judgment rule. The "business judgment rule" accords deference to a business decision, so long as it lies within a range of reasonable alternatives . . . It reflects the reality that directors, who are mandated under s. 102(1) of the *CBCA* to manage the corporation's business and affairs, are often better suited to determine what is in the best interests of the corporation. This applies to decisions on stakeholders' interests, as much as other directorial decisions.

196 Two additional points should be made with respect to the business judgment rule. First, the rule shields business decisions from court intervention only where they are made prudently and in good faith: *CW Shareholdings Inc. v. WIC Western International Communications Ltd.* (1998), 160 D.L.R. (4th) 131 (Ont. Gen. Div. [Commercial List]), at pp. 150-151.

197 Second, the rule's protection is available only to the extent that the Board of Directors' actions actually evidence their business judgment: *UPM-Kymmene*, at para. 153.

198 In deciding that the rule afforded no defence to Essar Global, the trial judge, at para. 123, relied on the fact that the Board did not follow "advice to go after Essar Global on its cash equity commitment". The trial judge went on to note that had Algoma's Board formed an independent committee in February 2014, events may have evolved differently, and the Board may have accepted the advice to hold Essar Global to its commitment.

199 Essar Global takes issue with this conclusion by asserting that the trial judge should not have characterized Algoma's Board as lacking independence because of its decision not to strike an independent committee. Essar Global points out that there was no evidence that Mr. Ghosh — who cast the deciding vote in that decision — was not free to vote as he chose.

200 Essar Global's argument ignores the trial judge's key finding that the four directors who voted against the independent committee in February 2014, including Mr. Ghosh, were not independent. The trial judge noted at para. 15 that he could "not overlook" that Mr. Ghosh had been with Essar Steel India, adding that Algoma's CFO, Mr. Marwah, had described these four directors as "Essar-affiliated directors". On this basis, it was open for the trial judge to find that the Essar-affiliated directors were not free from the influence of Essar Global and the Ruia family, particularly

when considered alongside his extensive comments at paras. 43-60 finding that the critical decisions regarding Algoma's recapitalization and the Port Transaction were made not by Algoma's Board, but by Essar Global and Essar Capital as led by Mr. Seifert.

201 Specifically, the trial judge made findings of fact at paras. 51-53 regarding the limited role played by Algoma's Board and management. He accepted the evidence of Messrs. Ghosh and Marwah that they did not negotiate the economic terms of the debt refinancing or the Port Transaction. He also accepted the evidence of Mr. Ghosh that the Transaction was approved because there was no realistic alternative to generate sufficient cash to complete the recapitalization. He rejected the contradictory evidence of Mr. Seifert because the evidence of Messrs. Ghosh and Marwah was consistent with the documentary evidence. In my view, the trial judge was entitled to weigh the evidence as he did and make these findings of fact that were not infected by any palpable and overriding error.

202 Essar Global maintained before the trial judge, as they do before this court, that the Algoma Board's decisions were nonetheless shielded from court intervention because the Board had the benefit of sophisticated advisors throughout the recapitalization process. And yet, the only evidence tendered of any such advice was advice that the Board elected not to follow.

203 At para. 122, the trial judge described this advice, which was provided at least in part by Ray Schrock, described by the appellants as Algoma's lawyer. Mr. Schrock told the Board that unsecured noteholders would not react well to the Port Transaction and were likely to seek a higher infusion of cash from Essar Global, as promised in the Equity Commitment Letter. Mr. Schrock said that the Board should insist that Algoma press Essar Global to fulfill its equity commitments. There was no evidence that steps were taken in this regard and the trial judge found that this advice was not followed.

204 Additionally, the circumstances surrounding the resignation of the independent directors from Algoma's Board lend support to the trial judge's conclusion that reliance on the business judgment rule was unavailable. Mr. Dodds' letter stated that his decision to resign was driven by his conclusion that as an independent director, he lacked confidence that he was "receiving information and engaged in decision-making in the same manner as those Board members who are directly affiliated with the company and/or its parent". It was open to the trial judge to reach the conclusions he did. In these circumstances, the business judgment rule was of little assistance.

205 Essar Global also submits that the trial judge should not have gone on to censure the activities of the Board in November 2014 (when the Board approved the transactions) by relying on the Board's February 2014 decision regarding the independent committee.

206 The trial judge did not censure the decisions of the Algoma Board solely based on the February 2014 meeting. The February meeting, and the events surrounding it, are part of a larger context that included the November 2014 meeting, all of which the trial judge considered, and all of which demonstrated that the Board's decisions regarding the recapitalization were not made prudently or in good faith, as found by the trial judge, and thereby failed to attract the application of the business judgment rule.

207 Specifically, the trial judge found at para. 123 that, if the Board had acquiesced to forming an independent committee, or listened to the truly independent directors before they resigned in frustration, subsequent steps taken in pursuit of the recapitalization transaction "may have been taken differently". He then went on to say that:

> What happened in the Port Transaction was an exercise in self-dealing in that Algoma's critical Port asset was transferred out of Algoma to a wholly owned subsidiary of Essar Global with a change of control provision that benefited Essar Global at a time that a future insolvency was a possibility.

208 Additionally, the trial judge found that the Board had accepted the inclusion of the contentious change of control provision in the Cargo Handling Agreement without considering alternatives. If the provision was truly for the benefit

of GIP, it could have been accomplished in another way, without providing Essar Global with an effective veto over a change of control of Algoma.

209 All this evidence speaks to the Board's lack of business judgment and good faith, the failure to consider reasonable alternatives, and the Algoma Board's limited role in directing the recapitalization. There is no palpable and overriding error in the trial judge's conclusion that the Board was precluded from relying on the business judgment rule. His decision was amply supported by the record.

210 Essar Global makes an additional point relating to the business judgment rule: that, in any event, no independent committee was required under corporate law.

211 It is a contrivance for Essar Global to impugn the trial judge's conclusion regarding the business judgment rule on the basis that an independent committee was not required. Although it is true that an independent committee was not legally or technically required, the Board's decision not to strike one, in the circumstances surrounding the November 2014 restructuring transactions, speaks volumes. The decision not to strike an independent committee must be considered alongside the evidence I have already reviewed: the Board's lack of independence, the Board's failure to follow its advisors' advice, the Board's failure to consider alternatives, and the Board's acquiescence to recapitalization transactions that primarily benefited the interests of Essar Global over those of Algoma. Again, the totality of the evidence supports the Board's lack of good faith, and renders the business judgment rule inapplicable.

212 There is one final argument Essar Global raises in invoking the business judgment rule. It claims that it was procedurally offensive for the trial judge to criticize the directors for not following Mr. Schrock's advice because evidence of the advice was not before him. It adds that, had the directors relied on legal advice from Mr. Schrock in the legal proceedings, privilege had not been waived.

213 Here, the minutes of the Board meeting held in November 2014 describe Mr. Schrock as "informing the Board [that] the [unsecured noteholders] would not react well to the proposed changes and that they were likely to push [Essar Global] for a higher infusion of cash/equity into [Algoma] as set forth in the Commitment [L]etter". Mr. Schrock also commented that the proposed Port Transaction "was likely to cause concern by the [unsecured noteholders]". Accordingly, Mr. Schrock advised the Board to "insist that [Algoma] should press all parties to fully satisfy their . . . obligations regarding the equity contributions".

214 To the extent that Mr. Schrock's comments amounted to legal advice, I would first note that his advice was only one piece of the evidentiary puzzle in the broader factual context. Even if Mr. Schrock's advice, and the Board's failure to implement it, are disregarded, the record still amply supports the trial judge's conclusions on this issue.

215 I would also add that Essar Global's claim that the evidence of Mr. Schrock's advice was not before the trial judge is incorrect. The Board minutes were included in the record as an exhibit to an affidavit tendered by Essar Global. Finally, as for Essar Global's argument that privilege had not been waived, any privilege that may have attached to Mr. Schrock's advice belonged to Algoma and not Essar Global.

216 Fifth, Essar Global submits that the involvement of Algoma's management and Board in the Port Transaction sanitizes that transaction, because the trial judge concluded that Messrs. Ghosh and Marwah acted in good faith thinking they were doing the best for Algoma in the circumstances. Essar Global also claims that the trial judge erred by holding otherwise because the Monitor failed to attack the Board's process in its pleading. I do not accept these arguments.

217 Despite Essar Global's argument, this court has established that good faith corporate conduct does not preclude a finding of oppression: *Brant Investments Ltd. v. KeepRite Inc.* (1991), 3 O.R. (3d) 289 (Ont. C.A.).

218 Moreover, Essar Global's argument on this point ignores the trial judge's findings that Algoma's Board and management played a limited role in the Port Transaction. It also ignores evidence that indicates that Messrs. Ghosh and Marwah's support was only given because there was no alternative to address Algoma's financial straits. This factual

background demonstrates why it was open for the trial judge to conclude that the Port Transaction was oppressive, despite the good faith of Messrs. Ghosh and Marwah.

219 On the pleadings issue, I note that the Monitor pleaded that the Port Transaction was the result of Essar Global's "*de facto* control" of Algoma. In response, Essar Global pleaded that the Port Transaction was in the best interests of Algoma, based on the approval of the transaction by Algoma's Board and senior management, who were acting on an informed basis and with the benefit of financial advice. Given the way in which Essar Global framed its defence in its pleadings, it cannot now say that issues related to the Board's process were not properly before the trial judge.

220 Turning to the appellants' last argument relating to wrongful conduct and harm, they submitted that the trial judge identified two potential harms caused by Essar Global, neither of which is actionable in the oppression action: the undervalue of the Port Transaction to Algoma and the impairment of Algoma's ongoing restructuring.

221 In my view, it is inaccurate to characterize the trial judge's findings and analysis as concluding that harm flowed to stakeholders because the Port Transaction did not provide sufficient value to Algoma.

222 Specifically, he did not find that the US$171.5 million in consideration paid by Portco to Algoma constituted undervalue. Indeed his remedy that GIP be repaid in full suggests the contrary. Rather, he found that Essar Global received an unreasonable benefit from the Port Transaction.

223 Moreover, it was an exercise in self-dealing. As the trial judge stated at para. 144:

> For the balance of the first 20 years under the Cargo Handling Agreement after the GIP loan matures, if that agreement survives only to that date, Algoma will pay a further 12 years at $25 million, or $300 million, to Portco which will benefit Essar Global after the balance of the GIP loan is paid off. If the Cargo Handling Agreement is not terminated before the end of its life of 50 years, that will be another 30 years at $25 million, or $750 million, paid to Portco/Essar Global. Taken with the small amount paid by Essar Global, the $4.2 million in cash (and the $19.8 million note that it has refused to pay), it means that Essar Global will obtain an extremely large amount of cash from Algoma for little money. I realize that if Algoma became solvent and able to pay its debts, it would be able to pay a dividend to Essar Global (or the appropriate subsidiary) so long as Essar Global remained its shareholder. Whether and when Algoma could become solvent with its pension deficits that have existed for some time and be in a position to pay dividends to its shareholder is a significant unknown. But the payments under the Cargo Handling Agreement do not require any solvency test and are in the financial circumstances Algoma finds itself in, a clear contractual benefit for little money. It is an unreasonable benefit that was prejudicial to, and unfairly disregarded, the interests of the creditors on whose behalf this action has been brought by the Monitor.

224 The trial judge also concluded that the mismatched terms of the Cargo Handling Agreement (20 years renewable) and the 50-year lease offered Essar Global an additional benefit. In that regard, he was not bound to accept the evidence of the appellants' expert. He reasoned, at para. 142, that the Port was critical to Algoma's functioning, and therefore that Algoma would not be in a position to terminate the Cargo Handling Agreement for the duration of the lease:

> The other concerns are with respect to the obligations in the Cargo Handling Agreement. I have a concern with the imbalance in the term of the lease to Portco for 50 years against the term of the Cargo Handling Agreement for 20 years with automatic renewal for successive three year periods unless either party gives written notice of termination to the other party. If Essar Global thought that it wanted an increased payment after 20 years, it could refuse to continue the Cargo Handling Agreement and put Algoma at its complete mercy. If the market did not support an increased payment, or indicated that the payments from Algoma to Portco should be less in the future, Algoma would still be at the mercy of Essar Global. As the Port facilities are critical to the operation and survival of Algoma, it would be foolhardy indeed for Algoma to refuse to extend the Cargo Handling Agreement. The language in the Cargo Handling Agreement that Algoma can refuse to extend it after 20 years is illusory and not realistic. In reality, it is a provision that is one-sided in favour of Essar Global.

225 The change of control provision or veto was also an exercise in "self-dealing". The consent provision unnecessarily tied Algoma's strategic options to Essar Global. The trial judge properly found that the insertion of control rights in the Cargo Handling Agreement served no practical purpose to GIP and the same rights could have been provided for in the Assignment of Material Contracts.

226 As the trial judge concluded at para. 138:

> In my view, and I so order, the appropriate relief for the oppression involving the change of control clause in the Cargo Handling Agreement is to delete section 15.2 from that agreement and to insert a provision in the Assignment of Material Contracts agreement that if GIP becomes the equity owner of Portco, Algoma or its parent cannot agree to or undertake a change of control of Algoma without the consent of GIP.

227 There was evidence from Messrs. Ghosh and Marwah that supported the trial judge's conclusion that harm had flowed from the presence of the change of control provision and the ensuing letter from counsel. They were not cross-examined and no competing evidence was tendered by the appellants. It was also open to the trial judge to interpret the letter sent by Portco's counsel to Algoma's counsel as a veto threat to potential bidders while Essar Global continued to be interested in being a bidder. I would not give effect to this argument.

228 On the issue of the impairment of Algoma's ongoing restructuring, the appellants argue that no harm could have flowed from this, as the restructuring was not, in fact, impaired. Specifically, they argue that the only evidence of impairment consisted of statements in the affidavits of Messrs. Ghosh and Marwah that potential bidders for Algoma were concerned about the change of control clause. I would reject this argument as well. Again, I note that the appellants chose not to cross-examine on these affidavits, nor did they object to their admission into evidence. They cannot now, after the fact, impugn the trial judge's reliance on these statements.

229 Additionally, the appellants argue that it was premature for the trial judge to conclude that the control clause impaired the restructuring, because Portco/Essar Global was never asked to consent to a new transaction or to new owners. However, at para. 117, the trial judge noted that the change of control rights had to be considered alongside Essar Global's holding itself out as a prospective buyer in any bidding process for Algoma. That Essar Global has never been asked to consent to a new transaction was immaterial, as it remained in Essar Global's "interest to dissuade other buyers in order for it to achieve the lowest possible purchase price". In coming to this conclusion the trial judge pointed to the letter from counsel for Portco/Essar Global on May 12, 2016, which "sp[oke] volumes" by "clearly invit[ing] any bidder to understand that Essar Global has control rights."

230 I see no error in the trial judge's conclusion.

(5) The Remedy

231 Turning then to the issue of the remedy. Essar Global submits that the trial judge erred in striking out the control clause in the Cargo Handling Agreement and in granting Algoma the option of terminating the Port agreements upon repayment of the GIP loan. They argue that he was only permitted to rectify the harm that was suffered. Deleting the provision was an overly broad remedy that was unconnected to the reasonable expectations of the stakeholders and instead, he should have considered a nominal damages award.

232 GIP supports the submissions of Essar Global. It argues that the remedy awarded was not sought by any party, no evidence had been called in respect of that remedy, and no submissions were made. The practical effect of granting Algoma a termination right is that GIP does not have the security for which it bargained and it was prejudiced, despite its lack of involvement in the oppression found against Essar Global. GIP also argues that the Monitor and Algoma are seeking to set-off amounts owed by Essar Capital to Algoma against amounts owed to GIP, which results in additional prejudice.

233 I would not give effect to these submissions. First, trial judges have a broad latitude to fashion oppression remedies based on the facts before them. Once a claim in oppression has been made out, a court may "grant any remedy it thinks fit": *Pente Investment Management Ltd. v. Schneider Corp.* (1998), 42 O.R. (3d) 177 (Ont. C.A.), at para. 4. The focus is on equitable relief, and deference is owed to the remedy granted: *Fedel*, at para. 100.

234 Second, the trial judge properly identified the need to avoid an overly broad remedy, stating at para. 136 that there were "less obtrusive ways" of remedying the oppression than ordering shares of Portco be transferred to Algoma (the remedy the Monitor had originally requested). Varying the transaction as he did was one such way. The trial judge's remedy removes Portco's control rights (the main obstacle to a successful restructuring) and, after GIP is paid, restores the Port to the ownership of Algoma. If GIP becomes the equity owner of Portco, its consent will be required to any change of control. Unlike a damages award, the remedy was responsive to the oppressive conduct. It served to vindicate the expectations of the stakeholders that Algoma would retain long-term control of the Port and that Essar Global would not have a veto over its restructuring efforts.

235 Third, the remedy granted preserves the security GIP had bargained for and therefore GIP has not suffered any prejudice as a result of the remedy. The trial judge's remedy, as described at para. 145, ensures that GIP is to be paid in full. Until "payment in cash of all amounts owing to GIP" is made, the Port remains in Portco's hands and the contractual remedies held by GIP to enforce its security remain in place. Moreover, Essar Global guaranteed Portco's liabilities to GIP under GIP's loan in the Port Transaction, which further demonstrates GIP's lack of prejudice. As GIP's own affiant indicated, this guarantee provides GIP with "an extra layer of protection in the event the debtor is unable to repay the loan".

236 Finally, regarding the issue of set-off, I note that the arguments made by GIP in support of this ground were made prior to Newbould J.'s subsequent ruling dealing with this issue. In that decision, he held that Algoma had set-off amounts owed under the promissory note against Essar Global, but he preserved GIP's right to repayment. This decision is a full answer to GIP's arguments on this point, and ensures that GIP will not suffer any prejudice as a result of the remedy granted in response to Essar Global's oppressive conduct.

(6) Was There Procedural Unfairness?

237 Essar Global submits that the trial judge erred in basing his decision and relief on bases that were not pleaded. GIP supports the position of Essar Global, with particular focus on the remedy that was ultimately imposed.

238 As mentioned, the trial judge was the supervising *CCAA* judge and deeply acquainted with the facts of the restructuring. Of necessity, and on agreement of all parties to the oppression action, the timelines for pleadings, productions, and examinations were truncated. Additionally, no party objected at trial that the process had been procedurally unfair. Given the context and the complexity of the dispute, the pleadings were not as clear as they might have been in a less abbreviated schedule. That said, on a review of the record, I am not persuaded that there was any procedural unfairness with respect to the claims or that the appellants did not know the case they had to meet.

239 The focus of at least GIP's complaint lies in the remedy. The appellants are correct that the precise remedy awarded by the trial judge was not pleaded. A trial judge must fashion a remedy that best responds to the oppressive conduct and that is not overly broad. While it is desirable for a party seeking oppression relief to provide particulars of the remedy, a trial judge is not bound by those particulars. Because the discretionary powers under the oppression remedy must be exercised to *rectify* the oppressive conduct complained of (see: *Naneff v. Con-Crete Holdings Ltd.* (1995), 23 O.R. (3d) 481 (Ont. C.A.), at para. 27), it follows that the remedy will, by necessity, be linked to the oppressive conduct that was pleaded. Therefore a party against whom a specifically-tailored oppression remedy is ordered cannot fairly complain that the remedy caught them by surprise. This conclusion is consistent with *Fedel*, where this court upheld oppression remedies imposed by the trial judge where the relief granted had not been specifically pleaded or sought in argument.

240 Moreover, absent error, a trial judge's decision on remedy is entitled to deference. As I have discussed, there is an absence of error. Furthermore, in this case, there is no prejudice to GIP. Its position is preserved by the remedy granted by the trial judge. At the same time, the remedy is responsive to Essar Global's oppressive conduct.

241 That said, the trial judge did consider whether Essar Global and GIP could fairly argue that they were taken by surprise by his remedy. At para. 141, he rejected this position, holding that the issue of the change of control clause was pleaded by the Monitor, and affidavit material filed by both Essar Global and GIP provided evidence on the provision's significance. At para. 146, he concluded that issues relating to the relief he ordered were "fully canvassed in the evidence and argument", and that the remedy he ordered in fact was less intrusive than the remedy originally pled by the Monitor. And although he did not think an amendment was necessary, he nonetheless ordered that the Monitor would be granted leave to amend its claim to support the relief he granted.

242 I would not give effect to this ground of appeal.

(7) Fresh Evidence

243 Essar Global seeks to introduce fresh evidence on appeal that addresses the independence of Algoma's Board of Directors. It takes the position that the trial judge's rejection of the independence of two directors, Messrs. Kothari and Mirchandani, played a significant role in his decision. It adds that the lack of independent directors was not pleaded by the Monitor and so Essar Global had no reason to adduce this evidence earlier.

244 Messrs. Mirchandani and Kothari joined Algoma's Board in June and August 2014, respectively, after the three independent directors resigned. They were therefore on the Board when the Port Transaction was approved in November 2014.

245 Whether "a proper case" exists to allow fresh evidence is determined by applying the test outlined in *R. v. Palmer* (1979), [1980] 1 S.C.R. 759 (S.C.C.), or the slightly modified test from *Sengmueller v. Sengmueller* (1994), 17 O.R. (3d) 208 (Ont. C.A.).

246 As this court has noted, the two tests are quite similar: see *Korea Data Systems Co. v. Chiang*, 2009 ONCA 3, 93 O.R. (3d) 483 (Ont. C.A.), at para. 77. Under the *Palmer* test, the party seeking to admit fresh evidence must demonstrate that the evidence could not, by due diligence, have been adduced at trial; that the evidence is relevant in that it bears on a decisive issue in the trial; that the evidence is credible; and that the evidence, if believed, could be expected to affect the result.

247 Under the *Sengmueller* test, the moving party must demonstrate that the evidence could not have been obtained by the exercise of reasonable diligence prior to trial; that the evidence is credible; and that the evidence, if admitted, would likely be conclusive of an issue on appeal.

248 Essar Global has failed to meet either the *Palmer* or the *Sengmueller* test for two main reasons.

249 In both its original and its amended statement of claim, the Monitor alleged that representatives of Essar Global were members of Algoma's Board and exercised *de facto* control over Algoma, such that they made decisions for the benefit of Essar Global while unfairly disregarding the interests of Algoma's stakeholders. Essar Global cannot claim to have been caught by surprise by the issue of the Board's independence being in play. The fresh evidence could have been obtained with reasonable diligence prior to trial.

250 In any event, the evidence would not have affected the result at trial, and is not conclusive of any issue on appeal. The fresh evidence Essar Global asks to proffer consists of the affidavit of Mr. Mirchandani, which states that he and Mr. Kothari were determined to be independent Board members as a result of a conflict of interest policy and by virtue of the questionnaires they each completed.

251 However, there was evidence before the trial judge essentially to this effect, including Algoma's October 2014 offering memorandum, which stated that the Board included two independent directors. Indeed, the trial judge commented on this evidence in footnote 7 of his reasons, and rejected it in concluding that Messrs. Mirchandani and Kothari were not truly independent of Essar Global.

252 Additionally, and as I have already discussed elsewhere in these reasons, the remainder of the record strongly supported the Board's lack of independence. Even if the trial judge had Mr. Mirchandani's affidavit before him, it would not have made a difference.

253 I would therefore dismiss the motion for fresh evidence.

(8) Costs

254 GIP claimed costs of CDN$750,156.18 against the Monitor payable on a partial indemnity scale. It claimed it was entirely successful because it successfully resisted relief sought by the Monitor that would have prejudiced GIP. The trial judge exercised his discretion and observed that success between the Monitor and GIP was divided. He also relied on GIP's appeal as a basis to conclude success was divided. He therefore did not order any costs in favour of or against GIP.

255 GIP seeks leave to appeal the trial judge's costs award. Before this court, GIP in essence renews the arguments made before the trial judge. The awarding of costs is highly discretionary and leave is granted sparingly. I see no error in principle in the trial judge's exercise of discretion nor was the award plainly wrong: *Hamilton v. Open Window Bakery Ltd.* (2003), 2004 SCC 9, [2004] 1 S.C.R. 303 (S.C.C.), at para. 27.

256 At trial, GIP was unsuccessful in challenging both the Monitor's claim of standing and its claim that the Port Transaction was oppressive. It also seems incongruous for GIP to suggest that it was entirely successful in defeating the Monitor's claims, while it appeals the trial decision.

257 I see no basis on which to interfere with the costs award of the trial judge and would refuse leave to appeal costs.

E. DISPOSITION

258 For these reasons, I would dismiss the appeal, the motion for fresh evidence and the motion for leave to appeal costs.

259 As agreed, I would order that the Monitor and Algoma are entitled to costs of the appeal fixed in the amounts of CDN$100,000 and CDN$60,000 respectively, inclusive of disbursements and applicable taxes on a partial indemnity scale. At the oral hearing, the parties had not agreed on whether the award should be payable on a joint and several basis and requested more time to consider the matter. On September 15, 2017, counsel wrote advising that they had still not agreed on this issue. GIP requested the opportunity to make additional costs submissions on this issue at the appropriate time. Under the circumstances, I would permit GIP to make brief written submissions on this issue by January 10, 2018. Essar Global shall have until January 17, 2018 to file its submissions. The Monitor and Algoma shall have until January 24, 2018 to respond.

***R.A. Blair J.A.*:**

I agree.

***K. van Rensburg J.A.*:**

I agree.

Appeal dismissed; application dismissed.

Footnotes

1 Algoma was named in the proceeding below as a defendant, but supports the position taken by the respondent, Ernst & Young Inc. It is therefore a respondent on this appeal.

2 In early 2015, Essar Consulting obtained two additional valuations of the Port assets, one in February from Royal Bank of Canada and one in April from ICICI Securities. The RBC valuation, which was an exhibit to the affidavit of Joseph Seifert, was between US$165 and US$200 million. The ICICI valuation, which was an exhibit to the affidavit of Anshumali Dwivedi, was US$349 million.

3 Although Deutsche Bank intervened in the proceedings below, it was not involved in this appeal.

4 Before this court, no submissions on urgency were advanced.

5 Stephanie Ben-Ishai and Catherine Nowak, "The Threat of the Oppression Remedy to Reorganizing Insolvent Corporations" in Janis P. Sarra, ed., *Annual Review of Insolvency Law, 2008* (Toronto: Carswell, 2009) 429, at pp. 430-431 and 436.

6 Janis Sarra, "Creating Appropriate Incentives, A Place for the Oppression Remedy in Insolvency Proceedings" in Janis P. Sarra ed., *Annual Review of Insolvency Law, 2009* (Toronto: Carswell, 2010) 99, at p. 99.

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Tab 12

Most Negative Treatment: Recently added (treatment not yet designated)
Most Recent Recently added (treatment not yet designated): Poulin et Remac innovateurs industriels inc. | 2018 QCCS 3315, 2018 CarswellQue 6502, EYB 2018-297068, 297 A.C.W.S. (3d) 29 | (C.S. Qué., Jul 20, 2018)

2013 ABCA 288
Alberta Court of Appeal

Smith v. Pricewaterhousecoopers Inc.

2013 CarswellAlta 1520, 2013 ABCA 288, [2013] A.W.L.D. 3759, 232 A.C.W.S. (3d) 579, 245 A.R. 245, 3 Alta. L.R. (6th) 341, 584 W.A.C. 245

William Franklin Smith, Applicant and Pricewaterhousecoopers Inc. and Servus Credit Union Ltd., Respondents

Patricia Rowbotham J.A.

Heard: August 14, 2013
Judgment: August 22, 2013
Docket: Calgary Appeal 1301-0046-AC

Counsel: J.G. Hanley for Applicant
H.A. Gorman for Respondent, Pricewaterhousecoopers Inc.
R. Gurofsky for Respondent, Servus Credit Union Ltd.

Subject: Civil Practice and Procedure; Insolvency
Headnote
Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Court of Appeal — Availability — Leave by judge
Company entered into credit facility with credit union — Company was ultimately assigned into bankruptcy — Since company did not have sufficient funds to pay all creditors, creditors brought action against company's founder to make up shortfall through recourse to guarantee — Founder wanted to bring action on behalf of estate of bankrupt company against credit union for improvident realization, breach of fiduciary duty, negligence and economic loss — Since trustee did not consent to commencement of action, founder applied pursuant to s. 38(1) of Bankruptcy and Insolvency Act for leave to commence action — Bankruptcy judge refused to grant leave — Founder brought application for declaration that leave to appeal was not required or alternatively for leave to appeal — Application dismissed — Founder did not have appeal as of right under s. 193(c) of Act — There was no prima facie evidence that decision of bankruptcy judge was erroneous or abuse of power — Bankruptcy judge's decision to grant standing to proposed defendant to oppose application due to concerns about material omissions in founder's affidavit and irregularities in proceedings was discretionary and warranted significant appellate deference — Trustee did not act improperly in opposing action.
Table of Authorities
Cases considered by *Patricia Rowbotham J.A.*:

Alberta Treasury Branches v. Chocolaterie Bernard Callebaut Partnership (2012), 2012 ABQB 245, 2012 CarswellAlta 704 (Alta. Q.B.) — considered

Alberta Treasury Branches v. New Hatchwear Co. (2012), 2012 ABQB 788, 2012 CarswellAlta 2323, 97 C.B.R. (5th) 227 (Alta. Q.B.) — referred to

Alternative Fuel Systems Inc. v. Edo (Canada) Ltd. (Trustee of) (1997), 48 C.B.R. (3d) 171, (sub nom. *Edo (Canada) Ltd. (Bankrupt), Re*) 206 A.R. 295, 1997 CarswellAlta 737, (sub nom. *Edo (Canada) Ltd. (Bankrupt), Re*) 156 W.A.C. 295 (Alta. C.A. [In Chambers]) — referred to

Bank of Montreal v. Tolo-Pacific Consolidated Industries Corp. (2012), 97 C.B.R. (5th) 56, 2012 BCSC 1785, 2012 CarswellBC 3719 (B.C. S.C.) — referred to

Coroban Plastics Ltd., Re (1994), 10 B.C.L.R. (3d) 52, 34 C.B.R. (3d) 50, (sub nom. *Formula Atlantic Financial Corp. v. Canada (Attorney General)*) 86 W.A.C. 214, 1994 CarswellBC 1186, (sub nom. *Formula Atlantic Financial Corp. v. Canada (Attorney General)*) 52 B.C.A.C. 214 (B.C. C.A.) — considered

Decock v. Alberta (2000), 255 A.R. 234, 220 W.A.C. 234, 2000 CarswellAlta 384, 79 Alta. L.R. (3d) 11, 186 D.L.R. (4th) 265, [2000] 7 W.W.R. 219, 2000 ABCA 122 (Alta. C.A.) — referred to

Dominion Trustco Corp., Re (1997), 45 C.B.R. (3d) 25, 1997 CarswellOnt 308, (sub nom. *Dominion Trustco Corp. (Bankrupt), Re*) 24 O.T.C. 162 (Ont. Bktcy.) — considered

Dominion Trustco Corp., Re (1997), 1997 CarswellOnt 4901, 50 C.B.R. (3d) 84 (Ont. C.A.) — referred to

Dykun v. Odishaw (1998), 1998 ABCA 220, 7 C.B.R. (4th) 151, 1998 CarswellAlta 594 (Alta. C.A.) — referred to

Elias v. Hutchison (1981), 37 C.B.R. (N.S.) 149, 27 A.R. 1, (sub nom. *Catalina Exploration & Development Ltd., Re*) 121 D.L.R. (3d) 95, 1981 CarswellAlta 183, 14 Alta. L.R. (2d) 268 (Alta. C.A.) — considered

HSBC Bank Canada v. Kupritz (2011), 2011 BCSC 788, 2011 CarswellBC 1503, 82 C.B.R. (5th) 73, 88 B.L.R. (4th) 328, 18 P.P.S.A.C. (3d) 322 (B.C. S.C.) — referred to

J. & W. Investments Ltd. v. Black (1963), 38 D.L.R. (2d) 251, 1963 CarswellBC 23, 41 W.W.R. 577 (B.C. C.A.) — referred to

Jolub Construction Ltd., Re (1993), 1993 CarswellOnt 235, 21 C.B.R. (3d) 313 (Ont. Bktcy.) — referred to

Mutual Trust Co. v. Scott, Pichelli & Graci Ltd. (1999), 11 C.B.R. (4th) 54, 1999 CarswellOnt 2190 (Ont. Bktcy.) — referred to

Nesi Energy Marketing Canada Inc., Re (1998), 8 C.B.R. (4th) 76, (sub nom. *Nesi Energy Marketing Canada Inc. (Bankrupt), Re*) 233 A.R. 347, [1999] 7 W.W.R. 217, 68 Alta. L.R. (3d) 150, 1998 CarswellAlta 1012, 1998 ABQB 912 (Alta. Q.B.) — considered

Polar Products Inc. v. Hongkong Bank of Canada (1992), 14 C.B.R. (3d) 225, 1992 CarswellBC 514 (B.C. S.C.) — referred to

Royal Bank v. Profor Kedgwick Ltée/Ltd. (2008), (sub nom. *Plancher Héritage ltée/Heritage Flooring Ltd. (Bankrupt), Re*) 336 N.B.R. (2d) 332, (sub nom. *Royal Bank v. Profor Kedgwick Ltd.*) 299 D.L.R. (4th) 727, 2008 NBCA 69, 2008 CarswellNB 463, 2008 CarswellNB 464, 47 C.B.R. (5th) 159, (sub nom. *Plancher Héritage ltée/Heritage Flooring Ltd. (Bankrupt), Re*) 862 A.P.R. 332 (N.B. C.A.) — considered

Shaw Estate (Trustee of) v. Nicol Island Development Inc. (2009), 2009 ONCA 276, 2009 CarswellOnt 1748, 51 C.B.R. (5th) 12, (sub nom. *Shaw Estate v. Nicol Island Development Inc.*) 248 O.A.C. 35 (Ont. C.A.) — referred to

Simonelli v. Mackin (2003), 39 C.B.R. (4th) 297, (sub nom. *Simonelli (Bankrupt), Re*) 320 A.R. 330, (sub nom. *Simonelli (Bankrupt), Re*) 288 W.A.C. 330, 2003 CarswellAlta 176, 2003 ABCA 47 (Alta. C.A. [In Chambers]) — referred to

Tirecraft Group Inc., Re (2009), 54 C.B.R. (5th) 140, 470 A.R. 113, 2009 ABQB 281, 2009 CarswellAlta 687 (Alta. Q.B.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 38(1) — considered

s. 193 — considered

s. 193(c) — considered

s. 193(e) — considered

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68

R. 129 — referred to

APPLICATION by bankrupt company's founder for declaration that leave to appeal not required or for leave to appeal.

***Patricia Rowbotham J.A.*:**

Introduction

1 The applicant wishes to commence an action on behalf of the estate of a bankrupt company. The respondent trustee did not consent to the commencement of the action. The applicant applied pursuant to section 38(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-6 *(BIA)* for leave to commence the action. A bankruptcy judge refused to give leave. The applicant applies to this court for a declaration that he does not require leave to appeal, or, in the alternative for leave to appeal. For the reasons that follow I find that leave is required and I deny leave to appeal.

Background

2 The applicant is the founder of Caliber Systems Inc., a heavy construction company. It had entered into a credit facility with a credit union that has now merged to become Servus. Caliber found itself in financial distress during a downturn in the economy, and after nine months of violating the terms of its credit facility with Servus, became subject to a receivership order. Caliber was ultimately assigned into bankruptcy.

3 It was ultimately determined that Servus was not the first secured creditor, but that the first priority went to GE Capital, who was fully paid out once Caliber was liquidated. There were insufficient funds to pay out the remaining creditors, including Servus, who are now attempting to make up the shortfall through recourse to a guarantee provided by the applicant. The applicant alleges that Servus was negligent in failing to provide notice to the first secured creditor, and to engage in discussions on potential restructuring of Caliber with a view to pay the indebtedness.

4 The draft statement of claim pleads improvident realization, breach of fiduciary duty, negligence in relation to the appointment of the receiver, and a claim for economic loss. In response to a request for the trustee's consent to sue, the trustee's counsel replied in writing: "We are having trouble understanding the basis for such a claim in an instance where Caliber had consented to the receivership appointment and the realization was completed through a Court supervised and approved process."

5 At the leave application a preliminary issue arose as to the standing of Servus to address the application. The bankruptcy judge found that this was a situation where there is an:

> [I]nterested party who has evidence that is germane and relevant to the Court's determination with respect to whether or not there is an action here, to use your words, or a cause of action that might be accepted. That evidence is essential and vital to the Court's deliberation. The exceptions are present. There appear to be material at least omissions from your client's affidavit if not downright misrepresentations, so I would grant Servus the standing to enter their evidence, that being the affidavit of Mr. Tuchee and make submissions on it and other matters that may arise during the application.

6 Counsel agreed that the test for granting the application was whether the applicant could show that the claim is not obviously spurious.

Decision of the Bankruptcy Judge

7 The bankruptcy judge found that the claim was spurious. She said:

> There cannot be a better documented situation, in my view, of a company which was in financial difficulty that reached out to its lender, Servus, and through a series of nine months attempts were made to save Caliber which were not successful. That is the sum total of what happened here.

> I cannot see on any of the evidence that has been presented by Mr. Smith any of the causes of action that we outlined — that we went through that could possibly be framed or outlined in the statement of claim being anything more than spurious.
>
> This is very well documented, Mr. Hanley, through the forebearance agreements and through the e-mails, right up until the day of the taking of the consent order from Mr. Robinson. It did not work.
>
> . . .
>
> I see from one of the cases you had referred me to that there was a similar allegation made by counsel in front of the judge at that time, and that judge also took the position that the motivation was not relevant, the question is whether or not there is anything on the face of the — of the proposed action that would — that has the merest chance of success or, put differently, that it's not obviously spurious. This is to my mind obviously spurious. There just is such — it's so well documented what occurred, what happened here, that the possibility of a string of oral agreements in the face of the written agreements is just not — just — just to my mind is completely not possible.

Legislation

8 The appeal of an order under section 38(1) is governed by section 193 of the *BIA*. The appellant relies on section 193(c), or alternatively section 193(e):

> 193. Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
>
> (a) if the point at issue involves future rights;
>
> (b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
>
> (c) if the property involved in the appeal exceeds in value ten thousand dollars;
>
> (d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and
>
> (e) in any other case by leave of a judge of the Court of Appeal.

Analysis

Automatic Right of Appeal (Section 193(c))

9 This court has consistently held that appeals involving procedural rights that are not appreciable in monetary terms fall outside the scope section 193(c) of the *BIA*: *Elias v. Hutchison* (1981), 27 A.R. 1, 14 Alta. L.R. (2d) 268 (Alta. C.A.); *Simonelli v. Mackin*, 2003 ABCA 47, 320 A.R. 330 (Alta. C.A. [In Chambers]) at paras 13-27. *Elias* involved an appeal from the refusal to grant the appellant leave to sue the bankruptcy for allegedly wrongful acts in the course of his bankruptcy. *Simonelli* involved an appeal from an application to strike a statement of claim under former Rule 129 Alberta *Rules of Court*, Alta Reg 390/168. *Simonelli* and *Elias* were followed by the New Brunswick Court of Appeal in *Royal Bank v. Profor Kedgwick Ltée/Ltd.*, 2008 NBCA 69, 299 D.L.R. (4th) 727 (N.B. C.A.), in similar circumstances to this appeal. There, the appellant was a guarantor to a bankrupt company and sought to pursue a claim against a bank so that he might reduce any claim against him personally under the guarantee. As in the present appeal, the application for leave pursuant section 38(1) was unsuccessful. The court observed at para 21:

> [I]t is difficult to think of a case involving a corporate bankrupt in which the amount ultimately in issue would not exceed $10,000. Consequently, there would be little utility to the other four subsections under s. 193 if such cases were subject to an appeal as of right. Since the issue on appeal in this case does not directly involve an amount in

excess of $10,000 there can be no appeal as of right under s. 193(c). The central issue in this case is whether or not the motion judge erred by failing to consider whether the appellant, as a guarantor, is a creditor of the bankrupt. Since the issue on appeal does not involve an amount in excess of $10,000, there can be no appeal as of right under s. 193(c).

10 I conclude that the applicant does not have an appeal as of right and must apply for leave to appeal.

Leave to Appeal (Section 193(e))

11 The test for leave to appeal involves consideration of the following five factors:

(1) whether the point of appeal is of significance to the bankruptcy practice;

(2) whether the point is of significance to the action itself;

(3) whether the appeal is *prima facie* meritorious;

(4) whether the appeal will unduly hinder the progress of the action; and

(5) whether the judgment appears to be contrary to law, amounts to an abuse of judicial power, or involves an obvious error causing prejudice, for which there is no remedy.

(See *Alternative Fuel Systems Inc. v. Edo (Canada) Ltd. (Trustee of)* (1997), 206 A.R. 295 (Alta. C.A. [In Chambers]) at para 12; *Dykun v. Odishaw*, 1998 ABCA 220, 7 C.B.R. (4th) 151 (Alta. C.A.) at para 5; and *Simonelli* at para 28.)

12 It is acknowledged that as Caliber's estate has been fully liquidated and distributed to creditors, there is no further consequence to the bankruptcy proceedings. Accordingly, the fourth factor is met.

13 The applicant advances four grounds of appeal. He says that the bankruptcy judge erred:

(1) in her application of the test for authorization to commence an action under section 38(1);

(2) in rendering a decision on the merits without sufficient evidentiary basis to make that decision;

(3) in granting standing to the defendant Servus; and

(4) in taking into consideration submissions made by the trustee contesting the application.

Grounds One and Two - Application of the Test and the Evidentiary Basis

14 The applicant argues that the clarification of the test to be applied to applications under section 38(1) is of significance to bankruptcy practice. However, given that counsel agreed on the test to be applied, and that the bankruptcy judge adopted the test articulated in the authorities, I cannot find that test for a section 38(1) application requires clarification. Rather, the issue is one of the application of the test to a specific set of facts. While this is of potential significance to the bankruptcy itself, it is not an issue of significance to the bankruptcy practice.

15 Turning to the requirement that the appeal be *prima facie* meritorious, the applicant submits that the bankruptcy judge erroneously held him to the more onerous standard of demonstrating that Caliber would succeed on the merits of the proposed action. He says that she erred in considering the affidavit evidence tendered by the respondents and that she treated this as akin to an application for summary judgment.

16 To obtain an order under section 38(1) an applicant must satisfy a court that four criteria are met:

(1) the applicant must be a creditor of the bankrupt estate;

(2) the applicant must have requested that the trustee undertake the proceeding which the applicant now seeks permission to undertake itself;

(3) the trustee must have refused or neglected to undertake the requested proceeding; and

(4) there is threshold merit to the proposed proceeding, i.e., it is not obviously spurious.

17 The first three criteria arise from the statutory language of section 38(1), and it is acknowledged that the applicant met these criteria. The real issue was whether there was threshold merit to the proposed action.

18 The threshold merit criterion emanates from the implicit gatekeeper function assigned to the court under section 38(1). Without the authority to make an inquiry into the merits of a proposed action, the court would become a rubber stamp and there would be no utility in requiring a creditor to seek the court's permission when the statutory criteria are met: *Jolub Construction Ltd., Re*, 1993 CarswellOnt 235 (Ont. Bktcy.) at para 16, (1993), 21 C.B.R. (3d) 313 (Ont. Bktcy.).

19 An applicant seeking leave under section 38(1) must demonstrate a *prima facie* case, which must be supported by evidence and not mere allegations: Houlden and Morawetz*, Bankruptcy and Insolvency Law of Canada* (looseleaf) at 1-236.1; *Polar Products Inc. v. Hongkong Bank of Canada* (1992), 14 C.B.R. (3d) 225 (B.C. S.C.); *Jolub Construction Ltd., Re* at para 20. The threshold is not particularly high, and requires the applicant to show that the claim is not "obviously spurious": *Nesi Energy Marketing Canada Inc., Re*, 1998 ABQB 912 (Alta. Q.B.) at para 22, (1998), 233 A.R. 347 (Alta. Q.B.); *Alberta Treasury Branches v. Chocolaterie Bernard Callebaut Partnership*, 2012 ABQB 245 (Alta. Q.B.) at para 15).

20 The applicant swore an affidavit in which he deposed not only to the statutory requirements but also described the background to the proposed statement of claim. This included evidence about the trustee's actions and, in particular, that the trustee had failed to meet with the applicant or consider an offer by the applicant and others to purchase certain assets. The respondents swore brief affidavits attaching documents and correspondence relating to the meetings and the offer. The purpose of the affidavits was to give the court a complete picture and to address certain material omissions in the applicant's narrative.

21 In his memorandum on the leave application the applicant submits that there is no requirement under section 38(1) for an applicant to provide evidence as to the merits of the proposed action. He relies on *Dominion Trustco Corp., Re*, 1997 CanLII 12398, (1997), 45 C.B.R. (3d) 25 (Ont. Bktcy.) at para 16, aff'd (1997), 50 C.B.R. (3d) 84, 1997 CarswellOnt 4901 (Ont. C.A.), where the court stated, in respect of section 38(1) applications, "...I see no requirements that the [applicant's] affidavit must deal with the merits of the proposed action." However, the application in *Dominion Trustco Corp., Re* proceeded with the consent of the trustee, and there was no issue raised as to the merit of the proposed action during the section 38(1) hearing.

22 There is ample authority requiring an applicant to provide some evidence in support of the merits of its claim. In *Nesi Energy Marketing Canada Inc., Re*, the court commented that in addition to meeting the procedural requirements of section 38(1) of the *BIA*, an applicant must demonstrate a *prima facie* case which amounts to a requirement that "some evidence needs to be presented which is sufficient to persuade the court that the claim is not 'obviously spurious'": at para 22. In *Jolub Construction Ltd., Re* the court stated that some screening of creditors' claims was clearly contemplated by section 38(1) and that an applicant must establish a "sufficient case on the merits...to warrant the Court's approval to proceed": at para 19. Recently, in *Alberta Treasury Branches v. Chocolaterie Bernard Callebaut Partnership* the court stated that "an applicant must establish a threshold case sufficient on its merits to warrant the Court's approval to proceed... [t]here must be evidence beyond mere allegations to support the claim": at para 15.

23 Moreover, the applicant acknowledged at the hearing that he bore the onus to demonstrate that his proposed action was not obviously spurious. This onus necessarily required him to demonstrate, through evidence, at least the barest merit to his claim. This was particularly so in this case where the threshold merit of the proposed claim was contested.

24 Before this court the applicant submitted that the bankruptcy judge was not entitled to receive evidence from the respondents, and that in so doing she delved into the merits of the claim and overstepped her gate-keeping function. The applicant was unable to point to any authority which would deny the respondents the opportunity to put in evidence. Indeed, given the bankruptcy judge's comments that there appeared to be material omissions if not downright misrepresentations in the applicant's affidavit, it was important to the court's function that it have that evidence.

25 I am not satisfied that there is any *prima facie* merit to the applicant's contention that the bankruptcy judge erred in permitting the respondents to adduce evidence. I am not persuaded that her decision was contrary to the law or that her decision amounted to an abuse of power or involved an obvious error causing prejudice.

26 The applicant also contends that the bankruptcy judge held him to a more onerous standard than was required. A bankruptcy judge's decision under section 38(1) is discretionary, and would attract deference on appeal: *Decock v. Alberta*, 2000 ABCA 122 (Alta. C.A.) at para 13, (2000), 255 A.R. 234 (Alta. C.A.). The bankruptcy judge went through each of the causes of action and inquired of the applicant what evidence he had in support of those causes of action. She concluded that "I cannot see on any of the evidence that has been presented by Mr. Smith any of the causes of action that we outlined — that we went through that could possibly be framed or outlined in the statement of claim being anything more than spurious."

27 The transcript of the hearing reveals several bases upon which to conclude that the bankruptcy judge correctly applied the test for section 38(1). First, she adopted the correct test, and confirmed that test with the applicant's counsel. And, the applicant's counsel repeatedly reminded the bankruptcy judge that she was not to render a decision on the merits of the proposed claim. The bankruptcy judge specifically canvassed each potential cause of action disclosed by the proposed statement of claim and invited the applicant's counsel to highlight the factual foundation for those causes of action. This avenue of inquiry is consistent with a proper application of the correct legal test. A review of the transcript reveals that the bankruptcy judge was merely asking the applicant to show the location of the supporting facts, not that she was demanding that he show that his evidence was persuasive or that he would ultimately prevail.

28 When discussing the cause of action plead as improvident realization, the bankruptcy judge inquired about the elements of the cause of action. Improvident realization has been recognized as a defence available to a guarantor, and may obviate the guarantor's obligations to the debtor if it is demonstrated that the debtor's manner of selling the collateral was improvident and the debtor's failure to act in a commercially reasonable manner resulted in the recovery of less money than would otherwise have been the case: *Bank of Montreal v. Tolo-Pacific Consolidated Industries Corp.*, 2012 BCSC 1785 (B.C. S.C.) at para 98, (2012), 97 C.B.R. (5th) 56 (B.C. S.C.), citing *J. & W. Investments Ltd. v. Black* (1963), 38 D.L.R. (2d) 251 (B.C. C.A.), at 264 and *HSBC Bank Canada v. Kupritz*, 2011 BCSC 788 (B.C. S.C.) at para 35. See also *Alberta Treasury Branches v. New Hatchwear Co.*, 2012 ABQB 788, 97 C.B.R. (5th) 227 (Alta. Q.B.). The applicant conceded that it was the court appointed receiver who conducted all realizations of Caliber's assets, not Servus, the only named defendant in the proposed statement of claim. Further, there was evidence from the respondents that all sales were conducted with court supervision and approval and that the total realization of Caliber's assets yielded a higher return than their appraised value. Accordingly, it was reasonable for the bankruptcy judge to have concluded that there was no factual basis to allege an improvident realization claim against Servus.

29 She also considered the fiduciary duty claim. The applicant alleged that Servus' actions to appoint a receiver was an improper breach of an oral agreement or oral promise that amounted to a breach of a fiduciary duty. In discussing this claim with counsel the bankruptcy judge stated:

> Okay. And - and again, I - I - I agree with you, Mr. Hanley, it's a many splendored thing, fiduciary duties. They seem to continuously be evolving. That still doesn't mean that you - that you just - it's not magic. You can't just say "fiduciary duty" in a statement of claim and hope that the Court finds one. You need to set up a foundation of facts giving rise to a fiduciary duty. Do - I don't see that here, but I may just be missing it

30 The bankruptcy judge was not requesting proof of the breach of the alleged fiduciary duty. She merely asked that he identify the factual foundation for the claim, which she did not see on the face of the applicant's material.

31 The draft statement of claim also alleged that Servus acted negligently or unreasonably and in bad faith in putting Caliber into receivership at the time that it did. The applicant failed to identify any evidence that could support his allegations. He acknowledged that Caliber was in "a cash flow crisis." It was never seriously disputed that Caliber had been in a constant state of default for the nine-month period leading up to the receivership. The terms of the final forebearance agreement executed between Caliber and Servus, which the applicant personally signed on behalf of Caliber, made it explicit in clauses 3.4 and 3.5 that Servus was at liberty to make immediate use of the Consent Receivership Order that had previously been signed by Caliber's legal counsel on the company's behalf. The applicant's counsel conceded that it would have been easy to undo the receivership order if any of Caliber's other creditors or another third party would have come forward to rescue the company. It was demonstrably false that the trustee and Servus refused to meet with the restructuring group as alleged in the proposed statement of claim. Accordingly, it was reasonable for the chambers judge to have concluded, as she did, that the negligence claim was spurious.

32 The bankruptcy judge also attempted to identify the factual foundations of Smith's economic loss claim. These were not apparent.

33 In conclusion on this ground, the bankruptcy judge articulated the proper test, and in analyzing the proposed action found that it was spurious. I am not persuaded that there is *prima facie* merit to the contention that she set the threshold any higher than that of a spurious case. Nor am I persuaded that the decision was contrary to law, an abuse of judicial power or involved any obvious errors. Accordingly, the applicant has failed to satisfy the test for granting leave to appeal on these grounds.

Standing of the Respondent Servus

34 As a general rule prospective defendants, do not by virtue of that status alone, have standing to oppose a section 38(1) application: *Nesi Energy Marketing Canada Inc., Re* at paras 18-19. There are exceptions to this rule including for the purpose of preventing the court's process "being used so as to perpetuate a fraud": see *Coroban Plastics Ltd., Re* (1994), 52 B.C.A.C. 214 (B.C. C.A.) at para 13, (1994), 10 B.C.L.R. (3d) 52 (B.C. C.A.); *Tirecraft Group Inc., Re*, 2009 ABQB 281, 470 A.R. 113 (Alta. Q.B.) at para 34 citing *Shaw Estate (Trustee of) v. Nicol Island Development Inc.*, 2009 ONCA 276 (Ont. C.A.) at para 45. There is also an exception where there is a procedural irregularity in the bankruptcy proceeding: *Tirecraft Group Inc., Re* at para 34.

35 In my view, the discretionary decision of a chambers judge to grant standing to a proposed defendant within the ambit of the recognized exceptions to the general rule precluding standing is not of particular significance to the bankruptcy practice. No party is challenging the validity of the general rule, and Servus relied on recognized exceptions to the general rule to establish standing. There is no novel point of law or interpretation being advanced on this issue, simply an application of the existing law to the circumstances of this case.

36 However, I do find that this issue is of significance to the action. If Servus was improperly granted standing, a significant portion of the evidence that was before the bankruptcy judge should not have been admitted. Without Servus' evidence a different outcome on the application may have resulted.

37 I am not satisfied that there is *prima facie* merit to this ground. This was a discretionary decision which would be accorded significant appellate deference. The grant of standing to Servus was within the ambit of the existing exceptions to the general rule denying standing to proposed defendants to oppose section 38(1) applications. The bankruptcy judge was concerned about material omissions in the applicant's affidavit. There were also irregularities in the proceedings. The applicant conceded the existence of a procedural irregularity. The application had initially been made within Smith's personal bankruptcy action, rather than Caliber's bankruptcy action where it properly belonged.

38 As the applicant has not satisfied the test for leave to appeal on this ground, leave is denied.

Submissions by the Trustee

39 The applicant contends that the bankruptcy judge erred in hearing submissions and admitting evidence from the trustee. He says that it was improper for the trustee to actively oppose the application. While of significance to the action itself and even potentially to the practice, I am not persuaded that there is *prima facie* merit to this ground.

40 The applicant did not object to the trustee's participation at the section 38(1) hearing. In any event there does not appear to be any authority for the proposition that considering a trustee's submissions on a section 38(1) application can amount to an error in law. What the authorities do say is that a trustee should not oppose a creditor's section 38(1) application where it is clear on the basis of materials provided to the trustee from the creditor that the proposed action is not frivolous and vexatious: Houlden and Morawetz, *Bankruptcy and Insolvency Law of Canada*, 4th ed (looseleaf) at 1-204; *Halsbury's Laws of Canada*, 1st ed (Canada: LexisNexis, 2009) - Bankruptcy & Insolvency, V.62(c), at para HBI-200; see also *Mutual Trust Co. v. Scott, Pichelli & Graci Ltd.* (1999), 11 C.B.R. (4th) 54 (Ont. Bktcy.) at para 27, [1999] O.J. No. 2659 (Ont. Bktcy.). Further, these same authorities establish that where a trustee opposes a section 38(1) application in circumstances where it was clear the proposed action was not frivolous, the trustee is subject to having costs awarded against it.

41 Moreover, it does not appear that the trustee acted improperly. From the outset the letter from the trustee's counsel made it plain that the trustee did not see the basis for the proposed action. At the very least it was arguable the claim was frivolous, and the bankruptcy judge's ultimate conclusion that Smith's proposed action was obviously spurious supports the reasonableness of the trustee's decision to oppose the application.

42 In conclusion on this ground, the applicant has failed to satisfy the test for granting leave to appeal.

Conclusion

43 Leave to appeal from an application under *BIA* section 38(1) is required in this case. Leave to appeal is denied.

Application dismissed.

Tab 13

2011 ONSC 2044
Ontario Superior Court of Justice

Montor Business Corp. (Trustee of) v. Goldfinger

2011 CarswellOnt 2214, 2011 ONSC 2044, 200 A.C.W.S. (3d) 1228, 75 C.B.R. (5th) 170

A. Farber & Partners Inc., the trustee of the bankruptcy estates of Montor Business Corporation, Annopol Holdings Limited and Summit Glen Brantford Holdings Inc., on its own behalf and on behalf of all the creditors of Summit Glen Brantford Holdings Inc., Annopol Holdings Limited and Summit Glen Waterloo/2000 Developments Inc. (Applicant) and Morris Goldfinger, Goldfinger Jazrawy Diagnostic Services Ltd., Annopol Holdings Limited, Summit Glen Brantford Holdings Inc., Summit Glen Waterloo/2000 Developments Inc., Summit Glen Bridge Street Inc., Mahvash Lechcier-Kimel and Jack Lechcier-Kimel (Respondents)

Mesbur J.

Heard: March 28, 2011
Judgment: March 31, 2011
Docket: 10-8629-00CL

Counsel: Milton A. Davis, Ben Hanuka for Moving Parties, Morris Goldfinger, Goldfinger Jazrawy Diagnostic Services ltd.
Melvyn L. Solmon for Moving Party, jack Lechcier-Kimel
P. Shea for Responding Party, A. Farber & Partners Inc.

Subject: Civil Practice and Procedure; Insolvency; Estates and Trusts; Evidence; Corporate and Commercial

Headnote

Civil practice and procedure --- Practice on interlocutory motions and applications — Evidence on motions and applications — Use of affidavit evidence — Miscellaneous

Trustee brought application to set aside various transactions involving respondents G, his corporation G Ltd., and L as improper conveyances and preferences — G and L brought motion to remove trustee — Trustee responded to removal motion by filing report — Respondents objected on ground that proper course was to file affidavit — Respondents brought motion to strike or expunge trustee's report — Motion dismissed — Rule 39.01(1) of Rules of Civil Procedure does not require that only evidence to be used on motion must be in affidavit form — Subrule 37.10(2)(c) refers to copy of all affidavits and other material served by any party for use on motion — In Companies' Creditors Arrangement Act proceedings, receiverships and bankruptcies, reports are admitted as evidence every day — Common practice permits party to raise questions about statements in report, and if asked, trustee is obliged to respond — Notably, court made express order permitting cross-examination in case at bar — Unlike receiver, trustee is subject to additional duties imposed by Bankruptcy and Insolvency Act and additional supervision of office of superintendent — While trustee's report may have contained hearsay, given safeguards imposed by trustee being court's officer, hearsay contained was no less admissible than if it had been contained in affidavit stated to be on information and belief — Trustee's report constituted exception to hearsay rule, in same way as official statement is excepted.

Bankruptcy and insolvency --- Administration of estate — Trustees — Removal

Trustee brought application to set aside various transactions involving respondents G, his corporation G Ltd., and L as improper conveyances and preferences — G and L brought motion to remove trustee — Trustee responded to removal motion by filing report — Respondents objected on ground that proper course was to file affidavit — Respondents brought motion to strike or expunge trustee's report — Motion dismissed — Rule 39.01(1) of Rules of Civil Procedure

does not require that only evidence to be used on motion must be in affidavit form — Subrule 37.10(2)(c) refers to copy of all affidavits and other material served by any party for use on motion — In Companies' Creditors Arrangement Act proceedings, receiverships and bankruptcies, reports are admitted as evidence every day — Common practice permits party to raise questions about statements in report, and if asked, trustee is obliged to respond — Notably, court made express order permitting cross-examination in case at bar — Unlike receiver, trustee is subject to additional duties imposed by Bankruptcy and Insolvency Act and additional supervision of office of superintendent — While trustee's report may have contained hearsay, given safeguards imposed by trustee being court's officer, hearsay contained was no less admissible than if it had been contained in affidavit stated to be on information and belief — Trustee's report constituted exception to hearsay rule, in same way as official statement is excepted.
Evidence --- Hearsay — Exceptions — Miscellaneous
Trustee report — Trustee brought application to set aside various transactions involving respondents G, his corporation G Ltd., and L as improper conveyances and preferences — G and L brought motion to remove trustee — Trustee responded to removal motion by filing report — Respondents objected on ground that proper course was to file affidavit — Respondents brought motion to strike or expunge trustee's report — Motion dismissed — Unlike receiver, trustee is subject to additional duties imposed by Bankruptcy and Insolvency Act and additional supervision of office of superintendent — While trustee's report may have contained hearsay, given safeguards imposed by trustee being court's officer, hearsay contained was no less admissible than if it had been contained in affidavit stated to be on information and belief — Trustee's report constituted exception to hearsay rule, in same way as official statement is excepted.

Table of Authorities

Cases considered by *Mesbur J.*:

Anvil Range Mining Corp., Re (2001), 21 C.B.R. (4th) 194, 2001 CarswellOnt 908 (Ont. S.C.J. [Commercial List]) — referred to

Bell Canada International Inc., Re (2003), 2003 CarswellOnt 4537 (Ont. S.C.J. [Commercial List]) — followed

Big Sky Living Inc., Re (2007), 2007 ABQB 20, 2007 CarswellAlta 25, 28 C.B.R. (5th) 1 (Alta. Q.B.) — referred to

Confectionately Yours Inc., Re (2002), 2002 CarswellOnt 3002, 164 O.A.C. 84, 36 C.B.R. (4th) 200, 25 C.P.C. (5th) 207, 219 D.L.R. (4th) 72 (Ont. C.A.) — considered

HSBC Bank Canada v. Bear Mountain Master Partnership (2010), 2010 CarswellBC 1779, 2010 BCSC 957 (B.C. S.C.) — referred to

Lechcier-Kimel, Re (2011), 2011 ONSC 1859, 2011 CarswellOnt 1853 (Ont. S.C.J. [Commercial List]) — considered

New Solutions Financial Corp. v. Jennart International Inc. (2011), 2011 ONSC 439, 2011 CarswellOnt 238, 73 C.B.R. (5th) 212 (Ont. S.C.J.) — referred to

Ravelston Corp., Re (2007), 2007 CarswellOnt 661, 29 C.B.R. (5th) 1 (Ont. S.C.J. [Commercial List]) — referred to

Ravelston Corp., Re (2007), 29 C.B.R. (5th) 45, 2007 CarswellOnt 1115, 2007 ONCA 135, 85 O.R. (3d) 175 (Ont. C.A.) — referred to

Starcom International Optics Corp., Re (1999), 1999 CarswellBC 2070 (B.C. S.C.) — considered

Textron Financial Canada Ltd. v. Beta Ltée/Beta Brands Ltd. (2007), 2007 CarswellOnt 4896, 36 C.B.R. (5th) 94 (Ont. S.C.J.) — referred to

Textron Financial Canada Ltd. v. Beta Ltée/Beta Brands Ltd. (2007), 2007 CarswellOnt 5799, 36 C.B.R. (5th) 296 (Ont. S.C.J.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 13.5 [en. 1992, c. 27, s. 9(1)] — referred to

s. 14 — considered

s. 14.04 [en. 1992, c. 27, s. 9(1)] — considered

s. 43(3) — referred to

s. 43(9) — considered

s. 43(13) — referred to
Business Corporations Act, R.S.O. 1990, c. B.16
Generally — referred to
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to
Rules considered:
Bankruptcy and Insolvency General Rules, C.R.C. 1978, c. 368
Generally — referred to
Rules of Civil Procedure, R.R.O. 1990, Reg. 194
Generally — referred to

R. 37.10(2) — referred to

R. 37.10(2)(c) — considered

R. 39.01 — considered

R. 39.01(1) — considered

MOTION by corporate entities to strike or expunge trustee's report to prevent its use on pending motion to remove trustee.

***Mesbur J.*:**

Background to this motion to expunge a Trustee's report:

1 This is a motion to strike or expunge a Trustee's report to prevent its use on a pending motion to removal the Trustee. A. Farber & Partners Inc. (Farbers) is the Trustee in bankruptcy of the estates of various corporate entities listed as applicants in the title to these proceedings. In its capacity as Trustee, Farbers has brought this application to set aside various transactions involving the respondents Dr. Morris Goldfinger, his corporation Goldfinger Jazrawy Diagnostic Services Ltd. and the respondent Mr. Lechcier-Kimel as improper conveyances and preferences. The application also seeks relief under the oppression provisions of the OBCA. In support of the application, the Trustee filed an affidavit.

2 In the context of this application, Dr. Goldfinger and Mr. Lechcier-Kimel have brought a motion to remove Farbers as Trustee for the various corporations. Although the removal motion is not brought in the individual bankrupt estates, but rather in this application, it is founded on s. 14.04 of the *Bankruptcy and Insolvency Act* which is the section that governs the removal and replacement of trustees.

3 Section 14.04 permits the court, on the application of any "interested person" to remove a trustee "for cause", and appoint another trustee in that trustee's place. The issues on the removal motion, therefore, are first, whether the moving parties are "interested persons", and second, in the context of this case, whether Farbers is in a position of conflict that constitutes "cause" under the provision of the section.

4 Farbers responded to the removal motion by filing a report. The moving parties objected, suggesting the proper course was to file an affidavit in response. They complained about their inability to cross-examine on a report, as opposed to an affidavit.

5 Newbould J made an order permitting cross-examination, but only on the issues of Farbers' alleged conflict and the issue of whether the moving parties are "interested parties" in the context of a removal motion under section 14.04.

6 For various reasons, the moving parties chose not to exercise their right to cross-examine. They did not seek leave to appeal Newbould J's order, nor did they apply to amend or expand any of its terms. Instead, they have launched this motion to expunge or strike out the Farbers report. They say the report does not constitute admissible evidence on their motion to remove Farbers as trustee of the various estates.

Discussion:

7 Counsel tell me there is no reported case directly on point. That is to say, they could not refer me to any case in which a Trustee responded to a motion for its removal with an affidavit and the court commented on the use of the affidavit. They also could not refer me to any case in which a Trustee responded to a motion for its removal with a report, and the court commented on the use of a report. They could point to no case in which the court determined which procedure is appropriate. I suspect this is because no one has objected before to the form in which an impugned trustee has responded to a removal motion. I must therefore approach my task by way of analogy, and by applying first principles.

8 The real question is whether this case (that is the motion to remove the Trustee) is one of the circumstances where the court can and should accept the Trustee's report as admissible evidence. This is only a threshold issue. I need only determine whether the report should be struck, or whether it should constitute admissible evidence. My role is not to determine what weight, if any, should be given to it. That is the task of the judge who hears the removal motion itself.

When have reports been accepted?

9 The *Bankruptcy and Insolvency Act* sets out particular circumstances where a Trustee is required to file a report. Counsel for Dr. Goldfinger has helpfully outlined them in Schedule C to his factum. A motion to remove a Trustee is not one of the particular circumstances where the Trustee is required to file a report. That said, these are not the only circumstances in which Trustees have filed reports, and the courts have accepted them as evidence.

10 Trustees and Receivers are officers of the court with particular duties of impartiality and fair dealing. When someone acts as a Trustee of a bankrupt estate, additional obligations are imposed by the terms of the *Bankruptcy and Insolvency Act* and the overriding supervisory status of the Superintendent of Bankruptcy.

11 Those who act as Trustees or Receivers, in bankruptcy proceedings, receiverships or restructuring under the *CCAA*, routinely report to the court and set out recommendations and responses to questions by way of reports. The courts routinely accept the reports as evidence. Courts do so not only in the situations specifically enumerated under the *Bankruptcy and Insolvency Act*.

12 For example, in a case related to this one, *Lechcier-Kimel, Re* [1] on a motion under s. 43(13) of the *Bankruptcy and Insolvency Act* the court relied on the Trustee's reports in coming to its conclusion that various parties, including the Trustee itself, should be added as creditors. There, the Trustee was seeking to be added as a creditor. It filed two reports as the evidence to support its position. The respondents were permitted to cross-examine. The court accepted and relied on the reports, even though s. 43(13) does not make specific reference to a Trustee's delivering a report in those circumstances. Interestingly, s. 43(3) requires that on an application for a bankruptcy order itself, the applicant is required to support the application with an affidavit. Nevertheless, in *Lechcier-Kimel, Re*, the court accepted the Trustee's report as sufficient evidence to support the relief sought.

13 Trustees' or Receivers' reports have been accepted as admissible evidence on motions by an interim receiver for a finding of contempt against a shareholder of the debtor. [2] Courts have accepted reports as evidence in opposed motions by a Chief Restructuring Officer to file a CCAA plan [3] , opposed motions seeking approval to make payments [4] or to sell property [5] , and responding to opposed motions for leave to take proceedings against a receiver [6] . Other instances are set out in Farbers' factum.

14 From these cases I conclude it is entirely proper for the Trustee to submit its evidence on this motion in the form of a report.

Is the report admissible evidence?

15 Although it is clear the courts have accepted Trustees' reports as admissible evidence, the case law does not articulate particularly well the basis on which the reports are admissible. The moving parties attack the Farbers report's admissibility on various fronts. First they say that the *Rules of Civil Procedure* set out the material to be used on a motion. They infer that as a result, affidavits are required to respond to motions, and therefore a report is an inadmissible response.

16 Second, they say an affidavit is required in response to a motion to ensure procedural fairness, which includes the right to cross-examine.

17 Third, they suggest the report is hearsay, does not meet any of the hearsay exceptions, and thus is inadmissible.

18 Fourth, they say the report should not be admitted because it is neither balanced nor neutral.

19 Last they take the position the nature of the motion itself requires an affidavit, and is not the type of motion in which a Trustee's report is permitted.

20 I will deal with each of these arguments in turn.

Are affidavits required to respond to motions?

21 The moving parties suggest that although this application arises in the context of various bankruptcies, the application itself is simply a proceeding commenced under the *Rules of Civil Procedure*, and absent any contrary provision under the Bankruptcy Rules, the general *Rules of Civil Procedure* must apply. They say Farbers is a litigant like any other, and must be subject to the same rules as any other litigant.

22 They rely on rule 39.01 which sets out the evidence to be used on a motion. Since the rule contemplates affidavit evidence, they suggest no other evidence is either permissible or admissible. As a result, they argue the report must be expunged.

23 I do not see it that way. Rule 39.01(1) simply states that evidence on a motion or application "may be given by affidavit unless a statute or these rules provide otherwise." The rule does not require that the only evidence to be used on a motion must be in affidavit form. I come to this conclusion by looking at rule 37.10(2) which sets out the necessary contents of a motion record. Subrule 37.10(2)(c) refers to "a copy of all affidavits *and other material* served by any party for use on the motion." [emphasis added] From this I infer that material other than affidavits may properly be used on a motion.

24 As Farbers' counsel pointed out, in CCAA proceedings, receiverships and bankruptcies, reports are admitted as evidence every day. They are admitted on a vast variety of motions, contested and not. I have already referred to a variety of situations in which this has been the case.

25 It seems to me that a Trustee's report, by both custom and law, is in no more diminished a position as far as its reliability is concerned as is an affidavit based on information and belief. In fact, given that it is prepared by an officer of the court, with both statutory and common law duties, it is in many ways more reliable than an affidavit that is based entirely on information and belief, but is nevertheless under the *Rules of Civil Procedure, prima facie* admissible.

Does procedural fairness require the right to cross-examine?

26 Dr. Goldfinger and Mr. Lechcier-Kimel also attack the report on the basis that it deprives them of the right to cross-examine its maker. They say the report is not signed by an individual, and as a result, they do not know whose knowledge forms the basis of the statements in the report, and they are not able to cross-examine to test the accuracy of the statements in the report.

27 This argument carries no weight. First, common practice permits a party to raise questions about the statements in the report, and ask the Trustee to respond to those questions. The Trustee is obliged to respond. Courts have developed a process to permit this, and, in some circumstances, to permit a representative of the Trustee to be cross-examined. [7]

28 Second, and more importantly, here the court made an express order permitting cross-examination. The moving parties take issue with the scope of the cross-examination, and the fact they could not choose who would be presented for cross-examination. They took no steps to seek leave to appeal Newbould J's order. They did not seek to vary it when they encountered what they characterized as difficulties with the person Farbers proposed as the examinee. Having failed to avail themselves of the substantive rights they were given to cross-examine, they can hardly say they have been deprived of procedural fairness.

29 Even where a court's officer (for example, a court-appointed Chief Restructuring Officer) files an affidavit, the right to cross-examine is not automatic. For example, in *Starcom International Optics Corp., Re* [8] the court refused to permit cross-examination because it found there were no issues with the evidence in the affidavit.

Is the report is hearsay and inadmissible on that basis?

30 At the heart of the moving parties position is their submission the report is hearsay. They say the report does not meet any of the exceptions to the hearsay rule, and therefore it is inadmissible.

31 Farley J dealt with this in *Bell Canada International Inc., Re* [9] , the only case that squarely deals with this issue. When faced with the argument that a Monitor's report was "not evidence", he stated first, it was not "necessary to delve deeply into this question but ... to observe that such a report by a court appointed officer is recognized by the common law as being admissible evidence in a proceeding."

32 In support of this proposition, Farley J quoted approvingly from Wigmore [10] which stated that a report, if made under due authority, stands upon no less favourable footing than other official statements. It is admissible under the general principle. The general principle referred to is the hearsay exception that permits public documents (or as Wigmore calls them, "official statements") to be admitted into evidence. Reports by the court's officers meet the general criteria for the public document exception:

> a) they are made by a public official — trustees are licensed by a government official, the Superintendent in Bankruptcy, and have public duties imposed both by the court and by the *Bankruptcy and Insolvency Act*;
>
> b) the Trustee makes the report in the discharge of a public duty or function — the trustee functions in the context of its duties to the court and to the creditors, and its reports communicate the necessary information to discharge those duties;
>
> c) the reports are made with the intention they serve as a permanent record — as part of the court record, reports are permanent; and
>
> d) the report is available for public inspection — as part of the court record, the report, like the court file, is open to public viewing.

33 In addressing the issue of whether a report is made under "due authority", Farley J also referred approvingly to *The Law of Receivers and Administrators of Companies* [11] which states that officers of the court (which would include

Trustees) are "appointed by the Court and are subject to its general supervisory jurisdiction. In accordance with the rule in ex. p James [(1874) 2Ch. App 609] officers of the Court are obliged not only to act lawfully, but fairly and honourably."

34 Trustees, as the court's officers, operate under these obligations. In addition, they are subject to the provisions of the *Bankruptcy and Insolvency Act*, including following the prescribed Code of Ethics referred to in s. 13.5 of the *Act*. In looking at a Trustee's obligations, it is important to look at the entire scheme of the *BIA* in relation to a Trustee's duties and continued representation of an estate. For example, section 14 gives the creditors the right to substitute one Trustee for another. Most importantly, the Superintendent has broad powers to deal with a Trustee who has acted improperly. These include revoking the Trustee's licence, requiring the Trustee to make restitution, limiting the Trustee's ability to practice, or doing anything else the Superintendent considers appropriate and the Trustee agrees to. Thus, unlike a Receiver, whose role derives solely from the court order appointing it, the Trustee is subject to the additional duties imposed by the *Bankruptcy and Insolvency Act* itself, and the additional supervision of the Office of the Superintendent.

35 On the issue of hearsay, the *Rules of Civil Procedure* also set out what may be included in affidavits that are admissible on motions. On an interlocutory motion, an affidavit may be made "on information and belief". What this means is that hearsay evidence is admissible on a motion if the deponent sets out the source of the hearsay evidence and expresses a belief in its truth. It is always up to the court to determine the weight to be given to such evidence. Believing something to be true, however "reliable" the source, and however fervently one believes in the truth does not, of course, make it true. While the Trustee's report may contain hearsay, or indeed be hearsay, given the safeguards imposed by the Trustee's being the court's officer, I conclude the hearsay contained in a Trustee's report is no less admissible on this interlocutory motion than if it had been contained in an affidavit stated to be "on information and belief."

36 As a result, I conclude a Trustee's report constitutes an exception to the hearsay rule, in the same way as an official statement is excepted. I also conclude the report, insofar as it contains information from others is admissible in the same way as an affidavit containing similar information.

Is the report not balanced or neutral?

37 Both Dr. Goldfinger and Mr. Lechcier-Kimel take the position the report is not balanced and neutral, but rather it advocates a position on behalf of the estate of Montor. As a result, Mr. Lechcier-Kimel submits the report should be expunged on the basis that it is not a neutral and impartial statement of facts.

38 It seems to me the question of whether the report is neutral or balanced goes to the weight the court should give the report, if it is admitted. That is not the threshold issue before me; rather, it is a question for the motions judge to decide on the removal motion. I do not see it as a basis to expunge all or part of the report on this motion, although the moving parties will no doubt quite appropriately renew that argument on the removal motion.

Does the nature of the motion require an affidavit?

39 Dr. Goldfinger and Mr. Lechcier-Kimel rely on the Court of Appeal's decision in *Confectionately Yours Inc., Re* [12] to support their position that this motion requires an affidavit from the Trustee. That case arose out of an appeal from the assessment of a receiver's and its counsel's fees. An outline of the receiver's fees had been contained in its report, as opposed to being verified by affidavit. The court held that this resulted in "insulating them from the far-ranging scrutiny of a properly conducted cross-examination." The court determined that a receiver should verify the remuneration it claims by affidavit. Doing so ensures the veracity of the time spent, and provides an opportunity to cross-examine. As a result of this decision, it is now common practice for Trustees/Receivers and lawyers to verify their accounts with brief affidavits stating the hours were spent and the rates are commensurate with rates charged by other firms doing the same kind of work. It is rare, however, for either a Trustee or a lawyer to be cross-examined on one of these affidavits.

40 Mr. Lechcier-Kimel takes the position that a similar analysis to that in *Confectionately Yours Inc., Re* is necessary here. He suggests the purpose for which the report is proffered should determine whether the contents should be provided

by affidavit instead. He reasons that if the Trustee is trying to protect its own position or its own interests on this motion it is in the same position as when it is seeking approval of its own fees. Since in those circumstances the Trustee is required to file an affidavit in support, Mr. Lechcier-Kimel infers this is a similar situation that requires an affidavit.

41 I disagree. The issue of Trustee remuneration (or for that matter the remuneration of its counsel) is something that benefits only the Trustee. Here, the question to be ultimately determined is the removal of the Trustee. Under section 43(9), the court in making a bankruptcy order must appoint a Trustee. The court is to do so having regard to the wishes of the creditors, to the extent the court considers just. Generally, therefore, it is the creditors who choose the Trustee, whose role, among others, is to administer the estate for the benefit of the creditors. Under section 14 of the *Bankruptcy and Insolvency Act* the creditors are free to remove a Trustee and replace it with another of their choosing. Thus, the creditors' interests must be considered in the context of a removal motion. The issue of removal is not strictly personal to the Trustee. I cannot conclude this situation is akin to a Trustee seeking to be paid its fees. To the contrary, in these circumstances, it is entirely appropriate for the Trustee to deliver a report, as opposed to an affidavit.

Conclusion:

42 The report is therefore admissible. It will be up to the judge hearing the removal motion to determine the weight to be given to it, or any part of it.

43 Mr. Shea takes the position the moving parties' rights to cross-examine pursuant to Newbould J's order are now spent, and they have no further right to cross-examine. I disagree. Even if I had struck the report, I would have granted Farbers leave to file an affidavit instead. The moving parties would then have cross-examined.

44 It seems to me it will be helpful to the judge hearing the motion to have the benefit of the limited cross-examine Newbould J envisioned. I will permit that cross-examination to proceed. The parties are meeting with Brown J on April 5 to set a new timetable for the removal motion. He can schedule the cross-examination. If the moving parties do not avail themselves this time of that right to cross-examine, they will be barred in the future from doing so, and the court hearing the removal motion will be free to draw whatever inferences it wishes from their failure to do so.

45 In case the applicant has not been able to comply with paragraph [47] below before their 9:30 with Brown J, the parties will provide Brown J with a copy of this endorsement in the materials filed for the 9:30 on April 5.

46 I heard brief submissions from the parties on the issue of costs before they knew the outcome of the motion. On the basis of those submissions, reasonable costs are $15,000 all inclusive. Farbers is entitled to those costs. Since the moving parties' positions were identical, my inclination is to have them bear those costs equally. If the parties disagree, they may make brief written submissions to me concerning the apportionment of those costs within 14 days, failing which an order will go requiring each of Dr. Goldfinger and Mr. Lechcier-Kimel to pay $7,500 on account of Farbers' costs.

47 In an effort to bring some organization to the procedural history of this application, I also direct that the applicant prepare and maintain a continuing record of all endorsements and orders in this case. It is to be in a 3-ring binder, with a yellow cover and backing page titled "Endorsements Record". It is to include, in chronological order, a photocopy of every endorsement and order made in this case, separated by numbered tabs. It is to contain a Table of Contents, which is to be updated each time a new endorsement or order is made. All 9:30 endorsements are to be included as well. It will be the applicant's responsibility to ensure the Endorsements Record is provided with all other material for any further attendances in this case, including the trial.

Motion dismissed.

Footnotes

1 2011 ONSC 1859 (Ont. S.C.J. [Commercial List])

2 *New Solutions Financial Corp. v. Jennart International Inc.*, 2011 CarswellOnt 238 (Ont. S.C.J.)

3 *HSBC Bank Canada v. Bear Mountain Master Partnership*, [2010] B.C.J. No. 1346 (B.C. S.C.)

4 *Textron Financial Canada Ltd. v. Beta Ltée/Beta Brands Ltd.*, 2007 CarswellOnt 5799 (Ont. S.C.J.)

5 *Big Sky Living Inc., Re*, 2007 CarswellAlta 25 (Alta. Q.B.)

6 *Textron Financial Canada Ltd. v. Beta Ltée/Beta Brands Ltd.*, 2007 CarswellOnt 4896 (Ont. S.C.J.)

7 see, for example, *Anvil Range Mining Corp., Re*, 2001 CarswellOnt 908 (Ont. S.C.J. [Commercial List]); *Ravelston Corp., Re* (Ont. S.C.J. [Commercial List]), aff'd, 2007 CarswellOnt 1115 (Ont. C.A.)

8 (B.C. S.C.)

9 2003 CarswellOnt 4537 (Ont. S.C.J. [Commercial List])

10 Wigmore, John Henry, *Evidence in Trials at Common Law*, Little Brown & Company, Toronto & Boston: 1974, at pages 791-6

11 Sir Gavin Lightman and Gabriel Moss, (3 rd ed., 2000; Sweet & Maxwell, London) at p 115

12 2002 CarswellOnt 3002 (Ont. C.A.)

End of Document

Tab 14

2014 ONSC 5188
Ontario Superior Court of Justice

Martellacci, Re

2014 CarswellOnt 12416, 2014 ONSC 5188, 18 C.B.R. (6th) 274, 244 A.C.W.S. (3d) 768

In Bankruptcy and Insolvency

In the Matter of the Bankruptcy of Luigi Martellacci aka Louie Martellacci, of the City of Toronto in the Province of Ontario

Newbould J.

Heard: September 8, 2014
Judgment: September 10, 2014
Docket: 31-457461

Counsel: Mark A. Freake for Trustee Grant Thornton Limited
Brandon Jaffe for Amy McIntosh

Subject: Civil Practice and Procedure; Evidence; Insolvency

Headnote

Bankruptcy and insolvency --- Proving claim — Practice and procedure — Disallowance of claims — Miscellaneous
Individual filed proof of claim with trustee of bankrupt — Trustee later notified individual that her claim was disallowed — Individual served trustee with notice of motion and supporting affidavit in which she set out her intention to appeal disallowance — In response, trustee delivered trustee's report — Registrar held that report was inadmissible evidence and that trustee was required to file sworn affidavit if it wished to proffer evidence on appeal — Trustee appealed — Appeal allowed — Report of trustee was admissible — Registrar erred in principle and law in coming to her conclusion — She read more into rules of practice than was provided and she failed to follow established authority binding on her — Report of trustee in bankruptcy, monitor or receiver was admissible in evidence regardless of nature of particular motion or application, and whether interim or final or contested or not, unless there was some statutory prohibition of use of such report — Rules of practice did not prevent these reports from being admissible evidence.

Table of Authorities

Cases considered by *Newbould J.*:

Bell Canada International Inc., Re (2003), 2003 CarswellOnt 4537 (Ont. S.C.J. [Commercial List]) — followed

Impact Tool & Mould Inc. (Trustee of) v. Impact Tool & Mould (Windsor) Inc. (Receiver of) (2006), 2006 CarswellOnt 1523, 20 C.B.R. (5th) 220, (sub nom. *Impact Tool & Mould Inc. (Bankrupt), Re)* 208 O.A.C. 133, (sub nom. *Impact Tool & Mould Inc. (Estate Trustee of) v. Impact Tool & Mould (Windsor) Inc. (Interim Receiver of))* 79 O.R. (3d) 241, (sub nom. *Impact Tool & Mould Inc. (Trustee of) v. Impact Tool & Mould (Windsor) Inc. (Interim Receiver of))* 266 D.L.R. (4th) 192 (Ont. C.A.) — referred to

Montor Business Corp. (Trustee of) v. Goldfinger (2011), 2011 ONSC 2044, 2011 CarswellOnt 2214, 75 C.B.R. (5th) 170 (Ont. S.C.J.) — followed

Rules considered:

Bankruptcy and Insolvency General Rules, C.R.C. 1978, c. 368

Generally — referred to

R. 11 — considered

R. 13 — considered

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 37.10(1) — considered

R. 37.10(2) — considered

R. 37.10(2)(c) — considered

R. 39.01(1) — considered

APPEAL by trustee of bankrupt from decision of registrar in which it was held that report filed by trustee in appeal by certain individual from disallowance of her claim was inadmissible evidence and that trustee was required to file sworn affidavit if it wished to proffer evidence on appeal.

***Newbould J.*:**

1 This is an appeal by the Trustee of the bankrupt Luigi Martellacci from the decision of Master Jean sitting as a registrar in bankruptcy in which she held that a report filed by the Trustee in an appeal by Amy McIntosh from a disallowance of her claim was inadmissible evidence and that the Trustee was required to file a sworn affidavit if it wished to proffer evidence on the appeal.

2 Amy McIntosh filed a proof of claim with the Trustee in respect to a 1967 Corvette which is in the possession of the Trustee. The Trustee later notified Ms. McIntosh that her claim was disallowed as she had produced insufficient evidence of her beneficial ownership interest in the Corvette.

3 Ms. McIntosh served the Trustee with a notice of motion and supporting affidavit in which she set out her intention to appeal the Trustee's disallowance. In response, the Trustee delivered a Trustee's report. Counsel for Ms. McIntosh then inquired as to the authority that permitted the Trustee in a contested disallowance to file a report rather than an affidavit, but stated that if the Trustee agreed to submit to cross-examination the mischief would be addressed. Counsel for the Trustee responded with case authority and then by e-mail stated that the standard protocol was for counsel to ask the Trustee any questions about the Trustee's report and if not satisfied with the answers to seek leave to cross-examine. He further stated that the Trustee would be happy to follow this protocol except that he would consent to the cross-examination provided it was restricted to the questions raised and time limited.

4 Counsel for Ms. McIntosh did not respond to the Trustee's proposal. One day before the hearing he filed an affidavit alleging that the Trustee had refused to permit cross-examination on the Trustee's report and at the hearing objected to the admissibility of the Trustee's report. The registrar held that the report was inadmissible.

5 For the reasons that follow, the appeal is allowed. The report of the Trustee is admissible.

Analysis

6 An appeal of a registrar's order will be allowed where it is demonstrated that the registrar erred in principle or in law or failed to take into account a proper factor or took into account an improper factor which led to a wrong conclusion. See *Impact Tool & Mould Inc. (Trustee of) v. Impact Tool & Mould (Windsor) Inc. (Receiver of)* (2006), 20 C.B.R. (5th) 220 (Ont. C.A.) at para 48 and Houlden, Morawetz and Sarra, *The 2014 Annotated Bankruptcy and Insolvency Act*, at I§54.

7 In my view the registrar erred in principle and law in coming to her conclusion. She read more into the rules of practice than is provided and she failed to follow established authority binding on her.

8 The registrar referred to BIA rule 11 which requires every application to the court to be made by motion and to BIA rule 13 which requires the party making the motion to file every affidavit in support of the motion, or the motion, as the case may be. Because the BIA rules do not specify what should be included in a responding motion record, the registrar looked at rule 39.01(1) of the rules of practice which states:

Evidence on a motion or application may be given by affidavit unless a statute or these rules provide otherwise.

9 The registrar then stated that the rules provide only for affidavits on motions. This cannot be correct. The rule does not say that evidence must be by affidavit. The rule is permissive to allow affidavits unless a statute or rule provides otherwise.

10 Rule 37.10(1) of the rules of practice provides for the need to serve and file a motion record for a motion. Rule 37.10(2) provides what is to be included in a motion record and in what order. Rule 37.10 (2)(c) requires the motion record to contain "a copy of all affidavits and other material served by any party for use on the motion". As to this rule, the registrar said that the reference to "other material" referred to evidence that may be given because a statute or the rules provides for it, and as no statute or rule provided for a trustee's report on an appeal from a disallowance of a claim, the Trustee's report could not be filed.

11 I do not read rule 37.10(2)(c) as limiting what "other material" may be used. The limitation to that rule by the registrar requiring "other material" to be authorized by statute or another rule is not contained in the rule and is not warranted. The rule is clearly intended to provide technical direction as to what and how materials are to be put together and filed with the court, and no more.

12 The conclusion that the report was inadmissible because no statute or rule specifically authorized a trustee's report disregarded the common law. The case authority put before the registrar, namely the decision of Justice Mesbur in *Montor Business Corp. (Trustee of) v. Goldfinger* (2011), 75 C.B.R. (5th) 170 (Ont. S.C.J.) and the cases referred to therein were clear authority that a trustee's report is admissible evidence and there was no appropriate basis to distinguish that authority.

13 In *Goldfinger*, the trustee responded to a motion to remove the trustee by filing a trustee's report, and a motion was brought to strike the report on the basis that a trustee's report was not admissible evidence. Justice Mesbur held that the trustee's report was admissible evidence. She stated

> **11** Those who act as Trustees or Receivers, in bankruptcy proceedings, receiverships or restructuring under the *CCAA*, routinely report to the court and set out recommendations and responses to questions by way of reports. The courts routinely accept the reports as evidence. Courts do so not only in the situations specifically enumerated under the *Bankruptcy and Insolvency Act.*

14 Some of the arguments made on behalf of Ms. McIntosh in this case were made and rejected by Mesbur J. Regarding the rules of practice, Mesbur J. stated:

> **21** The moving parties suggest that although this application arises in the context of various bankruptcies, the application itself is simply a proceeding commenced under the Rules of Civil Procedure, and absent any contrary provision under the Bankruptcy Rules, the general Rules of Civil Procedure must apply. They say Farbers is a litigant like any other, and must be subject to the same rules as any other litigant.
>
> **22** They rely on rule 39.01 which sets out the evidence to be used on a motion. Since the rule contemplates affidavit evidence, they suggest no other evidence is either permissible or admissible. As a result, they argue the report must be expunged.
>
> **23** I do not see it that way. Rule 39.01(1) simply states that evidence on a motion or application "may be given by affidavit unless a statute or these rules provide otherwise." The rule does not require that the only evidence to be used on a motion must be in affidavit form. I come to this conclusion by looking at rule 37.10(2) which sets out the necessary contents of a motion record. Subrule 37.10(2)(c) refers to "a copy of all affidavits *and other material* served by any party for use on the motion." [emphasis added] From this I infer that material other than affidavits may properly be used on a motion.

> **24** As Farbers' counsel pointed out, in CCAA proceedings, receiverships and bankruptcies, reports are admitted as evidence every day. They are admitted on a vast variety of motions, contested and not. I have already referred to a variety of situations in which this has been the case.
>
> **25** It seems to me that a Trustee's report, by both custom and law, is in no more diminished a position as far as its reliability is concerned as is an affidavit based on information and belief. In fact, given that it is prepared by an officer of the court, with both statutory and common law duties, it is in many ways more reliable than an affidavit that is based entirely on information and belief, but is nevertheless under the Rules of Civil Procedure, prima facie admissible.

15 Justice Mesbur also dealt with an argument that a trustee's report was inadmissible as being contrary to the hearsay rule. In dismissing this argument, she referred to a decision of Justice Farley in *Bell Canada International Inc., Re*, [2003] O.J. No. 4738 (Ont. S.C.J. [Commercial List]) as follows:

> **31** Farley J dealt with this in *Bell Canada International Inc. Re*, the only case that squarely deals with this issue. When faced with the argument that a Monitor's report was "not evidence", he stated first, it was not "necessary to delve deeply into this question but ... to observe that such a report by a court appointed officer is recognized by the common law as being admissible evidence in a proceeding."
>
> **32** In support of this proposition, Farley J quoted approvingly from Wigmore which stated that a report, if made under due authority, stands upon no less favourable footing than other official statements. It is admissible under the general principle. The general principle referred to is the hearsay exception that permits public documents (or as Wigmore calls them, "official statements") to be admitted into evidence. Reports by the court's officers meet the general criteria for the public document exception:
>
>> a) they are made by a public official - trustees are licensed by a government official, the Superintendent in Bankruptcy, and have public duties imposed both by the court and by the *Bankruptcy and Insolvency Act*;
>>
>> b) the Trustee makes the report in the discharge of a public duty or function - the trustee functions in the context of its duties to the court and to the creditors, and its reports communicate the necessary information to discharge those duties;
>>
>> c) the reports are made with the intention they serve as a permanent record - as part of the court record, reports are permanent; and
>>
>> d) the report is available for public inspection - as part of the court record, the report, like the court file, is open to public viewing.
>
> **33** In addressing the issue of whether a report is made under "due authority", Farley J also referred approvingly to *The Law of Receivers and Administrators of Companies* which states that officers of the court (which would include Trustees) are "appointed by the Court and are subject to its general supervisory jurisdiction. In accordance with the rule in *ex. p James* (1874) 2 Ch. App 609 officers of the Court are obliged not only to act lawfully, but fairly and honourably."

16 The registrar questioned the public authority aspect of a Trustee as follows:

> Mesbur J. referred to "due authority" or "public official" exception. In my view the trustee is appointed under the legislation to administer the estate, has certain duties and obligations and is an "officer of the court". Where I have difficulties with this line of argument is that the lawyers too are "officers of the court". There is no suggestion that lawyers could "report to the court" as opposed to file affidavit evidence. I see no reason why trustees should be given special standing in this regard.

17 Apart from the fact that the conclusions of Mesbur J., and that of Farley J. in *Bell Canada International* quoted by Mesbur J., were so far as the registrar was concerned not a line of argument but rather authority binding on her, the comparison of a trustee and counsel was misconceived. While each may be said to be an officer of the court with duties commensurate with their position, they are not officers in the same capacity. A trustee is a party to a proceeding appointed under statutory authority, or by the court if an order is made to replace a trustee, with statutory duties and duties to the court and to all stakeholders. A lawyer retained by a client advocates for the interests of his or her client and as an officer of the court has a duty of candour and respect for the court. But the advocate is not a public officer in the sense that a trustee in bankruptcy is and is not appointed by the court.

18 The registrar distinguished *Goldfinger* on the basis that it was a factually different case in that *Goldfinger* involved a motion to remove a trustee whereas this case involves an appeal from a disallowance of a claim by the Trustee. I do not see that as being a legitimate way to distinguish *Goldfinger*. The decisions of Mesbur J. in *Goldfinger* and of Farley J. in *Bell Canada International* were dealing with the principle of the admissibility of a report by a trustee in *Goldfinger* and of a monitor in *Bell Canada International* in light of their positions as trustee and monitor, not just in light of the particular circumstance of each case.

19 It was contended in argument that there is a distinction between an interim motion or proceeding and a final proceeding such as an appeal from an order disallowing a claim. I do not agree. There is no principled reason for the distinction. Nor is there a principled reason for distinguishing amongst a report of a monitor, a trustee in bankruptcy and a receiver. If the reasoning of the registrar were correct and a trustee's report could not be introduced as evidence unless a statute or rule specifically allowed it, it would mean that reports of receivers and monitors that are routinely and widely accepted in many proceedings, interim or final, contested or not, could no longer be used. In my view, a report of a trustee in bankruptcy, a monitor or a receiver is admissible in evidence regardless of the nature of the particular motion or application, and whether interim or final or contested or not, unless there is some statutory prohibition of the use of such a report. The rules of practice do not prevent these reports from being admissible evidence.

20 The registrar accepted the position of Ms. McIntosh that her counsel should have an unfettered right to cross-examine the Trustee and that it was not appropriate to impose restrictions on the cross-examination. This conclusion ignores the practice in Ontario at least regarding cross-examination of court officers such as trustees, receivers and monitors.

21 The general practice accepted in Ontario is that if a party has questions regarding a report of such a court officer, those questions should be put to the court officer. Generally in my experience, the court officer will answer the questions fully and any follow-up questions that may arise and cross-examination is not necessary. If there is some good reason to cross-examine the court officer, it can be ordered. I do not agree that a person has a *prima facie* right at large to cross-examine a court officer such as a trustee and I would not extend the practice in that way. See Farley J. in *Bell Canada International* at paras. 8 and 9 and his discussion of the limits on cross-examination of a court officer. I agree with his comments.

22 In this case, counsel for the Trustee suggested that questions could be put to the trustee and that if Ms. McIntosh was not satisfied with the answers, an application to cross-examine the trustee could be made. That is the normal practice. Counsel for the Trustee went further and said he would consent to an order for cross-examination provided it was restricted to the questions raised and time limited. This seemed to be a sensible offer but it was quite open to counsel for Ms. McIntosh to put questions to the Trustee and if not satisfied with the answers move to cross-examine on such terms as required.

23 I make one last point. The issue here is as to the admissibility of the Trustee's report, and not the weight to be given to it. Whether the Trustee could have filed other evidence, or chosen to file affidavit evidence, is not the issue. The weight to be given to the Trustee's report will be for the registrar dealing with the appeal from the disallowance of Ms. McIntosh's claim.

Conclusion

24 The appeal is allowed. The Trustee's report is admissible evidence on the appeal from the disallowance of the claim of Ms. McIntosh. The appellant has requested that this court decide the issue rather than returning it to the registrar. I decline to do so, but direct that the appeal from the disallowance be heard by a different registrar.

25 The Trustee is entitled to its costs of $1,500 inclusive of HST and disbursements to be paid by Ms. McIntosh within 30 days.

Appeal allowed.

Tab 15

2003 CarswellOnt 4537
Ont. S.C.J. [Commercial List]

Bell Canada International Inc., Re

2003 CarswellOnt 4537, [2003] O.J. No. 4738, 126 A.C.W.S. (3d) 790

IN THE MATTER OF BELL CANADA INTERNATIONAL INC.

AND IN THE MATTER OF AN APPLICATION BY BELL CANADA INTERNATIONAL INC. UNDER SECTION 192 OF THECANADA BUSINESS CORPORATIONS ACT, R.S.C. 1985, c. C-44, as amended (the "CBCA")

Farley J.

Heard: October 29, 2003
Judgment: October 30, 2003
Docket: 02-CL-4553

Counsel: John T. Porter, Derrick C. Tay, Alan B. Merskey for BCI
Christine Snow for Directors of BCI
James H. Grout for Monitor
W. Grant Worden for BCE
J.L. McDougall, Q.C., Michael D. Schafler for Peter Legault
Frederick L. Myers for Horizon
Robert Staley for Hicks, Muse, Tate & Furst Inc., Davivo International Ltd.

Subject: Corporate and Commercial; Insolvency

Headnote

Business associations --- Changes to corporate status — Amalgamations and takeovers — Takeovers — Miscellaneous issues

C Ltd. considered two bids for its shares — C Ltd. elected to accept bid by corporation H — Monitor scrutinizing bid process wrote report stating sale process conducted fairly and openly — Minority shareholder told monitor he had party interested in submitted higher bid, but no offer was received — BCI Inc. brought motion for order authorizing BCI Inc. to enter into voting agreement with H to vote its 75.6 per cent interest in common shares of C Ltd. in favour of sale agreement between C Ltd. and H — Order issued that BCI Inc., if authorized by its board, could enter into voting agreement with H, which obligated it to vote in favour of sale agreement — Report of monitor in proceedings of this nature is evidence — Monitor, as officer of court, not necessarily barred from being cross-examined — Court officers may be examined or cross-examined in unusual circumstances — Motion would have been better supported by affidavit, but given limited nature of relief sought, it was not fatal that only monitor's report provided — Motion granted subject to determination by board and management of whether it was in best interests of BCI Inc. to vote in favour of sale agreement.

Table of Authorities

Cases considered by *Farley J.*:

Anvil Range Mining Corp., Re (2001), 2001 CarswellOnt 908, 21 C.B.R. (4th) 194 (Ont. S.C.J. [Commercial List]) — considered

Confectionately Yours Inc., Re (2002), 2002 CarswellOnt 3002, 36 C.B.R. (4th) 200, 164 O.A.C. 84, 25 C.P.C. (5th) 207, 219 D.L.R. (4th) 72 (Ont. C.A.) — considered

Confederation Treasury Services Ltd., Re (1995), 37 C.B.R. (3d) 237, 1995 CarswellOnt 1169 (Ont. Bktcy.) — referred to

Mortgage Insurance Co. of Canada v. Innisfil Landfill Corp. (1995), 30 C.B.R. (3d) 100, 3 O.T.C. 23, 1995 CarswellOnt 43 (Ont. Gen. Div. [Commercial List]) — considered

Statutes considered:

Canada Business Corporations Act, R.S.C. 1985, c. C-44

Generally — considered

s. 189 — referred to

s. 189(3) — referred to

s. 190 — referred to

s. 192(1) "arrangement" — referred to

s. 192(3) — referred to

MOTION by corporation for order authorizing it to enter into voting agreement with another corporation to vote its interest in common shares in third corporation in favour of sale agreement.

***Farley J.*:**

1 [1] This was a motion by Bell Canada International Inc. ("BCI") for an order:

> (b) authorizing and approving the entry of BCI into a voting agreement (the "Voting Agreement") with Horizon, Cablevision do Brazil, SA ("Horizon") to vote its 75.6 percent interest in the common shares of Canbras Communications Ltd. ("Canbras") in favour of a sale agreement between Canbras and Horizon (the "Sale Agreement") pursuant to which Horizon proposes to acquire substantially all of Canbras' assets (the "Canbras Sale Transaction").

2 [2] It appears to me that all interested persons have been duly served, including Peter Legault ("L"), a minority shareholder of Canbras. L had originally been favourably disposed towards a bid by Elicio which was to acquire only BCI's shares in Canbras as this would allow him to continue as a shareholder of Canbras, a CBCA public corporation. It appears that the two bidders who were selected for further negotiations (Horizon and Hicks) were advised in early June 2003 by Canbras that the Board of Canbras would meet on June 23, 2003 to make a final decision on which of the two bids to pursue, and wanted both Horizon and Hicks to submit final bids. Horizon's final bid was for the CPAR shares (the holding company subsidiary of Canbras) while Hicks bid for all the shares of Canbras. Apparently, the two bids were compared after adjustment on an apples for apples, oranges for oranges basis, and the Horizon bid was determined to be substantially higher than the Hicks bid (which was determined to be subject to significant closing conditions that had a high risk of not being met).

3 [3] No one has submitted any further bid or proposal of any nature or sort. However, L contacted the BCI Monitor on October 14, 2003, indicating that he had a party that was interested in submitting a bid at a price higher than the proposed Horizon transaction (the salient terms of which, including price, had been publicly disclosed on October 8, 2003). L advised the interested party was a combination of Hicks and Elicio who would make a joint offer for all the shares of Canbras. (There appears to be some possible discrepancy here as a bid for all shares of Canbras would in fact negate L's desire to remain a shareholder of Canbras). On October 20, 2003, L contacted the Monitor and advised that the Monitor would likely receive a letter with details of the offer by October 24, 2003. No such offer has yet been received.

4 [4] According to L, Hicks advised with respect to a continuation of bidding in the spring of 2003 that Hicks would not unilaterally increase its bid, but would be prepared to top another bid (which assumes that this was part of the process - which it appears it was not - and that Hicks would be advised of the price and other terms of the other bid; this presumes that the other bidder would be similarly advised of Hick's bid, but this type of process is certainly belied by the very significant bid jump by Horizon).

5 [5] At paragraph 28 of its report, the Monitor stated:

> 28. Based on its procedures as outlined above, the Monitor is satisfied that the Canbras sale process was conducted fairly and openly, that all interested parties were given a commercially reasonable opportunity to submit offers to Canbras and that a "level playing field" was maintained at all times.

6 [6] L disputes that the Monitor's report is evidence but gives no basis for such a submission. With respect, I disagree. I do not think it necessary to delve deeply into this question but I do think it suffice to observe that such a report by a court appointed officer is recognized by the common law as being admissible evidence in a proceeding. For instance, see John Henry Wigmore, *Evidence in Trials at Common Law* (Little Brown & Company, Toronto & Boston; 1974) at pp. 791-6, Volume 5 (section 1670) discusses the ancient origins of reports being received as admissible evidence, stating at p. 791:

> A report is to be distinguished from a return, as already defined (s. 1664 supra,) in that the latter is typically concerned with something done or observed personally by the officer, while the former embodies the results of his investigation of a matter not originally occurring within his personal knowledge. The older term customarily applied to the former type of statement - "inquisition" or "inquest" - suggest more clearly its special quality, namely that of resting upon means of information other than original personal observation.
>
> Now an inquisition or report, if made under due authority, stands upon no less favourable a footing than other official statements. As a statement made under official authority, or duty, it is admissible under the general principle (sc 1633, 1635 supra).

7 [7] Sir Gavin Lightman and Gabriel Moss, *The Law of Receivers and Administrators of Companies* (3 rd ed., 2000; Sweet & Maxwell, London) at p. 115 distinguishes between the capacity and quality of "officer-holder" and "officer of the court."

> Officers of the court [such as court appointed receivers) (Chap. 22), administrator (Chap. 23), provisional liquidators and liquidators in a compulsory liquidation (Chap. 2)] are appointed by the Court and are subject to its general supervisory jurisdiction. In accordance with the rule in ex p. James [(1874) 9 Ch. App. 609] officers of the Court are obliged not only to act lawfully, but fairly and honourably.

8 [8] L submitted that the Monitor, as an officer of the court, cannot be cross examined (citing *Confectionately Yours Inc., Re*, [2002] O.J. No. 3569 (Ont. C.A.) at paras. 31-32; *Mortgage Insurance Co. of Canada v. Innisfil Landfill Corp.* (1995), 30 C.B.R. (3d) 100 (Ont. Gen. Div. [Commercial List]) at para. 5; *Anvil Range Mining Corp., Re*, [2001] O.J. No. 1125 (Ont. S.C.J. [Commercial List]) at paras. 3-4). With respect, that is an oversimplification or an overstatement as is clearly seen by my observations at paras. 3-4 of *Anvil Range Mining Corp.* including the cite from *Innisfil*:

> (3) The Interim Receiver is an officer of the Court. That designation with all of its obligations and responsibilities does not change merely because the Interim Receiver has brought a sanctioning motion. I disagree with and reject Mr. Jones' submissions that the Interim Receiver by virtue of bringing this motion has become an adversarial party in a contentious matter. Nor is this an exceptional or unusual circumstance situation which would require cross-examination.
>
> (4) See *Mortgage Insurance Co. v. Innisfil Landfill Corp.* (1995) 30 C.B.R. (3d) 100 (Ont. Gen. Div.) at pp. 101-2 where I stated:
>
>> As to the question, of there not being an affidavit of the Receiver to cross-examine on, I am somewhat puzzled by this. I do not understand that a Receiver, being an officer of the Court and being appointed by Court Order is required to give his reports by affidavit. I note that there is a jurisprudence to the effect that it would have to be at least unusual circumstances for there to be any ability of other parties to examine (cross-examine in effect) the Receiver on any report. However, I do acknowledge that in, perhaps what some might characterize

> as a tearing down of an institution in the rush of counsel "to get to the truth of the matter" (at least as perceived by counsel), Receivers have sometimes obliged by making themselves available for such examination. Perhaps the watchword should be the three Cs
>
> of the Commercial List - cooperation, communication and common sense. Certainly, I have not seen any great need for (cross-) examination when the Receiver is willing to clarify or amplify his material when such is truly needed.

The jurisprudence which I referred to included *Re Mr. Greenjeans Corp.* (1984), 52 C.B.R. (N.S.) 320 (Ont. H.C.J.) and *Avery v. Avery*, [1954] O.J. No. 67, (H.C.J.) as I recollect as I make this endorsement over this lunch hour break but was not limited to these two cases. I note that my view of the situation was adopted by Paperny J. (as she then was) in *Re Canadian Airlines Corp.* (2000), 20 C.B.R. (4th) 1 (Alta. QB) at p. 30. See also paper "*Canadian Airlines - The Last Tango in Calgary*"by Norm A. McPhedran at pp. 43-5 regarding cross examination of the monitor issue.

9 As will be seen by that cite, a court officer may be (cross) examined in unusual circumstances. It would seem to me that unusual circumstances would include the situation where the officer of the court refused to cooperate in clarifying a part of his report or in not expanding upon any element in the report as may be reasonably requested. Frequently, such can be accomplished by questions and answers in writing or an interview (depending on the circumstances it may be desirable to have a recording made, or a summary memo). The reasonability of a request must take into account the objectivity and neutrality of the officer of the court (see *Confederation Treasury Services Ltd., Re* (1995), 37 C.B.R. (3d) 237 (Ont. Bktcy.)) where I described the necessity for such and the caution that woe betide any officer of the court who did not observe his duty to be neutral and objective). *Bakemates* clarifies that an officer of the court when dealing with the question of his fees and disbursements is to be treated as an ordinary litigant as having an understandable self interest in the outcome; therefore fees and disbursements are to be supported by an affidavit and the officer of the court is in that respect open to cross examination.

10 [9] L raised a concern about this motion by BCI not being supported by anything other than the Monitor's report. This concern has been raised as a general problem quite recently. I have indicated within the past month that, in my view, it is desirable to have an affidavit from someone in the moving party's camp if the matter is reasonably expected to be contentious. If a matter turns contentious, it may be necessary to provide such an affidavit before the hearing with sufficient time to cross examine on it if necessary or to adjourn the hearing to allow for same (the exigencies of the situation may require otherwise if there is urgency). The provision of an affidavit is not of course a mandatory invitation to cross examine in the sense of delaying what must be accomplished on a timely basis, if it is to be accomplished at all (in other words, inappropriate delay should not be allowed to kill an otherwise meritorious motion). The Commercial List is well populated by counsel who have warmly embraced the 3Cs of communication, cooperation (at least in procedural matters) and common sense; I know there will be no problem with this question of unwarranted delay if the 3Cs continue to be observed.

11 [10] Here there was only the Monitor's report; in my view it would have been preferable to have had an affidavit (possibly, for instance, from Mr. Hendricks or from a representative of Credit Swiss First Boston, advisor to Canbras). However, given the limited nature of the relief requested by this motion - and the limited nature of the order which in fact can be granted, I do not see that the failure to provide such an affidavit is fatal.

12 [11] At para. 30 of its report, the Monitor has advised the Court and the parties:

> 30. Based on the above procedures, the Monitor is satisfied that the proceeds to be realized from the Canbras Sale Transaction maximize amounts available for distribution <u>to the BCI Stakeholders.</u> (emphasis added)

13 As a side note, I would observe that the Monitor here correctly proceeded by providing a "main" report which was circulated with enough time to allow reflection and a "follow up" report to advise as to any intervening matters on an up to date basis.

14 [12] There has been no prior request to this Court to deal with anything at the Canbras (or lower) level and certainly nothing with respect to the marketing process. The Canbras transaction is proceeding as an "ordinary" sale transaction as governed by s. 189(3) specifically of the CBCA and s. 189 generally. This will involve a right to dissent under s. 190. One may observe that consideration will also have to be given to s. 192(1) and (3). I also stressed that aside from the other concerns in this paragraph, nothing that this Court does in respect of this motion should be taken as authorizing, approving, sanctioning or otherwise dealing with the activities of the board and management of BCI, Canbras or any other lower tier subsidiary; in other words, any order I may grant in respect of this motion will not, nor is it intended, to create either a shield or a sword with respect to any oppression or other claim.

15 [13] I observed that the voting agreement which was handed up was ambiguous as to the quality of the court approval sought and that it needed to be revised. The Court does not have a copy of the Sale Agreement; it was withheld from the parties as being confidential and sensitive. The Court in no way is to be taken as approving the terms of the Sale Agreement. It is up to the board and the management to determine if it is in the best interests of BCI to vote in favour (I assume they have made that decision). Given the Monitor's conclusion in para. 30 of its report, I see no reason to prevent that vote from taking place.

16 [14] In conclusion, the Court orders that BCI (if authorized by its Board) may enter into a voting agreement with Horizon which obligates it to vote in favour of the Sale Agreement in respect of a vote pursuant to s. 189(3) of the CBCA (including any terms which are reasonably ancillary to that).

Order accordingly.

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Tab 16

Most Negative Treatment: Distinguished
Most Recent Distinguished: Joy Estate v. 1156653 Ontario Ltd. | 2007 CarswellOnt 7323, 38 B.L.R. (4th) 144, [2007] O.J. No. 4396, 161 A.C.W.S. (3d) 699 | (Ont. S.C.J., Nov 9, 2007)

2007 CarswellOnt 4135
Ontario Superior Court of Justice

1175777 Ontario Ltd. v. Magna International Inc.

2007 CarswellOnt 4135, [2007] O.J. No. 2549, 159 A.C.W.S. (3d) 189, 61 R.P.R. (4th) 68

1175777 Ontario Limited (Plaintiff) and Magna International Inc., Heri Polzl, Kurt Irrcher and Frank Stronach (Defendants)

C. Horkins J.

Judgment: June 27, 2007
Docket: 97-CU-117874

Proceedings: additional reasons to *1175777 Ontario Ltd. v. Magna International Inc.* (2006), 57 R.P.R. (4th) 215, 2006 CarswellOnt 7512 (Ont. S.C.J.)

Counsel: Ronald B. Moldaver, Q.C. for Plaintiff
John J. Chapman, Adam Stephens for Defendants

Subject: Civil Practice and Procedure; Contracts; Property

Headnote

Civil practice and procedure --- Costs — Particular orders as to costs — Costs on solicitor and client basis — Grounds for awarding — Unfounded allegations

Plaintiff, T, was told that M, division of corporate defendant D, might be interested in leasing plant — T purchased property suitable for proposed plant, began construction and submitted proposal for constructing and leasing plant to M — T presented G, general manager of M, with letter regarding proposed construction and leasing of plant — G signed letter but did not have authority to bind D, so he took it back to D for signature, which was never obtained — In spite of series of difficulties with D, T continued to construct plant — Plaintiff also pursued conspiracy claim contending that personal defendants P and S had conspired against them, their predominant purpose being to harm plaintiff — T's action against D for damages of $35,000,000 for breach of contract and conspiracy to injure was dismissed — Trial judge determined that letter from T was too uncertain to form offer and it had not been accepted, and conspiracy claim had not been made out — On issue of costs, defendants claimed substantial indemnity costs flowing primarily from failed conspiracy claim — Plaintiff claimed that since conspiracy claim did not allege fraud, it should not attract substantial indemnity costs — Substantial indemnity costs were appropriate — Substantial indemnity awards are not limited to cases alleging fraud — Unfounded allegations of improper conduct seriously prejudicial to character or reputation of party can also justify such award — Claims against S, who was chairman of public corporation, that he sought to personally profit from conspiracy was allegation of serious personal misconduct which remained part of public record throughout litigation — During litigation court warned plaintiff twice that conspiracy claim might expose it to cost sanctions — Since allegations were failed attack on S's integrity, substantial indemnity costs were warranted.

Civil practice and procedure --- Costs — Scale and quantum of costs — General principles

Plaintiff, T, was told that M, division of corporate defendant D, might be interested in leasing plant — T purchased property suitable for proposed plant, began construction and submitted proposal for constructing and leasing plant to M — T presented G, general manager of M, with letter regarding proposed construction and leasing of plant — G signed letter but did not have authority to bind D, so he took it back to D for signature, which was never obtained — In spite of series of difficulties with D, T continued to construct plant — Plaintiff also pursued conspiracy claim contending that personal defendants P and S had conspired against them, their predominant purpose being to harm plaintiff — T's action against D for damages of $35,000,000 for breach of contract and conspiracy to injure was dismissed — Trial judge determined that letter from T was too uncertain to form offer and it had not been accepted, and conspiracy claim had not been made out — On issue of costs, defendants claimed substantial indemnity costs of $528,307.12, flowing primarily from failed conspiracy claim, and disbursements of $319,130.32 — Substantial indemnity costs of $453,257.62 awarded together with disbursements of $292,284.54 — Conspiracy allegations were failed attack on S's integrity, and therefore substantial indemnity costs were warranted — Although liability part of action was not complicated, damage claim was exceedingly complex — Also, conduct of plaintiff in starting trial without proper expert reports added to expense and complexity of litigation by forcing plaintiff to ask for adjournment — Also, plaintiff changed its position with regard to facts on which it was relying so that defendants had to repeat trial and witness preparation and pay for supplemental expert reports — Given seriousness of issue to defendants and complexity of damage claim, defendant's second counsel fee was justified — However, hourly rates claimed for defence were to be adjusted since liability issues were not complicated, law clerks rather than junior lawyers could have done many tasks and defence counsel charged more than years of call required.

Table of Authorities

Cases considered by *C. Horkins J.*:

Andersen v. St. Jude Medical Inc. (2006), 264 D.L.R. (4th) 557, 208 O.A.C. 10, 2006 CarswellOnt 710 (Ont. Div. Ct.) — followed

Andersen v. St. Jude Medical Inc. (2006), 2006 CarswellOnt 7749 (Ont. C.A.) — referred to

Buchanan v. Geotel Communications Corp. (2002), 2002 CarswellOnt 2592, 26 C.P.C. (5th) 87 (Ont. S.C.J.) — referred to

Canadian National Railway v. Royal & SunAlliance Insurance Co. of Canada (2005), 77 O.R. (3d) 612, 2005 CarswellOnt 4402, 30 C.C.L.I. (4th) 235 (Ont. S.C.J.) — referred to

Celanese Canada Inc. v. Canadian National Railway (2005), 2005 CarswellOnt 1124, 196 O.A.C. 60 (Ont. C.A.) — considered

Foulis v. Robinson (1978), 1978 CarswellOnt 466, 21 O.R. (2d) 769, 92 D.L.R. (3d) 134, 8 C.P.C. 198 (Ont. C.A.) — referred to

Hamilton v. Open Window Bakery Ltd. (2003), 2004 SCC 9, 316 N.R. 265, 235 D.L.R. (4th) 193, 2003 CarswellOnt 5591, 2003 CarswellOnt 5592, 2004 C.L.L.C. 210-025, 184 O.A.C. 209, [2004] 1 S.C.R. 303, 70 O.R. (3d) 255 (note), 40 B.L.R. (3d) 1 (S.C.C.) — considered

Hanis v. University of Western Ontario (2006), 42 C.C.L.I. (4th) 65, 2006 CarswellOnt 4439, 53 C.C.E.L. (3d) 86 (Ont. S.C.J.) — referred to

Harding v. First Associates Investments Inc. (2003), 2003 CarswellOnt 4486 (Ont. S.C.J.) — referred to

MacDonald v. Sun Life Assurance Co. of Canada (2005), 2005 CarswellOnt 5157 (Ont. S.C.J.) — referred to

Manning v. Epp (2006), 2006 CarswellOnt 6508 (Ont. S.C.J.) — considered

Mele v. Thorne Riddell (1997), 32 O.R. (3d) 674, 1997 CarswellOnt 206, 26 O.T.C. 119 (Ont. Gen. Div.) — considered

Resch v. Canadian Tire Corp. (2006), 2006 CarswellOnt 4382 (Ont. S.C.J.) — referred to

Unisys Canada Inc. v. York Three Associates Inc. (2000), 2000 CarswellOnt 3449 (Ont. S.C.J.) — considered

Unisys Canada Inc. v. York Three Associates Inc. (2001), 2001 CarswellOnt 3301, 44 R.P.R. (3d) 138, 150 O.A.C. 49 (Ont. C.A.) — referred to

131843 Canada Inc. v. Double "R" (Toronto) Ltd. (1992), 7 C.P.C. (3d) 15, 1992 CarswellOnt 437 (Ont. Gen. Div.) — considered

1175777 Ontario Ltd. v. Magna International Inc. (October 29, 1997), Wilson J. (Ont. Gen. Div.) — considered

1175777 Ontario Ltd. v. Magna International Inc. (2001), 2001 CarswellOnt 1446, 200 D.L.R. (4th) 521, 9 C.P.C. (5th) 199, 17 B.L.R. (3d) 259, 145 O.A.C. 364, 13 C.C.E.L. (3d) 161 (Ont. C.A.) — considered

3664902 Canada Inc. v. Hudson's Bay Co. (2002), 22 C.P.C. (5th) 102, 2002 CarswellOnt 1712 (Ont. S.C.J.) — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Generally — referred to

R. 31.04(3) — referred to

R. 53.03 — referred to

R. 57.01 — considered

ADDITIONAL REASONS as to costs, to judgment reported at *1175777 Ontario Ltd. v. Magna International Inc.* (2006), 57 R.P.R. (4th) 215, 2006 CarswellOnt 7512 (Ont. S.C.J.), dismissing plaintiff's action for damages for breach of contract and conspiracy to injure.

***C. Horkins J.*:**

Introduction

1 The trial of this action was held in February, May and June 2006 over the course of 14 days. The plaintiff claimed damages of $35 million for breach of an alleged binding agreement and conspiracy to injure. I released my judgment on November 28, 2006 dismissing the plaintiff's action. The parties have not been able to agree on costs. As a result I requested and received written costs submissions.

2 A brief summary of the claim is helpful. The plaintiff is a company owned and controlled by Mr. Tiberini. For the purpose of this costs decision, the plaintiff and Mr. Tiberini are one and the same.

3 The alleged binding agreement concerned the construction and lease of a manufacturing plant. On October 28, 1996, Mr. Tiberini sent a letter ("the October letter") to Franz Gangl at Mytox Manufacturing, an unincorporated division of a Magna company. The October letter proposed that the plaintiff would build a new plant for Mytox on a 16.5 acre site on Talman Court.

4 Acceptance of the proposal required two signatures: one from Mytox and one from Decoma International, a Magna subsidiary. Decoma was described in the October letter as a guarantor. Franz Gangl signed the proposal for Mytox, but it was never signed by Decoma.

5 The plaintiff started construction of the plant before Franz Gangl signed the October letter. Construction stopped after the defendants disputed the existence of a binding agreement.

6 The plaintiff alleged that Frank Stronach conspired to injure the plaintiff by facilitating the construction of the Mytox plant by New Empire, one of the plaintiff's competitors. It was also alleged that as part of the conspiracy Frank Stronach agreed to personally profit from this conspiracy.

7 I concluded that the October letter was too uncertain to form an offer and in any event was never accepted. I also found that there was no substance to the conspiracy claim against Frank Stronach.

8 I did not assess damages. It was agreed that if I found the October letter to be too uncertain to form an offer that it would be impossible to assess damages. However, the nature of the damage claim and the manner in which it was presented by the plaintiff is critically important to my assessment of the defendants' costs.

Defendants' Position

9 In total, defence counsel billed Magna $757,688 in fees and $51,731.96 for GST. The parties agree that approximately $107,000 in fees must be deducted because this amount represents time for interlocutory motions and appeals, covered by earlier cost orders. This results in net fees billed of approximately $650,000.

10 The defendants' costs on a partial indemnity and substantial indemnity scale are as follows:

	Partial indemnity	Substantial indemnity
Legal fees	$352,204.75	$528,307.12
GST on Legal Fees	$24,654.33	$36,981.50
Disbursements (including GST)	$319,130.32	$319,130.32
Total	**$695,984.40**	**$884,418.94**

11 The defendants claim substantial indemnity costs. There were no offers to settle. The plaintiff pursued a conspiracy claim against Frank Stronach that involved allegations of improper conduct. The defendants submit that this unsupported claim and certain rule 57.01 factors entitle them to substantial indemnity costs.

12 The partial indemnity fees are based on an hourly rate for Mr. Chapman of $300 for the pleadings and discovery and $350 for pre-trials, the trial and preparation. Mr. Stephens, the main associate on the file was a three year associate at the time of the trial. His partial indemnity rate is set at $175. This is $50 less than the maximum rate in the guideline.

13 The substantial indemnity fees are 1.5 times the partial indemnity amount.

Plaintiff's Position

14 The plaintiff submits that the defendants' costs are "grossly excessive". The specific criticism is as follows:

(1) The conspiracy claim does not allege fraud and should not attract substantial indemnity costs.

(2) The action was not complex.

(3) The defence was "over-lawyered". It is "overkill."

(4) A second counsel fee is not justified.

(5) The hourly rates are too high.

(6) Not all expert disbursements were reasonable and necessary.

(7) Photocopying and trial transcript fees are too high.

15 The plaintiff submits that a reasonable cost award for fees is $121,500 plus GST and $223,944.45 for all disbursements.

Legal Framework

16 In *Andersen v. St. Jude Medical Inc.*, [2006] O.J. No. 508 (Ont. Div. Ct.) at para. 22, leave to appeal to the Court of Appeal refused, May 12, 2006 [2006 CarswellOnt 7749 (Ont. C.A.)], the Divisional Court reviewed the guiding principles for fixing costs as follows:

1. The discretion of the court must be exercised in light of the specific facts and circumstances of the case in relation to the factors set out in Rule 57.01(1): *Boucher, Moon and Coldmatic*.

2. A consideration of experience, rates charged and hours spent (formerly a costs grid calculation) is appropriate, but is subject to the overriding principle of reasonableness as applied to the factual matrix of the particular case: *Boucher*. The quantum should reflect an amount the court considers to be fair and reasonable rather than any exact measure of the actual costs to the successful litigant: *Zesta Engineering*.

> 3. The reasonable expectation of the unsuccessful party is one of the factors to be considered in determining an amount that is fair and reasonable: Rule 57.01(1)(0.b).
>
> 4. The court should seek to avoid inconsistency with comparable awards in other cases. "Like cases, [if they can be found], should conclude with like substantive results": *Murano* at p. 249.
>
> 5. The court should seek to balance the indemnity principle with the fundamental objective of access to justice: *Boucher*.

17 Further a complaint that costs are excessive is "an elusive and inherently subjective concept unless it is measured against something." (*Andersen* at para. 13)

18 With these principles in mind, I will now review the defendants' costs.

Are Substantial Indemnity Costs Justified?

19 The request for substantial indemnity costs flows primarily from the failed conspiracy claim against Frank Stronach and to a lesser extent from certain factors in rule 57.01.

20 The plaintiff pursued a conspiracy claim against Heri Polzl and Frank Stronach. Before the trial started a settlement was reached with Heri Polzl and the action against him was dismissed. However, the plaintiff continued the conspiracy claim against Frank Stronach.

21 The essence of the conspiracy claim was that Heri Polzl and Frank Stronach conspired together and that their "predominant purpose" was to harm the plaintiff. It was alleged in the Fresh As Amended Statement of Claim that:

> 12. Within days of the acceptance of the offer, Polzl and Stronach entered into an agreement to conspire against 1175777 the predominant purpose of which was to injure 1175777 and Tiberini by depriving 1175777 of the benefits under the Agreement or the making such an agreement and by facilitating the construction of the Mytox plant by its competitor, New Empire Construction on another site known to the parties as the Aviva Park site. As part of the conspiracy, Polzl and Stronach agreed to carry out the following acts:
>
> > (a) coerce 1175777 into selling the Talman Property to Magna even though they knew that it was not economically viable for 1175777 to do so;
> >
> > (b) induce Decoma to breach the Agreement after allowing it to invest time and money in the development of the Talman Property;
> >
> > (c) locate another site for the construction of the Mytox plant; and,
> >
> > (d) facilitate New Empire's Construction of the Mytox plant;
> >
> > (e) financially gain from New Empire's construction of the Mytox plant.

22 There was also a vague allegation during the trial that Heri Polzl, Frank Stronach and New Empire were somehow linked financially. No evidence was produced to support this allegation.

23 Mr. Tiberini alleged that Frank Stronach acted in bad faith when he refused to honour the alleged October agreement. He says the fact that Mr. Stronach did not testify at trial "especially after Power's evidence superadded to that of Ferreira and Tiberini" leads to the "undeniable adverse inference" that "Mr. Stronach acted in bad faith" (Written Argument of the Plaintiff, June 21, 2006, at para. 115).

24 It is the plaintiff's position that this is not the type of conspiracy claim that should attract a substantial indemnity costs award. The plaintiff concedes that it alleged bad faith, but submits, "this is a far cry from fraud" (Costs submissions of the plaintiff at para. 39). Lastly the plaintiff argues that the conspiracy allegation did not involve an attack on Magna's business ethics.

25 The plaintiff's position assumes that fraud must be alleged to justify a substantial indemnity costs award. No authority was identified to support this position.

26 Substantial indemnity costs are the exception, not the rule. The court has the discretion to order these costs but it should be exercised in special and rare cases. Unfounded allegations of fraud typically attract a substantial indemnity award. See *Foulis v. Robinson* (1978), 8 C.P.C. 198 (Ont. C.A.).

27 However substantial indemnity awards are not limited to cases alleging fraud. Unfounded allegations of improper conduct seriously prejudicial to the character or reputation of the party, can also justify a substantial indemnity award. The following cases support this point.

28 A recent statement of principles concerning substantial indemnity costs is found in *Hamilton v. Open Window Bakery Ltd.* (2003), [2004] 1 S.C.R. 303 (S.C.C.):

> [26] In *Young v. Young*, [1993] 4 S.C.R. 3, at p. 134, McLachlin J. (as she then was) for a majority of this Court held that solicitor-and-client costs "are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties". An unsuccessful attempt to prove fraud or dishonesty on a balance of probabilities does not lead inexorably to the conclusion that the unsuccessful party should be held liable for solicitor-and-client costs, since not all such attempts will be correctly considered to amount to "reprehensible, scandalous or outrageous conduct". However, allegations of fraud and dishonesty are serious and potentially very damaging to those accused of deception. When, as here, a party makes such allegations unsuccessfully at trial and with access to information sufficient to conclude that the other party was merely negligent and neither dishonest nor fraudulent (as Wilkins J. found), costs on a solicitor-and-client scale are appropriate: see, generally, M.M. Orkin, *The Law of Costs* (2nd ed. (loose-leaf), at para. 219. [Emphasis added.]

29 In *131843 Canada Inc. v. Double "R" (Toronto) Ltd.*, [1992] O.J. No. 3879 (Ont. Gen. Div.), the court stated:

> ¶ 10 Cases where allegations of fraud are made and found to be totally unfounded fall into this latter category [the type of case justifying costs on a solicitor and client basis]. So, too, do cases involving "other allegations of improper conduct seriously prejudicial to the character or reputation of a party," which are found in the result to be totally unfounded ... [Emphasis added.]

30 In *Unisys Canada Inc. v. York Three Associates Inc.*, [2000] O.J. No. 3622 (Ont. S.C.J.) at para. 36 aff'd [2001] O.J. No. 3777 (Ont. C.A.) the court noted that the word "fraud" need not appear in the pleading:

> [36] Where allegations of impropriety or illegality such as would seriously prejudice the character of a party are made and the conduct is not proven, and the more so when they are shown to have no evidentiary base, the word "fraud" need not appear in the pleading for it to attract a costs award on a solicitor and client scale... [Emphasis added.]

31 And recently in *Manning v. Epp*, [2006] O.J. No. 4239 (Ont. S.C.J.) the court echoed the same point at paragraph 7:

> [7] Costs on the higher scale [substantial indemnity] can be awarded as a form of chastisement and as a mark of the court's disapproval of a litigant's conduct. This is intended to punish as well as to deter others from engaging in similar conduct. Unproved allegations of fraud frequently attract awards on the higher scale. Unproved allegations of breach of trust, conspiracy, misrepresentation, breach of fiduciary duty, and the like, may also attract this kind of award ... [Emphasis added.]

> [8] Cost sanctions are imposed for these kinds of unproved allegations because they are rooted in assertions of dishonesty and deceit and go to the heart of a person's integrity ...

32 In summary the case law confirms that substantial indemnity costs are not limited to claims alleging fraud. Unfounded allegations of improper conduct are equally capable of attracting substantial indemnity costs, particularly when the allegations are seriously prejudicial to the character or reputation of the individual.

33 The claim of conspiracy against Frank Stronach involved dishonest conduct. It was alleged that he conspired with Heri Polzl to deprive the plaintiff of the benefits of the alleged agreement by facilitating the construction of the new Mytox plant by New Empire Construction, and that Frank Stronach agreed to "financially gain" from this conspiracy.

34 The allegation that Frank Stronach sought to personally profit from this conspiracy was pursued through to the end of the trial. This is an allegation of serious personal misconduct made against the Chairman of a public corporation.

35 The plaintiff argues that the defendants did not consider the allegations against Mr. Stronach to have substance and for this reason there is no need to penalize the losing party with substantial indemnity costs. The plaintiff points to the defendants' opening statement at trial which "demonstrates the expectation coming in on this issue that it would not be vigorously pursued". (Costs submissions of the Plaintiff at para. 35)

36 The defendants' opening statement did emphasize their position that this was really a dispute about whether a binding contract existed. However, this is not the benchmark against which a court should determine if substantial indemnity costs are warranted. Obviously defence counsel is going to do everything possible to minimize these allegations, including an opening that seeks to minimize the bad faith claim.

37 What guides my decision to allow substantial indemnity costs is the fact that the conspiracy allegation against Frank Stronach remained part of the public record throughout the litigation. It has hung over Mr. Stronach's head since 1999 when he was added to the action. As the court stated in *Mele v. Thorne Riddell*, [1997] O.J. No. 443 (Ont. Gen. Div.) at p.4: "As long as the allegation remains part of the public record, that harm continues."

38 The plaintiff further argues that "no objective reasonably informed party could expect substantial indemnity costs — win or lose" (Costs submissions of the Plaintiff at para. 56). This submission is not valid. The risk is obvious from the case law. Further the request for substantial indemnity costs should come as no surprise to the plaintiff. During this litigation, the court warned the plaintiff twice that the conspiracy claim might expose it to costs sanctions.

39 In 1997, the plaintiff brought a motion to amend the statement of claim to include a conspiracy claim. At this point the conspiracy allegation did not include Frank Stronach. Wilson J. cautioned the plaintiff (*1175777 Ontario Ltd. v. Magna International Inc.* [(October 29, 1997), Wilson J. (Ont. Gen. Div.)], a decision of the Ontario Court of Justice (General Division), unreported, released October 29, 1997):

> Counsel who choose to expand and complicate claims by joining unnecessary parties and advancing weak claims that do not ultimately succeed, expose their clients to serious cost consequences, often of a solicitor client scale. This case is primarily a case about whether there is a binding contract and what consequences flow if a contract is proved that has been breached. A pleading that adds layers of complication and that includes unnecessary parties may be a signal that beneath the smoke and mirrors of words is a weak or untenable case.

40 In 1999, the plaintiff moved to add Frank Stronach as a defendant alleging conspiracy to injure. Ultimately the Court of Appeal allowed the amendment and once again the plaintiff was cautioned about the risk of cost sanctions. At para. 27 the court stated (*1175777 Ontario Ltd. v. Magna International Inc.*, [2001] O.J. No. 1621 (Ont. C.A.)):

> It is more than a little astonishing that the motion to amend by adding Stronach as a party defendant to the claim for conspiracy to injure was originally made some fifteen months after he was originally identified as a co-conspirator.

> Nevertheless, I agree with the conclusion of the motions judge in October 1997 that the type of abuse asserted by Stronach is more properly policed with costs sanctions at later stages of a proceeding.

41 Despite these warnings, the plaintiff persisted with the conspiracy allegation against Frank Stronach.

42 The allegation that Frank Stronach, Chairman of the Board of Magna, would personally profit from the conspiracy is a serious ethical attack. It was a failed attack against Mr. Stronach's integrity. In my view substantial indemnity costs are warranted.

43 While the failed conspiracy allegation against Frank Stronach is reason alone to grant substantial indemnity costs, the defendants also rely on other factors to support the request for substantial indemnity costs. These factors deal with the conduct of the plaintiff that directly contributed to the amount of fees and disbursements incurred by the defendants. (See "Conduct of the Plaintiff" below).

44 I will now determine an amount for costs using the substantial indemnity scale and applying the guiding principles of fairness and reasonableness and the factors set out in rule 57.01.

Analysis

45 I begin with some obvious findings about certain rule 57.01 factors.

46 The plaintiff claimed a significant amount for damages. Against Magna the plaintiff claimed $35 million for breaching and/or inducing the breach of the agreement, $1 million for breach of copyright and $35 million for conspiracy to injure. Against Frank Stronach the plaintiff claimed $35 million for conspiracy to injure.

47 The litigation was important. Serious allegations were made that attacked the business ethics of the defendants. It would be vital for any corporation to ensure that such a claim is vigorously defended.

48 The defendants were successful. The entire action was dismissed.

This Was a Complex Action

49 While the liability part of the action was not particularly complicated, the damage claim was exceedingly complex. The complexity is not apparent from the judgment because I did not have to assess the damages.

50 During the trial the defendants prepared a decision tree that demonstrates the complexity of the damages. A copy is attached. The plaintiff agrees that the decision tree accurately sets out the issues but argues that "such an elaborate chart was not necessary." (Costs submissions of the Plaintiff at Para. 107).

51 On a scale of one to ten, with ten being the most complicated, this damage claim was a ten. The decision tree was a valuable tool that helped counsel and the court to focus on the intricate web of issues.

Conduct of the Plaintiff

52 The conduct of the plaintiff unnecessarily added to the expense and complexity of this litigation.

53 Despite claiming more than $35 million pursuant to a highly complex damage theory, the plaintiff started the trial without proper expert reports. The defendants submit that the plaintiff's approach was "unusual, if not downright bizarre." (Reply Costs Submissions of Magna/Stronach at para. 49)

54 The plaintiff introduced two documents to prove the damage claim. Employees of one of Mr. Tiberini's companies prepared the documents. One was a handwritten document that an engineer prepared. This document purported to provide the cost of constructing additions on the building for the defendants, had the deal gone ahead. The second was

a 17 page document prepared by an accountant. It is best described as a spreadsheet with numerous footnotes. Much of the spreadsheet was incomprehensible.

55 The spreadsheet purported to calculate the damages and offer evidence on capitalization rates, discount rates and the cost of construction. What the plaintiff expected to earn from the alleged agreement with the defendants was compared to what it did earn when it mitigated its loss by constructing a building that it rented to Pierce Leahy. However the Pierce Leahy building was different in many respects from the building that the parties had been negotiating, making the comparison exceedingly difficult.

56 When the trial started in February, the defendants successfully challenged the plaintiff's attempt to prove damages using the spreadsheet and handwritten document. Initially plaintiff's counsel took the untenable position that the authors of the documents would not be giving expert evidence. He abandoned this position during argument conceding the obvious; that the authors would be giving both fact and opinion evidence. The documents did not comply with rule 53.03. The plaintiff had no choice but to ask for an adjournment to serve proper expert reports.

57 A three month adjournment was required. During this time the plaintiff retained independent experts and served reports.

58 The failure to serve proper expert reports was not the only problem the plaintiff created. In its opening submission at trial, the plaintiff changed its position about what part of the 16.5 acre lot was to be leased as part of the alleged agreement.

59 Before the trial the plaintiff had two different theories about what part of the 16.5 acre parcel of land would be leased. When the trial started the plaintiff changed its position and argued that the entire lot was to be leased. I dealt with this in detail in my judgment at paragraphs 103-138, released on November 28, 2006. A brief overview in paragraphs 103-104 follows:

> [103] The Talman Court property that Mr. Tiberini purchased on August 15, 1996, covered an area of 16.5 acres and was described in the Transfer/Deed of Land as "Parcel 15-1, section 65M-2532, being Block 15, Plan 2532". At trial, it was Mr. Tiberini's position that the October letter covered the entire 16.5 acre parcel. There is no uncertainty about this position. However, the content of the October letter clearly demonstrates that only part of the 16.5 acre parcel was to be leased and it is not possible to define the part with certainty.
>
> [104] Before trial Mr. Tiberini had two theories about what land was to be leased and both contemplated only part of the 16.5 acre parcel being leased. The defendants say that the uncertainty about what part was to be leased is the very reason why Mr. Tiberini changed his position at trial, and argued that the lease was for the entire 16.5 acres.

60 The plaintiff never corrected its answers at discovery on this issue, as the Rules require. The defendants, when instructing their experts were entitled to rely on the plaintiff's position as stated. This last minute change meant that much of the defendants' work done to instruct and obtain expert reports on damages was wasted.

61 The defendants had to repeat trial and witness preparation and pay for supplemental expert reports to address the change in the plaintiff's position and respond to the expert reports that the plaintiff eventually served. A further discovery of Mr. Tiberini was also required. The trial did not resume until May 29, 2006.

Conduct of the Defence

62 The trial was surprisingly short. It took only 14 days to complete. Cases like this one typically last much longer. The defence was thoroughly planned and focused. As a result, trial time was shortened.

63 The parties agreed on a fairly lengthy Statement of Facts and Joint Book of Documents (four volumes). The defence assumed the responsibility for these tasks. This is apparent from the dockets and explained in the following passage:

> In order to prepare a draft of an Agreed Statement of Facts, one has to go through all of the documents produced and all of the discovery transcripts. The initial task of sorting through all of the information produced at the discovery stage fell on Miller Thomson. It prepared a draft Agreed Statement of Facts with a cross-index showing which productions or examinations for discovery extracts were relied upon in support of the proposed individual agreed facts. The draft, cross-indexed, Agreed Statement of Facts was professionally prepared (it was not overreaching) and allowed Mr. Moldaver to quickly agree to the vast bulk of the facts.
>
> (Reply Costs Submissions of Magna/Stronach at para.29)

64 Defence counsel demonstrated the quality of advocacy that counsel should strive to achieve. They were thoroughly prepared. Their examinations and cross-examinations had a purpose and rarely wandered into unnecessary questioning. At the end comprehensive written submissions were done incorporating relevant trial evidence. This shortened the final oral argument to one day.

Is Plaintiff's Counsel's Time a Measure of What Is Reasonable?

65 In determining a reasonable amount for fees, the fees incurred by the losing party are a relevant factor to consider. They can provide a measure of what is reasonable.

66 The losing party's fees in this case are significantly less than the fees of the defence. However, this does not necessarily mean that the defence fees are unreasonable. For the reasons I have set out below, the plaintiff's fees are not a good measure of what is reasonable.

67 To consider this factor, I requested the lawyers' dockets and invoices. Both counsel provided the dockets. Mr. Moldaver also gave me the invoices he and his predecessor sent to the plaintiff. (Expert disbursements were not included). Miller Thomson's invoices number approximately 100. Since they repeat the detailed computer docket entries, I saw no need to duplicate this information with the actual invoices.

68 The defendants' Costs Submission included a detailed analysis of the dockets with a chart listing the hours of each lawyer for the various activities on the file (pleadings, discovery of documents, discovery, pre-trials, trial preparation and the trial). I reviewed the dockets as needed and accepted the accuracy of this chart. It was not challenged by the plaintiff.

69 I did not have a similar breakdown of the plaintiff dockets and so my review required a detailed review of Mr. Moldaver's dockets and accounts.

70 There were numerous motions and appeals before trial and costs orders were made. This work is not included in the defendants' Bill of Costs. Miller Thomson billed their client $757,688 plus GST. With a deduction for the interlocutory motions and appeals covered by previous cost orders, the net fees are approximately $650,000 plus GST and disbursements.

71 Except for a short period of time in 1997, Mr. Moldaver and his firm represented the plaintiff. Deleting the time spent on motions and appeals, counsel billed the plaintiff $246,954.50 On a partial indemnity scale he calculates his fees at $163,000 net GST and disbursements. This excludes the fees for interlocutory motions and appeals.

72 I do not propose to compare the fees and time for every stage of the litigation, but a comparison of some key stages in the litigation is useful.

Discovery time

73 There were seven days of discovery: three to examine the plaintiff and four to examine the defendants. Defence counsel docketed 234.53 hours for preparation and attendance at the discoveries (29.3 eight hour days).

74 Allowing for seven discovery days, this means that there were 22.3 days of preparation (or 3.2 eight hour days to prepare for each day of discovery). Mr. Chapman incurred about 88% of this time.

75 By comparison, plaintiff's counsel docketed 83.20 hours (or 10.4 eight hour days) to prepare for and attend all discoveries. Allowing an eight hour day for each of the seven days of discovery, leaves only 3.4 additional days for preparation. I recognize that some preparation work likely occurred on each discovery day but even so, the plaintiff's preparation time is far less than what I consider to be the norm in this type of case.

Trial preparation time

76 The trial was initially set for March 2005, but adjourned in late February because a judge was not available. It was put over to February 20, 2006 when it did go ahead.

77 The defence docketed 810.66 hours for trial preparation. In comparison, Mr. Moldaver docketed 238.6 hours for trial preparation.

78 In addition to the usual trial preparation activities, the defence dockets include work that was instrumental in streamlining the trial and minimizing trial time. It was the defence that invested the time to prepare the Joint Document Books, a Chronology of Pleadings, Damage Claims and Amendments and An Agreed Statement of Facts. Mr. Moldaver approved them all. This involved a comprehensive review of all productions and discovery transcripts.

79 As well the defence time included preparation of their Written Submissions of Fact and Law. This well organized document was the main reason why final oral argument was limited to one day. These hours include preparation before and during the trial and represent 101.33 eight hour days. (56% of the time is Mr. Chapman's and the rest is associate time).

80 In the year before the trial, Mr. Moldaver's time is surprisingly low. From February 8, 2005 through to December 22, 2005 he docketed 8 hours. This covered miscellaneous tasks that I will characterize as trial preparation.

81 From January 7, 2006 through to February 19, 2006, Mr. Moldaver docketed 68.70 hours or 8.6 days eight hours days. This included 5.7 hours to review the draft Books of Documents and Chronology of Pleadings that was used during the trial. It was defence counsel that incurred the time to prepare these drafts.

82 In summary, Mr. Moldaver docketed 76.7 hours (9.6 days) for trial preparation in the year before the trial started on February 20, 2006. Given the amount at stake and the complicated damage claim I find this to be exceedingly low.

83 The trial was adjourned on February 21, 2006 so the plaintiff could obtain expert reports. I would expect the post-adjournment dockets to cover work to locate suitable experts, instruct them on the retainer, provide experts with relevant documents, explain the damage issues in the case, discuss and review their reports and meet with the experts to prepare for trial. In addition, Mr. Tiberini was examined again for discovery and the statement of claim was amended. Despite all these post adjournment tasks Mr. Moldaver only docketed 16.8 hours from February 21, 2006 to May 17 2006 (or 2.1 days).

84 In the three days before the trial resumed on May 29 2006, Mr. Moldaver docketed 20 hours for "trial preparation".

85 After the trial resumed on May 29, 2006, 125.1 hours were docketed for trial preparation activities. On trial days when a block amount of time was recorded, I allowed six hours for the trial and the rest for preparation.

86 On its face there is a significant difference in the amount of trial preparation time each side docketed. Mr. Moldaver's 238.6 hours is far less than the 810.66 hours of defence trial preparation time. However the difference is not that stark when the following points are taken into consideration:

• The defence assumed the labour intensive tasks of preparing the Joint Book of Documents, Chronology and Agreed Statement of Facts,

• The defence time covers trial preparation work for the first trial date. If I compare the 2006 time the difference is less. The defence has 592.57 hours as compared to 238.6 of plaintiff time, and,

• Mr. Moldaver's time is less than what I would expect to see in this type of case.

Trial time

87 The defence docketed 139.5 hours to attend trial (69.3 hours for Mr. Chapman and 70.2 for his junior.)

88 Mr. Moldaver docketed 68.6 hours for trial time. He has no time docketed for two trial days: February 22 and June 8, 2006.

89 The comparison of the trial time demonstrates that the only issue is the reasonableness of a second lawyer attending trial.

Can the Costs in This Case Be Compared to Others?

90 In *Andersen* at paragraphs 49 and 50, the court stated:

> ¶ ....As part of the exercise of discretion, the judge must decide whether the case at bar can usefully be compared with other cases and this requires a judgment with respect to the degree of similarity with other cases. It would also impair the ability of the judge to do procedural and substantive justice between the parties in determining a fair and reasonable amount in the particular circumstances of the case. The result would be consistent, but artificial and arbitrary.
>
> ¶ 50 We of course accept and are bound by the principle articulated by Morden A.C.J.O. in *Murano* to which we have earlier referred that "like cases should conclude with like substantive results". We also agree that it is a desirable objective to have some measure of consistency in awards of costs on similar motions, but this presupposes that like cases can be found.

91 However, the court must be careful when drawing comparisons. "Without an intimate understanding of the course of proceedings in other cases, it is difficult to attempt to make comparisons that will provide firm guidance in determining an appropriate level of costs" (*Andersen* at para. 42).

92 The defendants provided a chart listing recent cost awards in other cases. This chart provides a sufficient level of detail about the cases to allow a comparison to be made to the defendants' fees. The comparison however is but one factor to consider.

93 The defendants rely on this chart to support their position that their costs are consistent with other awards in similar cases of complexity and length. For example, see *Canadian National Railway v. Royal & SunAlliance Insurance Co. of Canada*, [2005] O.J. No. 3931 (Ont. S.C.J.); *Resch v. Canadian Tire Corp.*, [2006] O.J. No. 2906 (Ont. S.C.J.) and *Hanis v. University of Western Ontario*, [2006] O.J. No. 2763 (Ont. S.C.J.).

94 In cases involving less complex issues, shorter trials (6 to 11 days) and substantially less claimed, fees in the range of $100,000 to $200,000 have been allowed. For example, see *Buchanan v. Geotel Communications Corp.*, [2002] O.J. No. 3063 (Ont. S.C.J.); *3664902 Canada Inc. v. Hudson's Bay Co.*, [2002] O.J. No. 2096 (Ont. S.C.J.); *Harding v. First Associates Investments Inc.*, [2003] O.J. No. 4652 (Ont. S.C.J.); *Celanese Canada Inc. v. Canadian National Railway*, [2005] O.J. No. 1122 (Ont. C.A.); *MacDonald v. Sun Life Assurance Co. of Canada*, [2005] O.J. No. 4468 (Ont. S.C.J.).

95 The plaintiff proposes that I allow fees of $121,500, but this level of fees is more consistent with less complex shorter trials, where less is at stake. To reduce the fees to this level would not respect the principle that "like cases should conclude with like substantive results".

96 Consistency is a "desirable objective" that would not be satisfied by reducing the fees to $121,500.

Should a Second Counsel Fee Be Allowed?

97 The plaintiff submits that it was not necessary for Mr. Stephens to attend the trial each day. He makes this submission because in his view Mr. Stephens had a relatively minor role at trial and daily transcripts were available. For these reasons, Mr. Stephens's time should either be eliminated or adjusted down to no more than clerk time.

98 A second counsel fee can be allowed when the nature of the case warrants it. The reasonableness of a second counsel fee was recognized in *Celanese Canada Inc. v. Canadian National Railway*, [2005] O.J. No. 1122 (Ont. C.A.). This case was decided when the old cost grid was in effect. The court did not allow the second counsel fee at the hourly rate. Instead, the daily and weekly block fees were found to include any allowable second counsel fee.

99 Although *Celanese* declined to recognize a separate counsel fee beyond the block fee, the fairness of this approach was questioned at paragraph 52:

> ....However, I would add that given that historically a fee for a second counsel is awarded in an appropriate case and, in many cases, is abundantly deserved, <u>the omission from the costs grid of a discrete fee for a second counsel at trial, as well as on appeal, likely reflects an oversight on the part of the Civil Rules Committee that should be corrected.</u> [Emphasis added.]

100 In a footnote to paragraph 52, the court added that while the "block fee ... may be adequate for one counsel, it is usually inadequate for two counsel."

101 The plaintiff recognizes that block fees no longer exist, but argues that the "principle is still informative and sensible." (Costs submissions of the Plaintiff at para. 74)

102 I was not directed to any cases to support the principle that the block fee approach should continue in some way to limit a second counsel fee. In my view, this limitation no longer exists. Instead all counsel fees are subject to review having regard to the rule 57.01 factors and the overriding reasonable and fairness test.

103 Given the complexity of the damage claim and the seriousness of the issue to the parties, Mr. Stephens' participation in the trial was entirely appropriate. Mr. Stephens assumed the traditional role of junior counsel. He examined two expert witnesses, dealt with some of the procedural issues that arose and assisted in preparing the document briefs and final submissions. In *Celanese* where far less was at stake, use of a junior counsel was found to be reasonable. There is no reason to criticize the use of a second counsel in this case.

The Hourly Rates

104 The guideline from the Rules Committee sets out the following rates:

> Law Clerks Maximum of $80 per hour
>
> Student at- law Maximum of $60 per hour
>
> Lawyer (less than 10 years) Maximum of $225 per hour
>
> Lawyer (10 or more but less than 20) Maximum of $300 per hour

Lawyer (20 years or over) Maximum of $350 per hour

105 Mr. Chapman was called to the Bar in 1983. At the time of the trial he was a 23 year lawyer and charged his client $650 per hour. The plaintiff concedes that he has considerable experience in real estate, landlord and tenant matters and commercial litigation in general. As I have indicated the defence team demonstrated a high level of advocacy and achieved a superb result. It was obvious to me that Mr. Chapman has considerable experience.

106 For the last three years of work on the file, Mr. Chapman was in the over 20 year category. His hourly billing rate during the life of the litigation ran from a low of $330 to a high of $650. For ease of calculation, the Bill of Costs uses $300 per hour for the pleadings and discovery stage and $350 for all subsequent work. These are the maximum rates in the guideline.

107 The plaintiff proposes lower rates for Mr. Chapman: $250 and $275 for the two time frames.

108 Mr. Stephens was called to the bar in 2002 and was a three year lawyer at the time of the trial. The Bill of Costs uses a rate of $175, $50 less than the maximum. The plaintiff proposes a rate of $125 for Mr. Stephens and all other junior counsel who worked on the file.

109 The lower rates that the plaintiff proposes, result in a fee reduction of $59,000 according to the plaintiff's submission. I acknowledge that this is not the end of the fee reductions that the plaintiff requests. After the test of reasonableness is applied the plaintiff submits that $121,500 should be allowed for all fees. I will consider the principle of fairness and reasonableness later.

110 There are three reasons to make a rate adjustment:

1. Only the damage side of the claim was complicated. The liability issues were of average complexity.

2. I acknowledge that Mr. Chapman brought a high level of skill to this file and achieved an excellent result for the defendants. Nevertheless he just entered the 20 years plus category in 2003. Further because the $300 rate is applied to all work done before the pre-trial stage, it covers Mr. Chapman's work done through 14 to 19 years of experience.

3. There are tasks that a law clerk can do more economically than a junior lawyer, such as document management related work. No law clerks worked on the file for the defence. Instead associates with a partial indemnity rate of $175 assisted Mr. Chapman.

111 The first two reasons justify reducing Mr. Chapman's rate to $250 (pleadings, discovery of documents and discoveries) and $300 (pre-trials and trial). The $175 rate for the associates is $50 less than the maximum. This is a fair partial indemnity rate for the associates.

112 I do not propose to go through the voluminous dockets and identify the specific tasks that ought to have been assigned to a law clerk at a lower rate. It is reasonable to expect that the defendants would use law clerks. In a case of this nature an experienced law clerk would be preferred and so a rate of $80 would be anticipated. My best estimate is that use of a law clerk would have reduced the partial indemnity fees by about $10,000. This assumes the law clerk would have worked on the file throughout the litigation. I appreciate that this is somewhat arbitrary, but it is a fair reflection of the savings.

113 I make the following adjustments: a flat $10,000 reduction and Mr. Chapman's rates are reduced to $250 and $300 as noted above. The associate rate remains at $175. These rate adjustments are made to the chart of partial indemnity fees in the Costs Submissions of the Defendants at pages 6-9. The partial indemnity and substantial indemnity fees are therefore reduced as follows:

Pleadings (including amendments):	$10,150.00
Discovery of Documents:	$6,025.00
Discoveries (preparation and undertakings):	$56,521.25
Pre-trials:	$4,202.50
Trial preparation:	$198,623.00
Trial (14 days):	$33,075.00
Bill of Costs and submissions	$3,575.00
Sub Total:	$312,171.75 plus GST
Less	$ 10,000.00 (allowing for a law clerk)
Total:	302,171.75 plus GST
Substantial indemnity:	1.5 × $302,171.75 = $453,257.62 plus GST

The Expert Fees

114 The defendants incurred expert fees of $284,968 (GST included). Of this amount $157,391.28 was incurred before the February adjournment and $127,576.72 was incurred after.

115 The plaintiff proposes that $87,000 plus GST be allowed. The basis for this reduction is as follows:

• The defendants' expert expense was not reasonable or necessary.

• The second set of defence expert reports, commissioned after the trial was adjourned in February, was unnecessary.

• The experts simply spent too much time and the rates are too high.

• No objective plaintiff would expect the defendants to spend this much in expert fees when the defendants had made it clear that the plaintiff had not delivered admissible expert reports and that the case "was a loser on both liability and damages." (Costs Submissions of the Plaintiff at para. 166)

116 I reject the basis for the plaintiff's proposed reduction in the expert fees. My reasons follow.

117 Expert reports were reasonable and necessary in this case. The parties required different experts to deal with construction costs, real estate values and quantification of the damages. A review of these reports confirms that this was far from the usual economic loss calculation. The expert reports were lengthy and provided opinions for various effective dates and scenarios. As well, the plaintiff's damage position was a moving target that the defendants had to manage.

118 The plaintiff says that the defence was "'over-experted' to the extreme" (Costs Submissions of the Plaintiff at para. 171). I do not agree. There are cases when experts are relied upon too heavily, but this was a case where experts were clearly needed to assist the court.

119 The plaintiff tries to minimize the impact of its decision not to serve proper expert reports. It argues that "[t]he plaintiff had the right to come to trial without outside expert reports" (Costs Submissions of the Plaintiff at para. 150) and that it was simply a case of their reports not being in "proper format". I reject this submission. The problem was not formatting. The spreadsheet and handwritten note utterly failed to qualify as expert reports under the rules.

120 The plaintiff goes so far as to suggest that expert reports in this highly complex damage claim were not necessary. "Out of an abundance of caution" the plaintiff says they chose to retain outside experts after the trial was adjourned. This submission completely ignores the substance of the ruling I made on February 22, 2006. While I ruled that there is no absolute rule precluding an employee with expertise from giving opinion evidence, a party who chooses this route must still comply with rules 31.04(3) and 53.03 and runs the risk that minimal or no weight will attach to an employee's opinion.

121 The plaintiff's blatant disregard for the rules that apply to expert reports caused the adjournment and necessitated a second set of reports to be prepared for the defence.

122 The defendants' first set of expert reports were based on the plaintiff's position before trial that that alleged lease was only for part of the land. This led to complicated apportionment issues concerning how to quantify the benefit of the Pierce Leahy lease that covered the full parcel of land. The plaintiff compounded the problem when it changed its position on how much land was to be leased under the alleged agreement.

123 The plaintiff criticizes some of the hourly rates charged in the defence expert bills and the amount of time incurred. An arbitrary reduction is submitted: $87,000 for all defence expert fees.

124 There is no evidence to demonstrate that the defence expert rates are excessive compared to other experts in the same field. The plaintiff has not disclosed what it paid to its experts, nor was there any information to gauge how much internal time it took the plaintiff to prepare the initial spreadsheet and handwritten note.

125 There is no criticism about the quality of the work of the defence experts work or their qualifications to give expert opinion testimony. The defendants' experts were highly qualified in their fields.

126 Qualified damage experts like Mr. Steger charge rates similar to senior counsel. Mr. Steger's top rate was $500. In my view, this is reasonable. The plaintiff has not volunteered the rate charged by Mr. Low, its lead expert, but I fully anticipate that it is also in the range of $500.

127 The defendants' appraiser Mr. Atlin charged $275 and the construction expert charged $215. I see nothing unreasonable about these rates charged by qualified experts.

128 While I concede that the cost of the defence expert reports is on the high side, this must be balanced against the complexity of the damage issues and the plaintiff's actions that justify the expert fees in this case.

129 Lastly the plaintiff argues that there was no objective expectation that the defence would spend this amount of money on expert reports because "the other side had made it clear that the Plaintiff had failed to deliver any admissible reports and that case was a loser on both liability and damages". (Costs Submissions of the Plaintiff at para. 166)

130 What did the plaintiff expect: that the defence was not going to hire any experts or spend less on expert reports? In my view, neither expectation accords with the reality of litigation. A defence may be very confident of its position but rarely does this mean that the defence can sit back and forgo retaining experts or alternatively instruct the experts to put less effort into the job.

131 After the plaintiff's formal expert reports were delivered it became apparent to the defence that the plaintiff's position on damages was based on a theory that did not comply with the law as stated in *Hamilton v. Open Window Bakery Ltd.* (2003), [2004] 1 S.C.R. 303 (S.C.C.). In essence, the Plaintiff's experts (whether internal or external) followed an incorrect legal theory for damages.

132 What is a defendant to do when faced with an expert damage claim that has at its heart a fatal legal or logical flaw? The Court can assess damages based on all the evidence. It can do the best it can with the available evidence. In a case where the Plaintiff's expert evidence is of no value, there is still a risk that the Court will assess damages attempting to do the best it can. Faced with this reality, the defendants put forward expert reports to assist the Court.

133 In summary, the experts report fees are justified. The plaintiff's conduct necessitated the second set of reports. I allow the expert fees as requested.

Non Expert Disbursements

134 The non-expert disbursements total $27,641.37. The plaintiff disputes two items: the $10,968.10 photocopying charge and $8,261.20 paid for daily transcripts.

135 It is submitted that previous cost orders from motions and appeals cover part of the photocopying expense. The defence agrees to reduce the photocopying expense to $5,000 which is a fair compromise.

136 The cost of trial transcripts is also disputed. While the plaintiff recognizes that daily transcripts are an option that may be available in a trial, the plaintiff submits that this was an unnecessary expense and suggests a reduction to $4,000.

137 It is not unusual in a trial of this nature for the parties to order daily transcripts. Both sides utilized the trial transcripts and used them to quote evidence in final argument. I decline to reduce this item.

The Final Step Back Analysis

138 Finally, the court must step back and decide if the costs are fair and reasonable. The overriding principle of reasonableness must govern, rather than any exact calculation of what costs should be allowed. A line by line assessment of the fees is not required.

139 With the rate adjustments I have made the substantial indemnity fees total $453,257.62 plus GST.

140 Having balanced the rule 57.01 factors, I conclude that an award of fees on a substantial indemnity scale at $453,257.62 plus GST satisfies the principle of reasonableness and fairness. No further reduction is necessary.

141 Photocopying is reduced to $5,000. This reduces the non-expert disbursements to $21,673.27. All other disbursements are allowed without reduction. The total allowed for all disbursements is $292,284.54 plus GST.

Conclusion

142 The plaintiff will pay the defendants substantial indemnity fees of $453,257.62 plus GST and disbursements of $292,284.54 plus GST.

143 The costs are to be paid in 90 days.

Order accordingly.

Tab 17

2010 ONSC 2661
Ontario Superior Court of Justice

MacKinnon v. MacKinnon

2010 CarswellOnt 2984, 2010 ONSC 2661, [2010] O.J. No. 1952, 188 A.C.W.S. (3d) 645, 56 E.T.R. (3d) 29

Robert James MacKinnon (Plaintiff / Applicant) and Stuart Alexander MacKinnon (Defendant / Respondent)

L.A. Pattillo J.

Heard: April 30, 2010
Judgment: May 10, 2010
Docket: 03-043/07

Counsel: Ian M. Hull for Plaintiff / Applicant
Allan Rouben for Defendant / Respondent

Subject: Civil Practice and Procedure; Estates and Trusts

Headnote

Civil practice and procedure --- Costs — Effect of success of proceedings — Upon discontinuance

Plaintiff and defendant were brothers and only children of parents — After mother died in 2001, defendant acted as father's power of attorney for property and looked after his affairs until his death in 2006 — In accordance with father's will, plaintiff and defendant shared residue of his estate equally, which amounted to $6,680.64 after payment of all debts — Plaintiff became suspicious that defendant had improperly dissipated father's assets during time he acted as his attorney for property — After exchange of correspondence and documents between parties' solicitors, plaintiff issued statement of claim alleging that defendant misappropriated funds, committed breach of trust and breach of fiduciary duty — Plaintiff sought accounting and claimed damages — Defendant was ordered to provide informal accounting in respect of his administration of father's assets from 2001 to 2006 — Defendant provided month by month breakdown for relevant years listing receipts and disbursements to and from joint account on behalf of father, as well as copies of joint bank account statements and few cheques drawn on account — Plaintiff served notice of discontinuance of his action — Parties made submissions on costs — Plaintiff ordered to pay defendant's costs on substantial indemnity basis — Plaintiff failed to establish that there were exceptional circumstances which required commencement of action such that he would be entitled to his costs against defendant — Plaintiff also failed to establish that he was justified in commencing action to entitle him to be relieved from payment of costs of action — While defendant had duty to account to plaintiff in respect of his administration of father's affairs, size of estate did not justify formal accounting — There was no evidence that plaintiff took any steps to determine whether information provided by defendant was incorrect prior to commencing action — There was no evidence that established that plaintiff obtained any additional information from informal accounting beyond that which he had already received prior to commencement of action — It was not established that plaintiff's action was justified.

Civil practice and procedure --- Costs — Particular orders as to costs — Costs on solicitor and client basis — Grounds for awarding — Unfounded allegations

Plaintiff and defendant were brothers and only children of parents — After mother died in 2001, defendant acted as father's power of attorney for property and looked after his affairs until his death in 2006 — In accordance with father's will, plaintiff and defendant shared residue of his estate equally, which amounted to $6,680.64 after payment of all debts — Plaintiff became suspicious that defendant had improperly dissipated father's assets during time he acted as his attorney for property — After exchange of correspondence and documents between parties' solicitors, plaintiff issued statement of claim alleging that defendant misappropriated funds, committed breach of trust and breach of fiduciary duty — Plaintiff sought accounting and claimed damages — Defendant was ordered to provide informal accounting in respect of his administration of father's assets from 2001 to 2006 — Defendant provided month by month breakdown for relevant years listing receipts and disbursements to and from joint account on behalf of father, as well as copies of joint bank account statements and few cheques drawn on account — Plaintiff served notice of discontinuance of his action — Parties made submissions on costs — Plaintiff ordered to pay defendant's costs on substantial indemnity basis — Plaintiff's allegations impugned both character and integrity of defendant — Impropriety of allegations was compounded by fact that plaintiff had no personal knowledge of circumstances and prior to commencement of action had been provided with substantial evidence from third parties to contrary — Unfounded allegations of dishonesty which go to heart of person's integrity will give rise to award of substantial or full indemnity costs — Plaintiff knew allegations of impropriety were unfounded prior to commencing his action.

Estates and trusts --- Estates — Will challenges — Testamentary capacity — Costs

Table of Authorities

Cases considered by *L.A. Pattillo J.*:

Fair v. Campbell Estate (2002), 2002 CarswellOnt 5482, 3 E.T.R. (3d) 67 (Ont. S.C.J.) — referred to

Gianopoulos v. Olga Management Ltd. (2004), 2004 CarswellOnt 4328, 2 C.P.C. (6th) 362 (Ont. S.C.J.) — referred to

Golda Developments Inc. v. Dawe (2008), 2008 CarswellOnt 3120, 64 C.P.C. (6th) 128 (Ont. S.C.J.) — followed

McDougald Estate v. Gooderham (2005), 17 E.T.R. (3d) 36, 2005 CarswellOnt 2407, (sub nom. *McDougald Estate, Re*) 199 O.A.C. 203, 255 D.L.R. (4th) 435 (Ont. C.A.) — considered

Mele v. Thorne Riddell (1997), 32 O.R. (3d) 674, 1997 CarswellOnt 206, 26 O.T.C. 119 (Ont. Gen. Div.) — followed

Murano v. Bank of Montreal (1995), 41 C.P.C. (3d) 143, 1995 CarswellOnt 1008 (Ont. Gen. Div. [Commercial List]) — referred to

Provincial Crane Inc. v. AMCA International Ltd. (1990), 1990 CarswellOnt 369, 44 C.P.C. (2d) 46 (Ont. H.C.) — referred to

Statutes considered:

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 131 — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Generally — referred to

R. 23.05 — considered

R. 57 — referred to

R. 57.01(2) — considered

RULING on costs in discontinued estate action.

***L.A. Pattillo J.*:**

1 On March 17, 2010, the plaintiff served a Notice of Discontinuance of his action. He now seeks his costs of the action on a full indemnity basis in the amount of $31,114.11 against either the Estate of Murdoch MacKinnon or the defendant personally. The defendant, in turn, seeks costs from the plaintiff on a substantial indemnity basis in the amount of $31,243.52.

2 The plaintiff and defendant are brothers and the only children of Murdoch and Jane MacKinnon. Mrs. MacKinnon died in May 2001. In September 2001, Mr. McKinnon moved into the Veterans Wing at Sunnybrook Hospital where he resided until his death on June 9, 2006. The plaintiff had been estranged from the family for many years.

3 After Mrs. MacKinnon's death, the defendant acted as Mr. MacKinnon's power of attorney for property and looked after his affairs until his death pursuant to a continuing power of attorney for property. On July 31, 2001, Mr. MacKinnon changed his bank account to a joint account with the defendant. The defendant looked after the sale of Mr.

MacKinnon's house in August 2002 and took care of all his monthly living expenses while he resided at Sunnybrook. All receipts and disbursements were made through the joint account.

4 In accordance with Mr. MacKinnon's will, the plaintiff and the defendant shared the residue of his estate equally. After payment of all debts, the residue amounted to $6,680.64. Given the proceeds from the sale of the house and Mr. MacKinnon's modest living expenses while at Sunnybrook, the plaintiff became suspicious that the defendant had improperly dissipated Mr. MacKinnon's assets during the time he acted as his attorney for property.

5 In September, 2006 the plaintiff requested, through a solicitor, an accounting of the defendant's actions on behalf of his father during the period he acted under the power of attorney. In October 2006, the defendant, through his solicitor, provided a summary of income and disbursements for the years 2001 to 2005 and from January 2006 to September 30, 2006. The summary provided an opening balance, total income received, expenses paid and a closing balance for each year. The summary showed significant cash gifts to the defendant and others which the covering letter explained were gifts to the defendant and sisters, nieces and nephews "in accordance with Mr. MacKinnon's express wishes".

6 On December 21, 2006, the solicitor for the plaintiff wrote to the defendant's solicitor and indicated that he had reviewed the unofficial accounting supplied by the defendant. The solicitor noted the significant disbursements to the defendant and took the position that the gifts were improper because Mr. MacKinnon's mental capacity "quickly declined after moving to Sunnybrook Hospital." The solicitor demanded that the monies be paid back to the estate and if the defendant refused then the plaintiff would proceed to court "for a tracing order and to have his assets frozen". The solicitor sought confirmation that the defendant would bring an application within 30 days to pass the accounts for the period before and after his father's death. On December 22, 2006, the defendant's solicitor replied, stating there was no factual foundation for the allegations. The solicitor cautioned against making unfounded accusations of impropriety and noted that in the event such accusations were to be advanced in court, full indemnity costs would be sought against the plaintiff.

7 In response to the plaintiff's allegations, the defendant obtained and provided to him in the period of March/April, 2007, the following additional information: a letter from the bank manager at the bank where the joint account was opened indicating that the account had been changed by Mr. MacKinnon on July 31, 2001 to be a joint account with the defendant; a letter from Mr. MacKinnon's primary care nurse for most of the period he was at Sunnybrook indicating that Mr. MacKinnon was alert and mentally competent up to the time of his death; a number of letters from close friends, former neighbours and relatives who visited Mr. MacKinnon while he resided at Sunnybrook which speak of Mr. MacKinnon's mental acuity while at Sunnybrook, his pride and devotion to the defendant and his estrangement from the plaintiff; and copies of hospital records from Sunnybrook concerning Mr. MacKinnon's care. Some of the letters refer to the plaintiff having received substantial sums of money from his mother when she was alive which "loans" Mr. MacKinnon did not approve of and considered to be the extent of the plaintiff's entitlement to the family money.

8 Following receipt of the documentation, the plaintiff's solicitor wrote to the defendant's solicitor requiring that the defendant provide copy of accounts "in the proper court format within 30 days of the date of this letter". In the absence of complying, the letter indicated that the solicitor had instructions to bring an application compelling the defendant to do so and seeking costs against him accordingly. The defendant's solicitor responded that he was awaiting delivery of the bank statements from the joint account.

9 In the absence of receiving a formal accounting, on June 8, 2007, the plaintiff commenced an application to compel the defendant to pass his accounts as attorney and estate trustee and to account with respect to the assets held jointly with Mr. MacKinnon. The application was returnable September 17, 2007.

10 On September 5, 2007 the plaintiff issued a statement of claim consolidating with the action the claim for an accounting. The claim alleged that the defendant misappropriated funds, committed breach of trust and breach of fiduciary duty. The plaintiff alleged the defendant took advantage of Mr. MacKinnon by removing funds from the joint account while he was incapacitated. In addition to the accounting, the plaintiff claimed, among other things, damages

from the defendant in respect of misappropriations from the deceased during his lifetime and the estate upon his death in an amount to be determined; damages for breach of trust; damages for breach of fiduciary duty from the defendant in respect of his administration of the assets of the deceased while he was alive, acting personally and as attorney for property, in an amount to be determined; punitive damages in respect of the defendant's administration of the assets of the deceased while living, specifically for diverting assets from the deceased to himself; and such tracing orders as may be requested by the plaintiff and awarded by the court.

11 On September 17, 2007, the plaintiff's application came before Conway J. and resulted in an Order Giving Directions which provided, among other things, that within 45 days the defendant was to provide the plaintiff with an "informal accounting" with all vouchers produced that were in the defendant's possession or control in respect of his administration of the assets of Mr. MacKinnon from July 1, 2001 to June 9, 2006.

12 Subsequently, the defendant provided to the plaintiff a month by month breakdown for the years in question listing the receipts and disbursements to and from the joint account on behalf of Mr. MacKinnon, as well as copies of the joint bank account statements and a few cheques drawn on the account.

13 In support of his motion for costs, the plaintiff filed the affidavit of an associate in the plaintiff solicitor's office. The affidavit indicates that after delivery of the accounting and close of pleadings, the parties engaged in further discussions but no settlement was reached. Paragraph 25 of the affidavit states:

> 25. After receipt and review of the accounting provided, and in light of all the circumstances, Robert was sufficiently satisfied that any gifts were in accordance with the Deceased's wishes and ceased further steps on this proceeding very shortly thereafter. This information was not produced until after the proceedings and the Order compelling production was attained.

14 In support of his request for costs, the plaintiff submits that notwithstanding he discontinued his action, he is entitled to his costs, either from the Estate of Murdoch Mackinnon or the defendant personally, given he had a *bona fide* cause of action which was not frivolous or vexatious. The plaintiff submits there was some justification for him commencing the claim and seeking an accounting given the suspicious circumstances arising from the initial summary of receipts and disbursements provided by the defendant which showed substantial sums of money distributed to the defendant during the period he acted as their father's power of attorney.

15 The defendant submits pursuant to Rule 23.05 of the *Rules of Civil Procedure* which provides, in part, that where a plaintiff discontinues an action the defendant is entitled to the costs of the action, he is entitled to his costs of the action. The defendant submits that he provided more than sufficient information to the plaintiff concerning his father's mental capacity and the administration of his affairs prior to the commencement of the action that the plaintiff had no justification for commencing it. Finally, having regard to the allegations made by the plaintiff in the action of serious impropriety on his part which were totally unfounded, the costs of the action should be ordered against the plaintiff on a substantial indemnity basis.

16 Costs in estate litigation (which encompasses the plaintiff's action) are, except in certain limited exceptions, governed by the general cost rules for litigation as established by s. 131 of the *Courts of Justice Act* and Rule 57. The exceptions, which permit costs to be awarded from the estate, arise in circumstances where the litigation arose as a result of the actions of the testator or those with an interest in the residue of the estate or where the litigation was reasonably necessary to ensure the proper administration of the estate: *McDougald Estate v. Gooderham* (2005), 255 D.L.R. (4th) 435 (Ont. C.A.) at paragraphs 77 and 78.

17 Given the circumstances of this action, I do not consider that any of the limited exceptions outlined in *McDougald Estate*, supra, apply to justify an award costs out of the Estate. Accordingly, the general cost rules apply in the awarding of costs in the action.

18 Rule 23.05 gives the defendant a *prima facie* entitlement to costs upon the discontinuance of the action. The words "unless the court orders otherwise" at the conclusion of the Rule retain in the court discretion to order otherwise. In order for the court to exercise its discretion to relieve the plaintiff from having to pay the defendant's costs, the plaintiff must satisfy the court that he had a *bona fide* cause of action that is not frivolous or vexatious which the plaintiff had some justification to commence having regard to the conduct of the defendant: *Provincial Crane Inc. v. AMCA International Ltd.* (1990), 44 C.P.C. (2d) 46 (Ont. H.C.) at p. 48; *Gianopoulos v. Olga Management Ltd.* (2004), 2 C.P.C. (6th) 362 (Ont. S.C.J.); *Golda Developments Inc. v. Dawe* (2008), 64 C.P.C. (6th) 128 (Ont. S.C.J.).

19 The defendant relies on the decision of Dambrot J. in *Mele v. Thorne Riddell* (1997), 32 O.R. (3d) 674 (Ont. Gen. Div.) where the learned judge held that in order to be relieved from having to pay costs under Rule 23.05, a plaintiff must establish exceptional circumstances. In my view, the test of "justified action" as noted above is more in keeping with the general discretion granted to the courts in respect of costs under s. 131 of the *Courts of Justice Act* and Rule 57 and in that regard I adopt the reasoning of Boswell J. in *Golda Developments*, *supra*.

20 Notwithstanding that the general rule in litigation is that costs follow the cause, Rule 57.01(2) provides that that court may award costs against the successful party "in a proper case". When considering costs under Rule 23.05, given the rational for the Rule and the *prima facie* entitlement of the defendant, it is my view that a court should only award costs against a defendant in circumstances where the plaintiff has discontinued the action where the plaintiff has established exceptional circumstances.

21 Turning to the present case, it is my view that the plaintiff has failed to establish on the material provided that there were exceptional circumstances which required the commencement of the action such that he would be entitled to his costs against the defendant. Further, it is also my view that the plaintiff has failed to establish he was justified in the commencing the action to entitle him to be relieved from the payment of costs of the action.

22 There is no issue that the defendant, as Mr. MacKinnon's attorney for property and subsequently his estate trustee, has a duty to account to the plaintiff in respect of his administration of Mr. MacKinnon's affairs. The plaintiff is a beneficiary of the estate. The defendant did not refuse to account to the plaintiff. He provided an accounting to him upon his request. When that accounting gave rise to questions concerning distributions to the defendant, the plaintiff was further entitled, in my view, to raise questions concerning of the propriety of those distributions. In response to such questions, the defendant provided further information in the form of letters and medical records from third parties establishing the joint bank account was created on the instructions of Mr. MacKinnon, that up until his death Mr. MacKinnon was mentally alert and capable and that his wishes were to distribute his money to the defendant and other relatives and not the plaintiff.

23 Notwithstanding production of this information, the plaintiff continued to insist on a formal court accounting from the defendant. The size of the estate did not justify a formal accounting. The defendant advised that the bank statements had been requested. Not satisfied to wait for those, the plaintiff commenced an application for a formal accounting and subsequently the action alleging, among other things, incapacity on the part of Mr. MacKinnon and impropriety on the part of the defendant. There is no evidence that the plaintiff took any steps to determine whether the information provided by the defendant was incorrect prior to commencing the action. I can only conclude therefore that the plaintiff's allegations in the action were asserted not only in the absence of any evidence to support them but in the face of third evidence from individuals, many of whom the plaintiff knew, that they were not correct.

24 The plaintiff submits that he was justified in commencing the action in order to obtain a proper accounting from the defendant. Once he got the informal accounting ordered by Conway J. and reviewed it, he discontinued the action. The problem with the plaintiff's submission is that there is no evidence before me that establishes the plaintiff obtained any additional information from the informal accounting beyond that which he already had received from the defendant prior to the commencement of the action. The affidavit of the associate in the plaintiff's solicitors firm and in particular

paragraph 25 quoted above which purports to explain why the plaintiff came to the decision to discontinue the action, does not indicate what information from the informal accounting satisfied the plaintiff's concerns.

25 Further, while the court ordered informal accounting was not provided by either party in their material on the motion, during argument the parties provided to me what was agreed was a copy of the informal accounting provided by the defendant pursuant to Conway J.'s order. On my review of it, apart from more detail in respect of receipts and disbursements on a monthly basis and the bank statements which the defendant had indicated he would provide prior to the action, there was no new information provided which the plaintiff did not already have from the earlier information he had received from the defendant.

26 In the circumstances, therefore, I am not satisfied that the plaintiff's action was justified and accordingly I am not prepared to exercise my discretion to relieve the plaintiff from having to pay the defendant his costs of the action.

27 The defendant submits, having regard to the serious allegations in the action concerning misappropriation of Mr. MacKinnon's money, breach of trust and breach of fiduciary duty, all of which were prejudicial to the character and reputation of the defendant, that the defendant is entitled to costs on a full or substantial indemnity basis.

28 There is no question, in my view, that the allegations made by the plaintiff in the action impugn both the character and the integrity of the defendant. Further, the impropriety of the allegations is compounded by the fact that the plaintiff had no personal knowledge of the circumstances and prior to the commencement of the action had been provided with substantial evidence from third parties to the contrary.

29 Unfounded allegations of dishonesty which go to the heart of a person's integrity will give rise to a award of substantial or full indemnity costs: *Murano v. Bank of Montreal* (1995), 41 C.P.C. (3d) 143 (Ont. Gen. Div. [Commercial List]); *Fair v. Campbell Estate* (2002), 3 E.T.R. (3d) 67 (Ont. S.C.J.).

30 In *Mele v. Thorne Riddell*, *supra*, Dambrot J. awarded costs on a solicitor and client scale where the plaintiff made unfounded allegations of wrongdoing by the defendant and subsequently discontinued the action. In so doing, the learned judge stated: "a significant part of the harm caused by unfounded allegations of wrongdoing by a plaintiff is the harm done to the reputation of the defendant. As long as the allegation remains part of the public record, that harm continues...if the plaintiffs knew some time ago that no foundation for these allegations existed then it seems to me that they compounded the harm caused by their recklessness by leaving the allegations publicly uncorrected." In my view the same can be said about this case where, based on the information he had received, the plaintiff knew the allegations of impropriety were unfounded prior to his commencing the action.

31 The defendant's bill of costs claims fees of $29,250 based upon 65 hours of work at $450 an hour. Having regard to the seniority of the defendant's counsel, in my view the hourly rate is reasonable based on substantial indemnity. Further, given the issues involved in the action beginning with the plaintiff's application for a formal accounting and two court appearances, the time spent is reasonable too. Nor are the fees claimed that different from the plaintiff's bill of costs such that the amount claimed could be considered unreasonable from the plaintiff's perspective.

32 The defendant also claims disbursements of $531.02 which are reasonable.

33 In the result, the defendant is entitled to his costs of the action against the plaintiff on a substantial indemnity basis, fixed in the total amount of $31,243.52.

Order accordingly.

Tab 18

2015 ONSC 1106
Ontario Superior Court of Justice

Hawkins v. Hawkins Estate

2015 CarswellOnt 2318, 2015 ONSC 1106, 250 A.C.W.S. (3d) 214

Ian Hawkins, Plaintiff and The Estate of John Patterson Hawkins, Defendant

The Estate of John Patterson Hawkins, Plaintiff by Counterclaim and
Ian Hawkins and David Kent Hawkins, Defendants to the Counterclaim

David Kent Hawkins, Plaintiff by Counterclaim and The estate of John Patterson Hawkins, Limerick Farms Ltd. And Carl Hawkins and Garry Kingsley, Defendants to the Counterclaim of David Kent Hawkins

Timothy Minnema J., In Chambers

Judgment: February 19, 2015
Docket: CV-12-53276

Counsel: E. Jane Murray, for Ian Hawkins
John Paul Zubec, for Carl Hawkins and Garry Kingsley
Eric Lay, for David Kent Hawkins

Subject: Civil Practice and Procedure

Headnote

Civil practice and procedure --- Costs — Particular orders as to costs — Costs on solicitor and client basis — Grounds for awarding — Unfounded allegations

Within context of estate litigation, in response to summary judgment motion, parties agreed to dismissal of third party claim brought by plaintiff IH against CH and to dismissal of DKH's counterclaim against CH and GK, all with costs — Parties made submissions on costs — Costs awarded — IH was to pay CH costs of $30,000 for dismissal of third party claim and summary judgment motion — DKH was to pay costs of $5,000 to CH and $35,000 to GK relating to dismissal of counterclaim and summary judgment motion — Substantial indemnity costs were awarded because allegations made against CH and GK were personal attacks, alleging intentional misconduct, and were not proven — CH and GK had same counsel and split invoices equally between them — Fees claimed up to summary judgment motion were generally valid although higher than what should have been reasonably expected — Fees claimed for summary judgments that were not argued were excessive — Proper amount for costs for both CH and GK was $70,000 inclusive of fees, disbursements and taxes, which was split equally between them — Costs were apportioned between IH and DKH, with IH owing less as he sued only one of CH and GK.

Table of Authorities

Cases considered by *Timothy Minnema J., In Chambers*:

Blair v. Toronto Community Housing Corp. (2014), 2014 ONSC 2292, 2014 CarswellOnt 4753 (Ont. S.C.J.) — followed

Boily v. Carleton Condominium Corp. 145 (2014), 2014 ONCA 735 (Ont. C.A.) — followed

Boucher v. Public Accountants Council (Ontario) (2004), 48 C.P.C. (5th) 56, 2004 CarswellOnt 2521, 188 O.A.C. 201, 71 O.R. (3d) 291 (Ont. C.A.) — referred to

Hawkins v. Hawkins Estate (2013), 2013 ONSC 661, 2013 CarswellOnt 1016, 84 E.T.R. (3d) 103, 34 C.P.C. (7th) 292 (Ont. S.C.J.) — referred to

MacKinnon v. MacKinnon (2010), 2010 ONSC 2661, 56 E.T.R. (3d) 29, 2010 CarswellOnt 2984 (Ont. S.C.J.) — referred to

Murray v. Murray (2005), 2005 CarswellOnt 7278, 205 O.A.C. 107, 79 O.R. (3d) 147 (Ont. C.A.) — referred to
New Solutions Extrusion Corp. v. Gauthier (2010), 2010 ONSC 1897, 2010 CarswellOnt 2101 (Ont. S.C.J.) — referred to
Said v. University of Ottawa (2014), 2014 ONSC 771, 2014 CarswellOnt 1267 (Ont. S.C.J.) — referred to
Serra v. Serra (2009), 2009 CarswellOnt 2475, 2009 ONCA 395, 66 R.F.L. (6th) 40 (Ont. C.A.) — followed

Statutes considered:

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 131(1) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 57.01 — considered

R. 57.01(7) — referred to

R. 57.04 — considered

ADDITIONAL REASONS respecting costs of dismissal on consent of claim and counterclaim against two parties, in response to summary judgment motion.

***Timothy Minnema J., In Chambers*:**

Nature of the Request/Background Facts

1 Within the context of estate litigation, in response to a summary judgment motion, the parties agreed to the dismissal of the third party claim brought by Ian Hawkins against Carl Hawkins, and to the dismissal of the counterclaim by David Kent Hawkins against Carl Hawkins and Garry Kingsley, all "with costs".

2 Counsel appeared before me for a consent Judgment on September 10, 2014. At that time settlement of the costs issue seemed attainable, or, if not, it was anticipated that resolving it would be a simple process, with short concise written submissions (nine pages in total). The parties added into their consent that the judge signing the order would hear the issue of costs. I had no previous involvement with this file. The costs issue did not settle.

3 Contrary to the earlier expectation, the costs submissions were actually quite complex. Carl Hawkins and Garry Kingsley seek costs on a substantial indemnity basis. There are disputes about the Bills of Costs. Apportionment, barely addressed, is complicated. Given some of these issues, David Kent Hawkins has, in the covering letter accompanying his submissions, suggested that I should seek out further submissions and arrange for an oral hearing. This is contrary to what the parties agreed, and would likely involve a half day attendance.

4 Rule 57.04 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 as amended ("Rules") deals with costs on a settlement and says:

> 57.04 Where a proceeding is settled on the basis that a party shall pay or recover costs and the amount of costs is not included in or determined by the settlement, the costs may be assessed under Rule 58 on the filing of a copy of the minutes of settlement in the office of the assessment officer.

5 The parties have decided, for their own reasons, not to follow that process and, as noted, have agreed that I decide costs on brief written submissions. The court is directed to devise and adopt the simplest, least expensive and most expeditious process for fixing costs: see Rule 57.01(7). As such, I am prepared to accommodate them. Along with the costs submissions, I rely for a summary of the facts on the very clear and helpful decision of Master MacLeod on a previous motion in this file to remove the estate trustees found at 2013 ONSC 661 (Ont. S.C.J.).

Law

6 Pursuant to subsection 131(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 as amended, costs are discretionary. I am to assess the costs guided by Rule 57.01. The fundamental purposes of that rule, as restated in *Serra v. Serra*, 2009 ONCA 395 (Ont. C.A.) at para. 8, are: "(1) to partially indemnify successful litigants for the cost of litigation; (2) to encourage settlement; and (3) to discourage and sanction inappropriate behavior by litigants."

7 There is no dispute in the submissions of Ian Hawkins and David Kent Hawkins that Carl Hawkins and Garry Kingsley are entitled to their costs. As to the amount of costs, the overriding principle is that costs are to be fixed in a way that is fair to the parties and reasonable in the circumstances (*Murray v. Murray* (2005), 79 O.R. (3d) 147 (Ont. C.A.)). This includes considering the reasonable expectations of the losing litigant regarding costs (*Serra v. Serra*, 2009 ONCA 395, 66 R.F.L. (6th) 40 (Ont. C.A.); *Boucher v. Public Accountants Council (Ontario)* (2004), 71 O.R. (3d) 291 (Ont. C.A.)).

Positions/Issues

8 Having shared the same lawyer, Carl Hawkins and Garry Kingsley are each claiming exactly $47,174.85, all inclusive, on a substantial indemnity basis. As the consent Judgment dismissed the claims against them, they seek their costs both in the action and on the summary judgment motion.

9 Ian Hawkins and David Kent Hawkins argue that costs should not be awarded on a substantial indemnity basis, and they allege the Bills of Costs contain duplication and are excessive. David Kent Hawkins submits that the total costs for both Carl Hawkins and Garry Kingsley should be fixed at $25,000 on a partial indemnity basis. Ian Hawkins argues that costs should only be awarded up to the summary judgment motion fixed at $15,954.82, and that he should only be responsible for a third of that. Both Ian Hawkins and David Kent Hawkins want the payment of costs deferred until the proceedings involving the estate are completed.

10 There are four issues then: whether Carl Hawkins and Garry Kingsley are entitled to elevated costs; whether the amounts they seek are appropriate; how costs should be apportioned; and whether the payment of the costs award should be deferred.

Scale of Costs

11 I adopt the recent passage from *Boily v. Carleton Condominium Corp. 145*, 2014 ONCA 735 (Ont. C.A.), at para. 12:

> Elevated costs are warranted in only two circumstances: *Davies v. Clarington (Municipality)*, 2009 ONCA 722 (CanLII), 100 O.R. (3d) 66. The first involves the operation of an offer to settle under rule 49.10 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, where substantial indemnity costs are explicitly authorized. The second is where the losing party has engaged in behaviour worthy of sanction.

12 I was not presented with formal offers to settle. So the question before me on the scale of costs is whether Ian Hawkins and Kent Hawkins engaged in behavior worthy of sanction. Carl Hawkins and Garry Kingsley maintain they are entitled to substantial indemnity costs for three reasons: (1) the nature of the claims (conspiracy, inducing breach of contract, and interfering with economic relations), (2) the claims were made without any evidence to support them, and (3) the claims were made purposefully rather than negligently or recklessly.

13 Regarding the latter two reasons, I do not find that they attract substantial indemnity costs in this case. Although it dealt with a discontinuance, the following comments from *Blair v. Toronto Community Housing Corp.*, 2014 ONSC 2292 (Ont. S.C.J.) at para. 31 are applicable:

> There has been no determination of the merits of the Third Party Claim, and all that can be said is that it appears that the case against Claims Pro and Mustang Security was unlikely to succeed; but that circumstance in and of itself is not a basis for substantial indemnity costs. Costs on a substantial indemnity scale or full indemnity scale are

> reserved for rare and exceptional cases, where the conduct of the party against whom costs is ordered is reprehensible or where there are other special circumstances that justify costs on the higher scale

14 I would add to the above that the court's ability to determine motive or disputed inappropriate behaviour are limited on a settlement, as the court only has submissions before it and has not adjudicated the matter on the merits. I find that I am unable to determine that the claims of Ian Hawkins and Kent Hawkins were made without evidence or made for an ulterior motive.

15 However, looking at the first reason given by Carl Hawkins and Garry Kingsley - the nature of the claims themselves - Ian Hawkins claimed against Carl Hawkins $4,000,000 for conspiracy and inducing breach of contract, and David Kent Hawkins claimed against Carl Hawkins and Garry Kingsley jointly and severally $8,000,000 for inducing breach of contract, intentional interference with economic relations, and conspiracy. There is no denial that the attacks were personal. David Kent Hawkins' justification was that when he was attacked personally, he responded in kind. Carl Hawkins and Garry Kingsley argue that these types of claims are alleging intentional misconduct and therefore can attract costs on a substantial indemnity basis if not proven. In the context of this case, I agree. Such allegations have been found to be prejudicial to characters or reputations of those to whom they are directed and to attract a higher scale of costs: see *New Solutions Extrusion Corp. v. Gauthier*, 2010 ONSC 1897 (Ont. S.C.J.) at paragraphs 3 and 4, *MacKinnon v. MacKinnon*, 2010 ONSC 2661 (Ont. S.C.J.) paragraphs 27 to 30, and *Said v. University of Ottawa*, 2014 ONSC 771 (Ont. S.C.J.) at paragraphs 7 to 9.

Amount of Costs

16 The substantial indemnity costs claimed by Carl Hawkins and Garry Kingsley noted above - exactly $47,174.85 each - are calculated as 90 percent of their full indemnity costs. They have produced two identical Bills of Costs, each attaching an identical print out of the very same Client Ledger from their shared counsel. Ian Hawkins takes exception to this arguing:

> Carl and Garry had one lawyer acting for them jointly. They are each claiming 100% recovery of the same docketed time and disbursements.

17 Carl Hawkins and Garry Kingsley in their reply submissions deny this, reiterating their initial submission as follows:

> Carl and Garry incurred $47,174.85 in costs and taxes ***each***. They are not seeking double recovery.

18 I have examined the Client Ledger and confirm that Carl Hawkins and Garry Kingsley's counsel has simply divided the amount in the Client Ledger in half to support the individual cost claims. Given the similarities in the nature of the claims this makes some sense, but I can see why it confused counsel for Ian Hawkins as it was not adequately explained.

19 Ian Hawkins submitted that no costs should be awarded after June 1, 2014 as the motion for summary judgment could have been avoided. He says that his counsel around that date indicated that he would consent to the dismissal of his claims, and therefore the costs for the summary judgment motion, of about roughly $23,500 for both Carl Hawkins and Garry Kingsley together on a substantial indemnity basis, should not be considered. I do not accept this. A claim is alive until it is disposed of. Ian Hawkins could have discontinued his claim at any time by serving a simple notice. He did not, and it took the summary judgment motion to obtain a resolution.

20 Ian Hawkins alleged, rather generally, that "[t]here was significant duplication of effort between counsel for the Estate and counsel for Carl and Garry which should be taken into account in assessing the appropriate quantum of costs." I agree that duplication would not be appropriate. However, there was no evidence or detail pointing me to specific impugned entries in the Client Ledger to support this claim. I have no basis upon which to make any such allowance. David Kent Hawkins made similar arguments. He noted that at the discoveries he was only examined for 1.5 hours, he did not examine Garry Kingsley, and Carl Hawkins would have been examined on matters relating to the estate in any event. He acknowledged that while he put Carl Hawkins and Garry Kingsley to some expense in responding to the

personal claims, he argued that they were relatively modest. However, as Carl Hawkins and Garry Kingsley point out, their solicitor and client fees before bringing the motion for summary judgment were not that far off those of David Kent Hawkins. I do not have an account from Ian Hawkins to compare.

21 In my view, upon review of the Client Ledgers, the fees claimed up to the summary judgment motion are generally valid, although higher than what should have been reasonably expected by Ian Hawkins and David Kent Hawkins given that the claims did not have to be judicially determined. That is not to say that the amounts Ian Hawkins and David Kent Hawkins suggest they are liable for are appropriate. They are much too low, particularly given the serious implications of the nature of their claims, the amount of monetary compensation they sought, and the resulting effort by counsel for Carl Hawkins and Garry Kingsley to respond to them. The combined fees of $23,500 sought by Carl Hawkins and Garry Kingsley for the summary judgment motions that were not argued are excessive in my view, even on a substantial indemnity scale. They had to have had some sense that just bringing the motions would force the responding parties to finally capitulate

22 I find that the proper amount for costs for both Carl Hawkins and Garry Kingsley is $70,000 inclusive of fees, disbursements and taxes. As by their Bills of Costs they maintain that the legal costs for each of them were equal, that amounts to $35,000 each.

Deferral

23 As noted by Master MacLeod at para. 67 of his decision referred to above, the modern practice in litigation involving estates is to apply the ordinary costs rules. Although tied to estate litigation, the claims disposed of here were personal. Ian Hawkins and David Kent Hawkins have not provided me with any authorities or argument explaining why it would be proportionally fairer to them than unfair to the moving parties for me to exercise my discretion by deferring payment in this situation. I am unable to find compelling reasons on the materials before me to make the order requested.

Apportionment

24 Ian Hawkins was the only party to address apportionment in his submissions. He suggested that he should only be liable for a third of the total costs incurred prior to the summary judgment motion.

25 As noted, Carl Hawkins and Garry Kingsley each seek their own costs with separate Bills of Costs submitted. The single Client Ledger from their shared lawyer shows a mix of legal services in defending both the third party claim and the counterclaim, making the apportionment of the responsibility for fees difficult to assess, and, again, as it has not been seriously challenged, I accept that their costs are equal.

26 I find that a lesser amount for Ian Hawkins is appropriate as he sued only one of the two defendants, although in my view that does not mean a straight fractional calculation is appropriate. The extent of the overlapping issues in the two separate proceedings has to be considered, and much of the work done for Carl Hawkins on the third party claim would have spilled over to his defence of the counterclaim. As for the motions for summary judgment, those undertakings were directed to both actions, and in my view the related costs should be borne roughly equally by Ian Hawkins and David Kent Hawkins.

Decision

27 Incorporating the above, fair and reasonable amounts for costs in all the circumstances are follows. Ian Hawkins shall pay costs to Carl Hawkins of $30,000 relating to the dismissal of the third party claim and the summary judgment motion. David Kent Hawkins shall pay costs of $5,000 to Carl Hawkins and $35,000 to Garry Kingsley relating to the dismissal of the counterclaim and the summary judgment motion. All sums are inclusive of taxes and disbursements.

Order accordingly.

End of Document

Tab 19

2010 ONSC 1897
Ontario Superior Court of Justice

New Solutions Extrusion Corp. v. Gauthier

2010 CarswellOnt 2101, 2010 ONSC 1897, 187 A.C.W.S. (3d) 358

New Solutions Extrusion Corporation (Plaintiff / Respondent) AND Jacques Gauthier, Gauthier & Associates and Myrna Tulandi (Defendants / Applicants)

A. Karakatsanis J.

Judgment: March 30, 2010
Docket: 09-CL-7978

Counsel: Sean Dewart, Tim Gleason for Defendants / Applicants
Christopher Du Vernet, C. McCoogan for Plaintiff / Respondent

Subject: Civil Practice and Procedure; Public; Torts; Contracts

Headnote

Civil practice and procedure --- Costs — Particular orders as to costs — Costs on solicitor and client basis — Grounds for awarding — Unfounded allegations

Plaintiff commenced action against defendant lawyers for conspiring to trespass and unlawfully disable industrial machine on behalf of their client in order to force plaintiff to settle litigation concerning machine — Defendants brought successful motion for summary judgment to dismiss action — Additional reasons were given concerning costs — Defendants awarded costs on substantial indemnity scale in amount of $60,000 including GST — Statement of claim included many scandalous allegations and conclusions about lawyers without basis in fact — Allegations relating to motivation, delay and deliberate unlawful conduct were based upon assumption and embellishment furnished by counsel — Allegations of criminal conduct and moral turpitude jeopardized professional's reputation for integrity.

Table of Authorities

Cases considered by *A. Karakatsanis J.*:

Stonehocker v. King (1998), (sub nom. *Church of Jesus Christ of Latter Day Saints, Canadian Trust v. King)* 165 D.L.R. (4th) 227, 113 O.A.C. 239, 1998 CarswellOnt 3816, (sub nom. *Church of Jesus Christ of Latter Day Saints v. King)* 41 O.R. (3d) 389, (sub nom. *Église de Jésus-Christ des saints des derniers jours c. King)* 41 O.R. (3d) 402 (Fr.), 31 C.P.C. (4th) 388 (Ont. C.A.) — referred to

Statutes considered:

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 131 — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 1.04(1.1) [en. O. Reg. 438/08] — referred to

R. 57.01(1) — referred to

ADDITIONAL REASONS concerning costs to judgment reported at *New Solutions Extrusion Corp. v. Gauthier* (2010), 2010 ONSC 1037, 2010 CarswellOnt 913 (Ont. S.C.J.), granting summary judgment for defendants and dismissing action.

***A. Karakatsanis J.*:**

1 The defendants seek costs of the action on a substantial indemnity scale in the amount of $78,471.26. The plaintiffs submit that the defendants are entitled to some costs but submit that they ought to be fixed on the usual partial indemnity

scale. Further, they dispute the quantum and submit that some of the costs sought relate to the defendants' defence of a third party claim by the bailiff.

2 I granted summary judgment for the defendants and dismissed this action. The plaintiff New Solutions Extrusion Corporation sued the defendant lawyers alleging they conspired to trespass and unlawfully disable an industrial machine on behalf of their client Macchi S.p.A. in order to force the plaintiff to settle litigation concerning that machine.

3 I found that the issues relating to the parties to the contract and to the legality of the entry and the disablement of the machine were genuine issues requiring a trial. However, I concluded that the factual basis of this claim did not support the intentional torts of conspiracy, inducing breach of contract and interference with economic relations. In short, there was no genuine issue requiring a trial relating to the causes of action asserted against the defendants.

4 I am satisfied that this is an appropriate case for costs on a substantial indemnity scale.

5 I do not agree with counsel's submission that lawyers who advise and assist a client with respect to a remedy, the legality of which is being challenged, have anticipated and elected to run the risk of such a lawsuit. This is not a case of conduct that is clearly unlawful; counsel for the plaintiff submitted, and I agreed, that the legality of the remedy was a genuine issue for trial.

6 The Statement of Claim includes many scandalous allegations and conclusions about the lawyers without basis in fact including: that they "had touted their ability to deliver a prompt and favourable result;" that the lawyers "began to devise a plan" and "deliberately and cynically decided to ignore all applicable law when hatching their plan, confident that their behaviour would never face judicial scrutiny;" that there were long delays responding to particulars because "Gautier was frequently away from his office pursuing graduate work in Europe;" that the lawyers "feared they would lose the file and the substantial fees it represented;" and that Gauthier's "practice was in shambles and he could not afford to lose the Macchi file under any circumstances [because] he was desperate."

7 The allegations relating to motivation, delay and deliberate unlawful conduct were based upon "assumption" and "embellishment" furnished by counsel. The re-possession by disablement of the machine was the client's idea and decision. The involvement of counsel in advising and assisting their client is not enough to justify allegations of a conspiracy between a client and the lawyer. Allegations of criminal and unlawful conduct are serious and should not be made without an evidentiary foundation.

8 These are allegations of criminal conduct and moral turpitude. Such allegations jeopardize a professional's most important asset: his reputation for integrity. It is understandable that a professional may mount a defence or argue each issue more forcefully than might otherwise be proportionate to the amounts in issue or the plaintiff's chances of success.

9 This is the second claim brought against the other party's lawyers. The first claim against prior counsel was struck by the Court for failing to disclose a cause of action. Obviously, a claim against litigation counsel can effectively deprive the other party of its legal representation, resulting in a tactical advantage.

10 For all these reasons, I am satisfied that this is a rare case justifying the departure from the norm and I award costs on a substantial indemnity scale: see *Stonehocker v. King* (1998), 41 O.R. (3d) 389 (Ont. C.A.).

11 Rule 57.01(1) sets out the factors to be considered in exercising my discretion under s.131 of the *Courts of Justice Act*, including the principle of indemnity, the reasonable expectations of the unsuccessful party, the importance and complexity of the issues, conduct that tended to shorten or to lengthen unnecessarily the duration, and denial of something that should have been admitted. Of course, Rule 1.04(1.1) requires that orders be proportionate to the importance and complexity of the issues, and to the amount involved in the proceeding.

12 With respect to the quantum of costs, an attack on the integrity of counsel or their reputation raises very important issues. I do not agree that the defendants took an unreasonable position based on the facts. While the plaintiffs

were successful on a number of the legal issues involving some limited unnecessary time and cost, I do not consider the submissions made by the defendants on these issues to have been unreasonable. The defendants proceeded with a summary judgment motion very efficiently, relying for the most part on the evidentiary record of the plaintiffs. The other party ought to have reasonably expected the lawyers to vigourously defend the claim.

13 The third party claim appears to merit some modest discount for the costs sought on the basis that there is some overlap as some of the work would be required for that claim in any event. Mr Dewart's attendance after my decision, to ensure he was available for the trial date, is appropriate in the event of an appeal. The rates claimed and the times spent are reasonable. The costs relate to the costs of the action, including the motion for summary judgment, but exclude the motion before Hoy J. for which costs have already been awarded.

14 Based upon these factors, my review of the docket and in particular the importance of the issues, I fix costs in the amount of $60,000 including GST, plus disbursements of $7,480.76.

Order accordingly.

Tab 20

1984 CarswellOnt 187
Ontario Supreme Court, Court of Appeal

Clarkson Co. v. Chilcott

1984 CarswellOnt 187, 13 D.L.R. (4th) 481, 13 C.R.R. 41, 48 O.R. (2d) 545, 53 C.B.R. (N.S.) 251, 6 O.A.C. 291

Re DILAWRI; CLARKSON COMPANY LIMITED v. CHILCOTT

Brooke, Lacourcière and Goodman JJ.A.

Heard: October 31, 1984
Judgment: November 1, 1984

Counsel: *C.T. Hackland* and *G. Creighton*, for applicant.
T.G. O'Neill and *R.R. Wells*, for respondent.

Subject: Corporate and Commercial; Insolvency; Civil Practice and Procedure
Headnote
Practice --- Discovery — Discovery of documents — Privileged document — Solicitor-client privilege
Examinations of bankrupt and others — Bankrupt's solicitor may be ordered to attend before a special examiner to answer questions concerning bankrupt's affairs — But not required to answer questions concerning received or advice given concerning bankrupt's property — Privilege not destroyed by trustee's allegation of criminal or fraudulent conduct by bankrupt.
A solicitor appealed a judgment ordering him to attend before a special examiner and answer questions concerning a bankrupt client.
Held:
Appeal dismissed.
The solicitor for a bankrupt can be properly ordered to attend before a special examiner to answer questions regarding his bankrupt client's affairs. A bankrupt who faces criminal charges and has retained a solicitor would not be substantially deprived of his right to counsel under s. 10(*b*) of the Canadian Charter of Rights and Freedoms by his testimonial compulsion. The solicitor can be compelled to disclose all information regarding the bankrupt's affairs, transactions and the whereabouts of his property, etc., which do not require the disclosure of communications made to the solicitor for the purpose of giving legal advice. These communications with respect to property are not privileged. The privilege attaches, however, to all information requested by the client for the purpose of obtaining professional advice and assistance and given for that purpose. This fundamental privilege normally can only be waived by the client or lost in special circumstances. The protection of creditor's rights, standing alone, is not sufficient to overcome the solicitor/client privilege, nor was the trustee's allegation of criminal or fraudulent conduct by the bankrupt. The fact that the trustee set out in his affidavit his belief that the solicitor's client fraudently conveyed property without consideration in order to defeat his creditors and that this was not specifically denied in an affidavit did not constitute sufficient prima facie proof of criminal conduct to destroy the claim for privilege.
Table of Authorities
Cases considered:
Cirone, Re; Reisman v. Laker (1965), 8 C.B.R. (N.S.) 237 (Ont. S.C.) — *distinguished*
Gresley v. Mouseley (1856), 2 K. & J. 288, 69 E.R. 789 — *referred to*
Ont. Securities Comm. v. Greymac Credit Corp.; Ont. Securities Comm. v. Prousky (1983), 41 O.R. (2d) 328, 21 B.L.R. 37, 33 C.P.C. 270, 146 D.L.R. (3d) 73 (Div. Ct.) — *referred to*
R. and Speid, Re (1983), 43 O.R. (2d) 596, 37 C.R. (3d) 220, 8 C.C.C. (3d) 18, 3 D.L.R. (4th) 246 (C.A.) — *applied*
Solosky v. R., [1980] 1 S.C.R. 821, 16 C.R. (3d) 294, 50 C.C.C. (2d) 495, 105 D.L.R. (3d) 745, 30 N.R. 380 — *applied*
Statutes considered:

Bankruptcy Act, R.S.C. 1970, c. B-3, ss. 133, 163.

Canadian Charter of Rights and Freedoms, Constitution Act, 1982, Pt. I, s. 10(*b*).

Authorities considered:

Cordery on Solicitors, 4th ed. (1935), p. 298.

Cordery on Solicitors, 7th ed. (1981), p. 3.

2 Hals. (3d) 408, para. 820.

Houlden, "Discovery in Criminal Prosecutions in Bankruptcy Matters" (1972), 50 Can. Bar. Rev. 486, p. 488.

Appeal from order of Ewaschuk J., 47 C.B.R. (N.S.) 93, 37 C.P.C. 218 ordering solicitor to appear before a special examiner and answer questions concerning his bankrupt client.

The judgment of the court was delivered by *Lacourcière J.A.* (orally):

1 This is an appeal pursuant to s. 163 of the Bankruptcy Act, R.S.C. 1970, c. B-3, from an order of Ewaschuk J. [47 C.B.R. (N.S.) 93, 37 C.P.C. 218] in which he ordered the appellant to answer a series of questions attached as Sched. A to his order.

2 The facts are not in dispute. On 22nd November 1982 a receiving order was made adjudging Hari Om Dilawri bankrupt after a five-day trail in Ottawa before Craig J. At that time the appellant acted as Dilawri's counsel.

3 The appellant had acted as solicitor for Dilawri and his group of companies for a number of years. He was involved in advising Dilawri in his negotiations with the petitioning creditor, the Royal Bank of Canada, with respect to proposed refinancing of the debts. The appellant continued to advise Dilawri following the receiving order.

4 The trustees in bankruptcy, Clarkson Company Limited, served the appellant with a notice of appointment under s. 133 of the Bankruptcy Act to examine the appellant on or about 18th March, 1982. The trustee advised the appellant that it waived any solicitor-client privilege regarding the affairs of Dilawri. The appellant, however, claimed that he was precluded from answering any of the trustee's questions on the basis of the solicitor-client privilege. At no time did the bankrupt himself waive his privilege.

5 The position of the trustee was and apparently is that it requires the answer to all the questions set out in Sched. A to assist him in locating and acquiring some of the property of the bankrupt. It is significant that the bankrupt Dilawri is presently facing criminal charges on certain counts of fraud relating essentially, it is alleged, to the same transactions which were the subject of the bankruptcy trial and the appellant is to be Dilawri's counsel in the criminal proceedings.

6 We unanimously agree that the appellant was properly ordered to reattend before the special examiner to answer questions regarding his bankrupt client's affairs. We do not agree with the appellant's submission that the bankrupt who faces criminal charges and has retained the appellant as counsel would be substantially deprived of his right to counsel under s. 10(*b*) of the Charter [Canadian Charter of Rights and Freedoms, Constitution Act, 1982, Pt. I] by this testimonial compulsion: *Re R. and Speid* (1983), 43 O.R. (2d) 596, 37 C.R. (3d) 220, 8 C.C.C. (3d) 18, 3 D.L.R. (4th) 246 (C.A.).

7 We also agree with the learned motions court judge's analysis of the rationale for the protection of the solicitor-client privilege without which the legal system could not function.

8 We respectfully disagree, however, with the proposition accepted by the learned motions court judge that a trustee in bankruptcy possesses the legal right to waive the privilege with respect to legal advice given to the bankrupt respecting his former property. He relied on *Re Cirone; Reisman v. Laker* (1965), 8 C.B.R. (N.S.) 237 (Ont. S.C.); in our respectful view, the case is based on a broad proposition stated in 2 Hals. (3d) 408, para. 820, which does not appear to be consistent

with the rationale for the privilege. *Cirone* involved the proposed examination of a solicitor against whom there were allegations of fraudulent preference with respect to his fees for services to the bankrupt.

9 Mr. Justice Houlden in his article "Discovery in Criminal Prosecutions in Bankruptcy Matters" (1972), Can. Bar Rev. 486 and 488, states that it is a difficult question whether or not the *Cirone* case should be extended beyond its particular facts. We think that it should be limited to its own facts, and that the proposition in Halsbury is too broad having regard to the authority upon which it is based. It is as follows:

> 820. ... The solicitor of a person who afterward becomes bankrupt cannot set up against the trustee in the bankruptcy any privilege which is the client's.

10 The authority cited in Cordery on Solicitors, 4th ed. (1935), at p. 298:

> For the same reason the solicitor's privilege can be no greater than the client's right. Where, therefore, the client cannot refuse discovery, the solicitor cannot claim privilege. Thus, a solicitor cannot refuse to give the address of a guardian of wards of Court, who is concealing them, nor to produce a document where his client could not refuse, nor could he refuse to lodge a bill in Court under the Probate Act, 1857, s. 26. It further follows that there is no privilege as between the solicitor and the client himself, or the client's representatives nor between different parties, all of whom claim under the client, as, for instance, in favour of executors as against the next of kin, nor in favour of a married woman's trustees against her creditors.

11 One of the cases relied upon is *Gresley v. Mouseley* (1856), 2 K. & J. 288, 69 E.R. 789. However, Cordery's 7th edition (1981), at p. 3, states as follows:

> The position as between the client's representatives and their *cestuis que trust* is not free from doubt; certainly the privilege does not extend beyond what is reasonably necessary to afford the protection without which professional legal advice and assistance could not be obtained safely or efficiently. [The footnote reference is to *Re Londonderry's Settlement; Peat v. Walsh*, [1965] Ch. 918, [1965] 2 W.L.R. 229, [1964] 3 All E.R. 855 (C.A.).]

With this qualification in mind we are satisfied that the appellant can set up against the trustee in bankruptcy the client's privilege in respect of his professional legal advice and assistance.

12 In our view, the appellant can be compelled to disclose all information regarding the bankrupt's affairs, transactions and the whereabouts of his property, etc., which do not require the disclosure of communications made to the appellant for the purpose of giving legal advice. These communications with respect to property are not privileged. All questions contained in Sched. A to the order of Ewaschuk J. can be read as falling in this category of non-privileged information and to that extent they should be answered by the appellant. In that respect, there is no privilege to be waived by the client or by the trustee.

13 The privilege attaches, however, to all information requested by the client for the purpose of obtaining professional advice and assistance and given for that purpose: *Solosky v. R.*, [1980] 1 S.C.R. 821, 16 C.R. (3d) 294, 50 C.C.C. (2d) 495, 105 D.L.R. (3d) 745, 30 N.R. 380. This fundamental privilege normally can only be waived by the client or lost in special circumstances which do not obtain in the present case.

14 It is unnecessary in this case to consider whether there is an analogy between the position of the trustee in bankruptcy and that of the receiver appointed in the circumstances which obtained in *Ont. Securities Comm. v. Greymac Credit Corp.; Ont. Securities Comm. v. Prousky* (1983), 41 O.R. (2d) 328, 21 B.L.R. 37, 33 C.P.C. 270, 146 D.L.R. (3d) 73 (Div. Ct.).

15 It is also unnecessary to say definitely whether there may be circumstances in which the trustee may properly waive the bankrupt's privilege. We do not think, however, that the protection of creditor's rights, standing alone, is sufficient to overcome the solicitor/client privilege.

16 Accordingly, we would dismiss the appeal but amend the formal order by striking out para. 2 which reads as follows:

> 2. IT IS FURTHER ORDERED that W. Dan Chilcott, Q.C. answer all questions put to him in Schedule "A" to this Order and any questions arising naturally therefrom in respect of the instructions he received from and advice he gave to the bankrupt in respect of the property involved only if the Trustee in Bankruptcy determines such communications are required to protect the rights of the creditors.

17 The questions proposed in Sched. A to the order of Ewaschuk J. will have to be answered by the appellant on his re-examination. We rule that the appellant may refuse to answer any and all questions in respect of instructions which he has received or professional advice which he gave to the debtor in respect of the bankrupt's property.

18 We agree with the learned trial judge that the trustee's allegation of criminal or fraudulent conduct by the bankrupt is not sufficient to disentitle the bankrupt to the privilege. For the purpose of the proposed examination, the fact that the trustee sets out in his affidavit his belief that the appellant's client fraudulently conveyed property without consideration in order to defeat his creditors and that this is not specifically denied in the appellant's affidavit does not constitute sufficient prima facie proof of criminal conduct to destroy the claim for privilege.

19 Subject to the variation mentioned, the appeal should be dismissed without costs.

Appeal dismissed subject to variation.

Tab 21

Most Negative Treatment: Distinguished
Most Recent Distinguished: Imperial Oil Ltd., Re | 2001 CarswellAlta 1674, 42 C.E.L.R. (N.S.) 114, [2002] A.W.L.D. 58 | (Alta. Environmental App. Bd., Dec 10, 2001)

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.

Subject: Insolvency; Estates and Trusts; Civil Practice and Procedure

Headnote

Bankruptcy --- Administration of estate — Trustees — Miscellaneous issues

Solicitor-client privilege fell into category of interests which were not transferred to or conferred upon trustee by Bankruptcy and Insolvency Act — Privilege attached to documents which recorded privileged communication and precluded disclosure of communication — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3.

Bankruptcy --- Practice and procedure in courts — Discovery and examinations — Evidentiary issues — Privilege — General

Solicitor-client privilege fell into category of interests which were not transferred to or conferred upon trustee by Bankruptcy and Insolvency Act — Privilege attached to documents which recorded privileged communication and precluded disclosure of communication — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3.

A company made an assignment in bankruptcy. Prior to the assignment, a law firm acted as counsel to the company and provided advice to the company, its officers and directors.

The trustee in bankruptcy's application for a declaration that it had the power and authority to waive the company's solicitor-client privilege was dismissed. The chambers judge found that the company's solicitor-client privilege did not pass or vest in the trustee. The chambers judge held that the law firm could be compelled to produce its lawyers and their files documents and records regarding the company for examination to the extent that privilege was not compromised. The trustee appealed.

Held: The appeal was dismissed.

Per Conrad J.A. (Wittmann J.A. concurring): Solicitor-client privilege fell into a category of interests which were not transferred to or conferred upon a trustee by the *Bankruptcy and Insolvency Act*.

Section 16 of the Act and related provisions were not broad or explicit enough to empower the trustee to take possession of and use privileged communications which fell under the Act's definition of property. While there could be a physical document which recorded communication, the essence of the document was the privileged communication. Privilege attached to the document and precluded disclosure of the communication.

Solicitor-client privilege was not property under the Act. The right to waive privilege was not a power attaching to property divisible among creditors. An explicit delegation was required for trustees to have a categorical right to waive privilege for bankrupts.

The Act did not confer on a trustee the authority over privilege and did not provide that the trustee stepped into the shoes of the bankrupt for all purposes.

Potential benefits from the ability of trustees to waive privilege for a bankrupt were not overriding when compared to the interests protected and enhanced by solicitor-client privilege.

The trustee did not prove that disclosure of the company's privileged communications with the law firm would have furthered the interests and intentions of the company. No identity of interest could be assumed to exist between a trustee in bankruptcy and a bankrupt. The directors of the company did not waive the company's privilege prior to resigning. In the absence of contrary evidence, it could be assumed that the company intended to engage in confidential communications with its solicitor without an intention to disclose those communications.

As there were still company shareholders and a meeting could be called to deal with the issue of privilege, the company retained the capacity to waive privilege. No steps were taken to perfect the capacity. There was no evidence demonstrating that the trustee could not obtain the desired information without setting aside solicitor-client privilege. There was no evidence that the trustee's available options had been exhausted.

Per LeVecchio J. (ad hoc) (dissenting in part): The company continued to exist as a corporation and it continued to possess the power to waive its solicitor-client privilege. The company did not waive the privilege as it had no officer or directors and no corporate means to authorize a waiver.

The only basis upon which a trustee could claim the power to waive a bankrupt's solicitor-client privilege was statutory. That the trustee might come into possession of privileged documents was not sufficient to allow the trustee to waive privilege. As the compelled transfer of possession of privileged communication was involuntary, it could not constitute a waiver of the privilege.

That privilege was not mentioned in the Act led to the implication that its omission was deliberate. It was reasonable to conclude that the ability to waive solicitor-client privilege remaining with the bankrupt was intended.

Matters very personal to a bankrupt were not included as property under the Act. The right of privileged communication with a solicitor was personal and not included in the definition of property in the Act. Solicitor-client privilege remained with the bankrupt and the trustee had no power to waive the privilege.

As no evidence was present on the basis of which an exception to solicitor-client privilege could apply, there was no reason to make an exception.

Table of Authorities

Cases considered by *Conrad J.A.* (*Wittman J.A.* concurring):

A. (L.L.) v. B. (A.), 103 C.C.C. (3d) 92, 44 C.R. (4th) 91, 130 D.L.R. (4th) 422, 190 N.R. 329, 33 C.R.R. (2d) 87, [1995] 4 S.C.R. 536, 88 O.A.C. 241 (S.C.C.) — referred to

Abacus Cities Ltd., Re (1981), 16 Alta. L.R. (2d) 279, 40 C.B.R. (N.S.) 172, 128 D.L.R. (3d) 566 (Alta. Q.B.) — not followed

Amonson, Re, 39 Alta. L.R. (2d) 307, [1985] 6 W.W.R. 377, 57 C.B.R. (N.S.) 314, 65 A.R. 396 (Alta. Q.B.) — considered

Bullivant v. Attorney General, [1901] A.C. 196, [1900-03] All E.R. Rep. 812 (U.K. H.L.) — referred to

Chetty v. Burlingham Associates Inc., [1995] 3 W.W.R. 153, 125 Sask. R. 249, 81 W.A.C. 249, 8 P.P.S.A.C. (2d) 130, 121 D.L.R. (4th) 297, 31 C.B.R. (3d) 161 (Sask. C.A.) — referred to

Cirone, Re (1965), 8 C.B.R. (N.S.) 237 (Ont. S.C.) — not followed

Clark v. Law Society (Alberta), 2000 ABCA 242, [2000] 11 W.W.R. 520, 20 C.B.R. (4th) 212, 84 Alta. L.R. (3d) 314, 266 A.R. 330, 228 W.A.C. 330 (Alta. C.A.) — considered

Clarkson Co. v. Chilcott (1984), 48 O.R. (2d) 545, 53 C.B.R. (N.S.) 251, 6 O.A.C. 291, 13 D.L.R. (4th) 481, 13 C.R.R. 41 (Ont. C.A.) — followed

Descôteaux c. Mierzwinski, [1982] 1 S.C.R. 860, 28 C.R. (3d) 289, 1 C.R.R. 318, 44 N.R. 462, 141 D.L.R. (3d) 590, 70 C.C.C. (2d) 385 (S.C.C.) — considered

Eggen v. Grayson (1956), 36 C.B.R. 72, 20 W.W.R. 632, 8 D.L.R. (2d) 125 (Alta. T.D.) — referred to

Gano v. Alberta Motor Assn. Insurance Co., 50 Alta. L.R. (3d) 258, [1997] 6 W.W.R. 484, 46 C.B.R. (3d) 144, 202 A.R. 118 (Alta. Master) — referred to

Goodman Estate v. Geffen, [1991] 5 W.W.R. 389, 42 E.T.R. 97, (sub nom. *Geffen v. Goodman Estate*) [1991] 2 S.C.R. 353, 125 A.R. 81, 14 W.A.C. 81, 80 Alta. L.R. (2d) 293, (sub nom. *Geffen v. Goodman Estate*) 81 D.L.R. (4th) 211, 127 N.R. 241 (S.C.C.) — considered

Greenough v. Gaskell (1833), 39 E.R. 618, 36 R.R. 258, 1 My. & K. 98 (Eng. Ch. Div.) — considered

Langworthy v. McVicar (1913), 25 O.W.R. 297, 5 O.W.N. 345 (Ont. H.C.) — referred to

Neufeld, Re (1993), 13 Alta. L.R. (3d) 16, (sub nom. *Neufeld (Bankrupt), Re*) 144 A.R. 182, 22 C.B.R. (3d) 275, [1994] 1 C.T.C. 252 (Alta. Q.B.) — referred to

R. v. Fosty, [1991] 6 W.W.R. 673, (sub nom. *R. v. Gruenke*) 67 C.C.C. (3d) 289, 130 N.R. 161, 8 C.R. (4th) 368, 75 Man. R. (2d) 112, 6 W.A.C. 112, (sub nom. *R. v. Gruenke*) [1991] 3 S.C.R. 263, 7 C.R.R. (2d) 108 (S.C.C.) — referred to

R. v. McClure, 2001 SCC 14, 151 C.C.C. (3d) 321, 195 D.L.R. (4th) 513, 40 C.R. (5th) 1, 266 N.R. 275, [2001] 1 S.C.R. 445, 142 O.A.C. 201 (S.C.C.) — considered

Rahall v. McLennan (1996), 190 A.R. 183, 44 C.B.R. (3d) 191, [1997] 1 W.W.R. 316, 44 Alta. L.R. (3d) 179 (Alta. Q.B.) — referred to

Slavutych v. Baker (1975), [1976] 1 S.C.R. 254, (sub nom. *Slavutch v. Board of Governors of University of Alberta*) 3 N.R. 587, [1975] 4 W.W.R. 620, 38 C.R.N.S. 306, 75 C.L.L.C. 14,263, 55 D.L.R. (3d) 224 (S.C.C.) — considered

Smith v. Jones, 169 D.L.R. (4th) 385, (sub nom. *Jones v. Smith*) 60 C.R.R. (2d) 46, 132 C.C.C. (3d) 225, 22 C.R. (5th) 203, (sub nom. *Jones v. Smith*) 236 N.R. 201, (sub nom. *Jones v. Smith*) 120 B.C.A.C. 161, (sub nom. *Jones v. Smith*) 196 W.A.C. 161, [1999] 1 S.C.R. 455, 62 B.C.L.R. (3d) 209, [1999] 8 W.W.R. 364 (S.C.C.) — considered

Solosky v. Canada (1979), (sub nom. *Solosky v. R.*) [1980] 1 S.C.R. 821, 105 D.L.R. (3d) 745, 16 C.R. (3d) 294, 30 N.R. 380, 50 C.C.C. (2d) 495 (S.C.C.) — referred to

Stewart v. Walker (1903), 2 O.W.R. 990, 1903 CarswellOnt 674, 6 O.L.R. 495 (Ont. C.A.) — referred to

Wolch's Guaranteed Foods Ltd. (Trustee of) v. Wolch, 18 Alta. L.R. (3d) 156, 24 C.B.R. (3d) 268, (sub nom. *Wolch's Guaranteed Foods Ltd. (Bankrupt), Re*) 152 A.R. 30, [1994] 6 W.W.R. 173 (Alta. Q.B.) — considered

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

Cameron v. Campbell (1987), 29 C.P.C. (2d) 41 (Ont. H.C.) — referred to

Canbook Distribution Corp. v. Borins (1999), 7 C.B.R. (4th) 121 (Ont. Gen. Div. [Commercial List]) — referred to

Chetty v. Burlingham Associates Inc., [1995] 3 W.W.R. 153, 125 Sask. R. 249, 81 W.A.C. 249, 8 P.P.S.A.C. (2d) 130, 121 D.L.R. (4th) 297, 31 C.B.R. (3d) 161 (Sask. C.A.) — referred to

Ciriello v. R., [2000] G.S.T.C. 104, 21 C.B.R. (4th) 9, 2001 G.T.C. 249 (T.C.C. [Informal Procedure]) — referred to

Clarkson Co. v. Chilcott (1984), 48 O.R. (2d) 545, 53 C.B.R. (N.S.) 251, 6 O.A.C. 291, 13 D.L.R. (4th) 481, 13 C.R.R. 41 (Ont. C.A.) — referred to

Descôteaux c. Mierzwinski, [1982] 1 S.C.R. 860, 28 C.R. (3d) 289, 1 C.R.R. 318, 44 N.R. 462, 141 D.L.R. (3d) 590, 70 C.C.C. (2d) 385 (S.C.C.) — referred to

Eggen v. Grayson (1956), 36 C.B.R. 72, 20 W.W.R. 632, 8 D.L.R. (2d) 125 (Alta. T.D.) — referred to

Festing v. Canada (Attorney General), 2000 BCSC 439, 31 C.R. (5th) 203, 73 B.C.L.R. (3d) 313, [2000] 5 W.W.R. 413, 73 C.R.R. (2d) 1 (B.C. S.C.) — referred to

Gano v. Alberta Motor Assn. Insurance Co., 50 Alta. L.R. (3d) 258, [1997] 6 W.W.R. 484, 46 C.B.R. (3d) 144, 202 A.R. 118 (Alta. Master) — considered

Husky Oil Operations Ltd. v. Minister of National Revenue, [1995] 10 W.W.R. 161, 35 C.B.R. (3d) 1, 128 D.L.R. (4th) 1, 137 Sask. R. 81, 107 W.A.C. 81, [1995] 3 S.C.R. 453, 188 N.R. 1, 24 C.L.R. (2d) 131 (S.C.C.) — considered

Laprairie Shopping Centre Ltd., Re, [1998] R.J.Q. 448 (C.A. Que.) — referred to

National Trust Co. v. Ebro Irrigation & Power Co., [1954] O.R. 463, [1954] 3 D.L.R. 326 (Ont. H.C.) — referred to
Neufeld, Re (1993), 13 Alta. L.R. (3d) 16, (sub nom. *Neufeld (Bankrupt), Re*) 144 A.R. 182, 22 C.B.R. (3d) 275, [1994] 1 C.T.C. 252 (Alta. Q.B.) — referred to
Nfld. Telephone Co. v. TAS Communications Systems Ltd., 80 N.R. 321, [1987] 2 S.C.R. 466, 45 D.L.R. (4th) 570, 85 N.B.R. (2d) 183, 68 Nfld. & P.E.I.R. 1, 29 Admin. L.R. 22, 20 C.P.R. (3d) 19, 209 A.P.R. 1, 217 A.P.R. 183 (S.C.C.) — referred to
R. v. McClure, 2001 SCC 14, 151 C.C.C. (3d) 321, 195 D.L.R. (4th) 513, 40 C.R. (5th) 1, 266 N.R. 275, [2001] 1 S.C.R. 445, 142 O.A.C. 201 (S.C.C.) — referred to
Rahall v. McLennan (1996), 190 A.R. 183, 44 C.B.R. (3d) 191, [1997] 1 W.W.R. 316, 44 Alta. L.R. (3d) 179 (Alta. Q.B.) — referred to
Shepherd (Trustee of) v. Shepherd (1997), 50 C.B.R. (3d) 115 (Ont. Gen. Div. [Commercial List]) — referred to
Solosky v. Canada (1979), (sub nom. *Solosky v. R.*) [1980] 1 S.C.R. 821, 105 D.L.R. (3d) 745, 16 C.R. (3d) 294, 30 N.R. 380, 50 C.C.C. (2d) 495 (S.C.C.) — referred to
Taberner Investments Ltd. v. Price Waterhouse, 2000 CarswellOnt 2427 (Ont. S.C.J.) — referred to
Taylor Ventures Ltd., Re (1999), 60 B.C.L.R. (3d) 348, 9 C.B.R. (4th) 136 (B.C. S.C.) — referred to
164461 Canada Inc., Re, 1996 CarswellQue 1235, 24 C.B.R. (4th) 147 (C.S. Que.) — referred to

Statutes considered by *Conrad J.A.* (*Wittman J.A.* concurring):

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 2(1) "property" — considered

s. 16 — referred to

s. 16(3) — considered

s. 16(5) — considered

s. 18 — referred to

s. 20(1) — referred to

s. 21 — referred to

s. 34 — considered

s. 67 — referred to

s. 67(1) — considered

s. 71(2) — considered

s. 163(1) — considered

s. 164(1) — considered

s. 167 — considered

Bankruptcy Code, 11 U.S.C. 1982

s. 542(e) — referred to

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

s. 311(1) — referred to

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

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 2(1) "property" — referred to

s. 16(3) — considered

s. 67(1) — referred to

s. 71(2) — considered

s. 163(1) — considered

s. 164 — referred to

s. 164(1) — considered

s. 167 — considered

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

s. 311(1) — referred to

APPEAL by trustee in bankruptcy from judgment reported at 1998 CarswellAlta 1061, 168 D.L.R. (4th) 215, 6 C.B.R. (4th) 32, 27 C.P.C. (4th) 51, (sub nom. *Bre-X Minerals Ltd. (Bankrupt), Re*) 233 A.R. 357 (Alta. Q.B.), dismissing application for declaration that trustee had authority to waive bankrupt company's solicitor-client privilege.

***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.

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Tab 22

2013 ONSC 4543
Ontario Superior Court of Justice [Commercial List]

Katz, Re

2013 CarswellOnt 9050, 2013 ONSC 4543, [2013] O.J. No. 3113,
229 A.C.W.S. (3d) 987, 2 C.B.R. (6th) 294, 91 E.T.R. (3d) 284

In the Matter of the Bankruptcy of Michael Katz

D.M. Brown J.

Heard: July 2, 2013
Judgment: July 3, 2013
Docket: 31-435114

Counsel: F. Tayar for Bankrupt, Michael Katz
B. Jaeger for Trustee, Sheriff & Sole Inc.
B. Morris for Opposing Creditor, Joe Morra
H. Fulchini, Opposing Creditor for himself

Subject: Civil Practice and Procedure; Insolvency; Estates and Trusts; Evidence

Headnote

Bankruptcy and insolvency --- Practice and procedure in courts — Discovery and examinations — Evidentiary issues — Privilege — Miscellaneous

Solicitor-client privilege — During bankruptcy proceedings, bankrupt gave conflicting responses regarding income, including whether family trust existed of which he was beneficiary — Bankrupt had meeting with family lawyer regarding family matters, and family lawyer claimed she could not remember substance of meeting and no longer worked at firm so she did not have relevant file — Voir dire held regarding file of meeting with family lawyer — Information ordered disclosed — Family lawyer ordered to answer questions concerning any information in her possession about existence and location of bankrupt's property prior to date of receiving order, as that information did not fall within scope of solicitor-client privilege — Solicitor who acted for bankrupt prior to receiving order can be compelled to disclose information about bankrupt, provided that in so doing so solicitor does not reveal communications made for purpose of giving legal advice — Solicitor-client privilege should not be invoked to allow bankrupt to circumvent Bankruptcy and Insolvency Act — Bankrupt's sister was present at meeting with family lawyer, which could vitiate solicitor-client privilege.

Table of Authorities

Cases considered by *D.M. Brown J.*:

Bre-X Minerals Ltd., Re (2001), 29 C.B.R. (4th) 1, 2001 ABCA 255, 2001 CarswellAlta 1363, 12 C.P.C. (5th) 41, 206 D.L.R. (4th) 280, [2002] 2 W.W.R. 71, (sub nom. *Bre-X Minerals Ltd. (Bankrupt), Re)* 293 A.R. 73, (sub nom. *Bre-X Minerals Ltd. (Bankrupt), Re)* 257 W.A.C. 73, 97 Alta. L.R. (3d) 1 (Alta. C.A.) — considered

Clarkson Co. v. Chilcott (1983), (sub nom. *Dilawri, Re)* 47 C.B.R. (N.S.) 93, 37 C.P.C. 218, 1983 CarswellOnt 190 (Ont. Bktcy.) — considered

Clarkson Co. v. Chilcott (1984), 48 O.R. (2d) 545, 53 C.B.R. (N.S.) 251, 6 O.A.C. 291, 13 D.L.R. (4th) 481, 1984 CarswellOnt 187, 13 C.R.R. 41 (Ont. C.A.) — referred to

Kaiser, Re (2012), 97 C.B.R. (5th) 37, (sub nom. *Kaiser (Bankrupt), Re)* 300 O.A.C. 161, 2012 ONCA 838, 2012 CarswellOnt 16539, 113 O.R. (3d) 308, 30 C.P.C. (7th) 223 (Ont. C.A.) — considered

Laprairie Shopping Centre Ltd., Re (1998), [1998] R.J.Q. 448, 1998 CarswellQue 118 (Que. C.A.) — considered

Maranda c. Québec (Juge de la Cour du Québec) (2003), 178 C.C.C. (3d) 321, (sub nom. *Maranda v. Richer)* 232 D.L.R. (4th) 14, 15 C.R. (6th) 1, (sub nom. *Maranda v. Richer)* [2003] 3 S.C.R. 193, 2003 SCC 67, 2003 CarswellQue

2477, 2003 CarswellQue 2478, (sub nom. *Maranda v. Leblanc)* 311 N.R. 357, 113 C.R.R. (2d) 76 (S.C.C.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 158 — considered

s. 158(a) — considered

s. 158(b) — considered

s. 161 — referred to

s. 163 — considered

s. 164 — considered

s. 170 — referred to

s. 198(2) — referred to

VOIR DIRE to consider admissibility of evidence.

***D.M. Brown J.*:**

I. Admissibility of information in possession of a bankrupt's former solicitor at a discharge hearing under section 170 of the Bankruptcy and Insolvency Act

1 By receiving order made May 27, 2004, Michael Katz was adjudged bankrupt. A contested bankruptcy discharge hearing commenced before me yesterday. An issue arose as to whether information in the possession of the bankrupt's former matrimonial lawyer about his pre-bankruptcy assets was cloaked with solicitor-client privilege.

II. Background evidence

2 During the course of his evidence-in-chief Mr. Katz was asked to explain entries on several pre-bankruptcy net worth statements which he had provided to lending institutions to secure financing for various residential real estate developments his business was undertaking. The entries noted that he received significant annual income (about $150,000) from a "family trust". In chief Mr. Katz testified that he had made a mistake in describing that income as coming from a "family trust", since none had ever existed. He stated that the money represented an allowance which his mother gave him. His mother, Roslyn Fingold, is a Toronto real estate broker.

3 On his October 6, 2007 Statement of Affairs the bankrupt did not disclose the existence of a beneficial interest in a family trust or any income received by him under such a trust. So, too, on his March 2, 2011 section 161 examination by the Official Receiver, the bankrupt did not identify any family trust as a source of income.

4 On cross-examination by Mr. Morris the bankrupt acknowledged that a year or so before his bankruptcy he had experienced matrimonial difficulties with his wife, Skye Katz, and had gone to see a matrimonial lawyer, Sandra Morris. Katz was accompanied by his sister, Cathy, on that visit.

5 Katz was asked whether he had discussed his property with Ms. Morris. Katz testified that he did not remember the appointment or its context, but his sister remained in the room during his meeting with the lawyer. Counsel for Katz then objected to the posing of any questions about what was discussed at that meeting.

6 I ordered the holding of a *voir dire*.

7 On the *voir dire* Katz testified that his purpose in visiting Ms. Morris was to obtain legal advice about his separation from Skye. He could not remember what was discussed nor could he remember whether he received any legal advice. Katz testified that he did not see Ms. Morris again.

8 Sandy Morris testified on the *voir dire*. Back in 2003 she was working as a matrimonial lawyer at the Wilson, Christen law firm. She testified that she did not have any independent recollection about the specifics of her discussion with Katz at that time, including whether they had discussed his assets or any trust in his favour. Ms. Morris, who appeared in response to a summons, stated that she was not able to bring her client file with her to court because she had left the Wilson, Christen firm and was told by the firm that it could not release the file to her without the authorization of the client.

9 Counsel for the opposing creditor submitted that any disclosure made by Katz to Ms. Morris about his assets back in 2003, specifically whether he was the beneficiary of a family trust which paid him a monthly amount, was not protected by solicitor-client privilege and requested that I order the Wilson, Christen law firm to release Katz's file so that non-privileged documents could be produced and Ms. Morris could refresh her memory. Katz's counsel opposed that request, submitting that any disclosure by Katz of his assets to Ms. Morris during that meeting would be cloaked with solicitor-client privilege.

III. Analysis

A. The principles of law

10 Under Canadian law, solicitor-client privilege is that of the client, in this case the bankrupt, and the *Bankruptcy and Insolvency Act* does not attempt to displace that privilege by authorizing the trustee to waive it.[1] In the *Bre-X Minerals* case the Alberta Court of Appeal observed that the common law was evolving in a direction which did not favour recognizing an exception to solicitor-client privilege in favour of trustees generally,[2] and it adopted the approach taken to the issue by the Ontario Court of Appeal in its 1984 decision in *Clarkson Co. v. Chilcott*,[3] commenting that that decision had correctly balanced the importance of solicitor-client privilege against creditor rights.[4]

11 The *Chilcott* case involved a motion by a trustee for an order that the bankrupt's lawyer attend to answer questions relating to the bankrupt's property. In the first instance Ewaschuk J. granted the order sought for two reasons: (i) questions relating to the bankrupt's acquisition, location and disposition of property did not attract any privilege "being objective acts and transactions and not confidential communications"; (ii) the trustee enjoyed the power to waive privilege as regards the client's instructions regarding the property, including the purpose for which the property was acquired or disposed.[5]

12 On appeal, the Court of Appeal agreed that the solicitor "was properly ordered to reattend before the special examiner to answer questions regarding his bankrupt client's affairs".[6] The Court of Appeal disagreed that the trustee possessed the power to waive the bankrupt's solicitor-client privilege with respect to legal advice given to the bankrupt concerning his former property.[7] The Court of Appeal stated:

> In our view, the [bankrupt's solicitor] can be compelled to disclose all information regarding the bankrupt's affairs, transactions and the whereabouts of his property, etc., which do not require the disclosure of communications made to the [bankrupt's solicitor] for the purpose of giving legal advice. These communications with respect to property are not privileged. All questions contained in sch. "A" to the order of Mr. Justice Ewaschuk can be read as falling in this category of non-privileged information and to that extent they should be answered by the [bankrupt's solicitor]. In that respect, there is no privilege to be waived by the client or by the trustee.

> The privilege attaches, however, to all information requested by the client for the purpose of obtaining professional advice and assistance and given for that purpose... [8]

13 In his dissent in the *Bre-X Minerals Ltd.* case, LoVecchio J., in referring to sections 163 and 164 of the *BIA*, stated that those sections allowed for the examination of a solicitor and "a solicitor may be compelled to disclose all information relating to the transactions of the bankrupt or the location of the bankrupt's property". [9]

14 Louise Lalonde, in an informative article entitled, *The Bankrupt's Right to Solicitor-Client Privilege: An Unbreakable Cone of Silence or Has the Last Word Been Said?*, [10] reviewed the jurisprudence on the discoverability of transactions by bankrupts with third parties and observed that the Quebec Court of Appeal, in *Laprairie Shopping Centre Ltd., Re*, [11] had reached a similar result as had the Court of Appeal in *Chilcott*.

15 More recent jurisprudence has not eroded the approach adopted in the *Chilcott* case. In *Maranda c. Québec (Juge de la Cour du Québec)* the Supreme Court of Canada observed regarding solicitor-client privilege that:

> The protection conferred by the privilege covers primarily acts of communication engaged in for the purpose of enabling the client to communicate and obtain the necessary information or advice in relation to his or her conduct, decisions or representation in the courts. The distinction is made in an effort to avoid facts that have an independent existence being inadmissible in evidence...It recognizes that not everything that happens in the solicitor-client relationship falls within the ambit of privileged communication, as has been held in cases where it was found that counsel was acting not in that capacity but simply as a conduit for transfers of funds (*Re Ontario Securities Commission and Greymac Credit Corp.* (1983), 41 O.R. (2d) 328 (Div. Ct.); *Joubert*, *supra*). [12]

16 Recently, in *Kaiser, Re*, the Court of Appeal held that "administrative information" relating to the solicitor-client relationship, such as who was paying the legal bills of the bankrupt's counsel, was presumptively privileged, a privilege which could only be rebutted by showing that disclosure of the information would not lead to the revelation of confidential solicitor-client communications or the requested information was not linked to the merits of the case and its disclosure would not prejudice the client. [13]

17 From these cases about the scope of the solicitor-client privilege enjoyed by a bankrupt I conclude that a solicitor who acted for a bankrupt prior to the making of a receiving order can be compelled to disclose information about a bankrupt's property — what assets the bankrupt owned or possessed an interest in - provided that in so doing the solicitor does not reveal communications made for the purpose of giving legal advice. So, for example, if prior to the making of a receiving order the bankrupt told his lawyer that he owned Asset A, then in the bankruptcy proceedings the solicitor could be compelled to disclose that fact. The solicitor could not be asked to disclose what advice he may have given about what to do with or how to treat Asset A, but the fact of the existence of Asset A would be discoverable.

18 I think this conclusion follows not only from the focus of the privilege's protection on the communications between client and lawyer for the purpose of receiving legal advice, but also from the related principle that solicitor-client privilege may not be invoked for the purpose of assisting in the commission of a crime, suppressing real evidence of a crime or perpetrating tortious conduct. [14] Section 158(a) of the *BIA* imposes a statutory duty on the bankrupt to "make discovery of and deliver all his property that is under his possession or control to the trustee..." and section 158(b) requires him to "deliver to the trustee all books, records, documents, writings and paper...in any way relating to his property or affairs". The failure of the bankrupt to do any of the things required of him under *BIA* s. 158, without reasonable cause, constitutes the commission of an offence. [15] To permit a solicitor to refuse to answer questions about the existence and location of the bankrupt's property would, in its effect, enable solicitor-client privilege to be invoked to assist the bankrupt in committing an offence — i.e. failing to comply with the duties imposed by section 158 of the *BIA*.

B. Application to the facts

19 Turning to the facts of this case, I conclude that Ms. Morris must answer questions concerning any information in her possession about the existence and location of the bankrupt's property prior to the date of the receiving order because that information does not fall within the scope of solicitor-client privilege.

20 I would also note that in his evidence Mr. Katz testified that his sister, Cathy, had attended his meeting with Ms. Morris. The presence of unnecessary third parties when the communication is made to or from the lawyer may serve to vitiate the solicitor-client privilege because the presence of an individual whose presence is not essential to the consultation leads to the presumption that the communication was not intended to be made in confidence. [16]

21 Ms. Morris has testified that she has no independent recollection of whether she discussed with Mr. Katz the assets which he owned at the time of their meeting. She stated she would need to look at her file in order to ascertain whether she had recorded any such information. Since Mr. Katz's client file remains with the Wilson, Christen firm, it follows that I order that firm to make that client file available to Ms. Morris for the purpose of enabling her to give evidence at this discharge hearing. I will ask counsel for their submissions on how this hearing should proceed in light of my ruling.

Evidence admitted.

Footnotes

1 *Bre-X Minerals Ltd., Re*, 2001 ABCA 255 (Alta. C.A.), para. 35

2 *Ibid.*, para. 45.

3 (1983), 47 C.B.R. (N.S.) 93 (Ont. Bktcy.), appeal dismissed (1984), 48 O.R. (2d) 545 (Ont. C.A.).

4 *Bre-X Minerals*, *supra.*, para. 38.

5 *Chilcott*, *supra.*, Ont. S.C., para. 9.

6 *Chilcott*, *supra.*, OCA, para. 6.

7 *Ibid.*, para. 8.

8 *Ibid.*, paras. 12 and 13. Unfortunately the reported reasons did not reproduce Schedule "A" to the decision of the motions judge.

9 *Bre-X Minerals Ltd.*, *supra.*, para. 82.

10 *2006 Annual Review of Insolvency Law* (Toronto: Carswell, 2007) 672.

11 [1998] R.J.Q. 448 (Que. C.A.), para. 47.

12 [2003] 3 S.C.R. 193 (S.C.C.), para. 30.

13 2012 ONCA 838 (Ont. C.A.), para. 30.

14 Sopinka, Lederman & Bryant, *The Law of Evidence in Canada, Third Edition* (Toronto: LexisNexis, 2009), §14.75 and 14.76.

15 *BIA*, s. 198(2)

16 Sopinka, Lederman & Bryant, *supra.*, §14.49.

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Tab 23

2003 BCSC 376
British Columbia Supreme Court [In Chambers]

Doman Industries Ltd., Re

2003 CarswellBC 538, 2003 BCSC 376, [2003] B.C.W.L.D. 336, [2003] B.C.J. No. 562, 121 A.C.W.S. (3d) 276, 14 B.C.L.R. (4th) 153, 41 C.B.R. (4th) 29

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

AND IN THE MATTER OF THE COMPANY ACT R.S.B.C. 1996, c. 62

AND IN THE MATTER OF THE CANADA BUSINESS CORPORATIONS ACT R.S.C. 1985, c. C-44

AND IN THE MATTER OF THE PARTNERSHIP ACT R.S.B.C. 1996, c. 348

AND IN THE MATTER OF DOMAN INDUSTRIES LIMITED, ALPINE PROJECTS LIMITED, DIAMOND LUMBER SALES LIMITED, DOMAN FOREST PRODUCTS LIMITED, DOMAN'S FREIGHTWAYS LTD., DOMAN HOLDINGS LIMITED, DOMAN INVESTMENTS LIMITED, DOMAN LOG SUPPLY LTD., DOMAN — WESTERN LUMBER LTD., EACOM TIMBER SALES LTD., WESTERN FOREST PRODUCTS LIMITED, WESTERN PULP INC., WESTERN PULP LIMITED PARTNERSHIP, and QUATSINO NAVIGATION COMPANY LIMITED (PETITIONERS)

Tysoe J.

Heard: March 7, 2003
Judgment: March 7, 2003
Docket: Vancouver L023489

Counsel: M.A. Fitch, Q.C., S. Martin, R. Millar for Petitioners
G. Morawetz, R. Chadwick, J.J.L. Hunter, Q.C. for Ad Hoc Committee of Senior Secured Noteholders
J.F. Dixon for Wells, Fargo, National Association
G.K. Macintosh, Q.C., R.P. Sloman for Herb Doman
R.D. Leong for Attorney General of Canada
W.C. Kaplan, Q.C., P.L. Rubin for CIT Business Credit Canada Inc.
J.I. McLean for Monitor, KPMG Inc.
D.I. Knowles, Q.C., M. Buttery, I. Nordholm for Brascan Financial, Merrill Lynch, Oppenheimer Funds
D.J. Hatter, R. Butler for Her Majesty the Queen in Right of British Columbia
P. Macdonald, G. Gehlen for Toronto Dominion Asset Management Inc., TD Securities Inc., Tordom Co.
K. Zimmer for Petro-Canada
W. Skelly for Pulp, Paper & Woodworkers of Canada, Locals 3 & 8

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

Headnote

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Miscellaneous issues

Section 11(4) of Companies' Creditors Arrangement Act does not authorize courts to stay proceedings in respect of defaults or breaches which occur after implementation of reorganization or restructuring plan, even if they arise as result of implementation of plan — Words "staying", "restraining" and "prohibiting" in s. 11(4) of Act are not intended to relieve debtor company from performance of affirmative obligations which arise subsequent to implementation of plan of compromise or arrangement — Section 11(4) of Act does not give courts power to grant permanent injunctions as means to permit debtor company to unilaterally and prospectively vary terms of contract to which it is party.

Table of Authorities

Cases considered by *Tysoe J.*:

Dylex Ltd., Re, 31 C.B.R. (3d) 106, 1995 CarswellOnt 54 (Ont. Gen. Div. [Commercial List]) — referred to

Menegon v. Philip Services Corp., 1999 CarswellOnt 3240, 11 C.B.R. (4th) 262, 39 C.P.C. (4th) 287 (Ont. S.C.J. [Commercial List]) — referred to

Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd., 63 Alta. L.R. (2d) 361, 92 A.R. 81, 72 C.B.R. (N.S.) 1, 1988 CarswellAlta 318 (Alta. Q.B.) — considered

Playdium Entertainment Corp., Re, 2001 CarswellOnt 3893, 18 B.L.R. (3d) 298, 31 C.B.R. (4th) 302 (Ont. S.C.J. [Commercial List]) — distinguished

Playdium Entertainment Corp., Re, 2001 CarswellOnt 4109, 31 C.B.R. (4th) 309 (Ont. S.C.J. [Commercial List]) — followed

Smoky River Coal Ltd., Re, 1999 CarswellAlta 491, 175 D.L.R. (4th) 703, 237 A.R. 326, 197 W.A.C. 326, 71 Alta. L.R. (3d) 1, [1999] 11 W.W.R. 734, 12 C.B.R. (4th) 94, 1999 ABCA 179 (Alta. C.A.) — considered

T. Eaton Co., Re, 1997 CarswellOnt 1914, 46 C.B.R. (3d) 293 (Ont. Gen. Div.) — considered

Westar Mining Ltd., Re, 70 B.C.L.R. (2d) 6, 14 C.B.R. (3d) 88, [1992] 6 W.W.R. 331, 1992 CarswellBC 508 (B.C. S.C.) — referred to

Woodward's Ltd., Re, 17 C.B.R. (3d) 236, 79 B.C.L.R. (2d) 257, 1993 CarswellBC 530 (B.C. S.C.) — considered

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 11 — referred to

s. 11(4) — considered

s. 11.2 [en. 1997, c. 12, s. 124] — referred to

Rules considered:

Rules of Court, 1990, B.C. Reg. 221/90

Generally — referred to

Words and phrases considered:

staying, restraining and prohibiting

[The words "staying", "restraining" and "prohibiting" in s. 11(4) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 are] not intended . . . to relieve the debtor company from the performance of affirmative obligations which arise subsequent to the implementation of the plan of compromise or arrangement.

APPLICATION by debtor group of companies for order authorizing calling of creditor meetings to consider plan of arrangement; APPLICATION by group of secured creditors for order allowing them to vote on plan, order authorizing them to file own plan and other orders relating to invalidity of plan.

***Tysoe J.*:**

1 There are two competing motions before the Court in these proceedings under the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "*CCAA*"). The first is a motion of the Petitioners (the "Doman Group") for an order authorizing the calling of creditor meetings to consider a plan of compromise or arrangement prepared by the Doman Group (the "Reorganization Plan" or the "Plan"). The second motion is an application by a group of secured creditors called the Ad Hoc Committee of Senior Secured Noteholders (the "Senior Secured Noteholders Committee") for numerous orders, including orders relating to the invalidity of the Reorganization Plan, allowing the Senior Secured

Noteholders to vote on the Plan and authorizing the Senior Secured Noteholders Committee to file its own secured creditor Plan.

2 One of the arguments which the Senior Secured Noteholders Committee wished to advance related to the constitutionality of the Court varying the terms of a contract in the absence of enabling provincial legislation. The Senior Secured Noteholders Committee applied to adjourn all of the applications so that the necessary notice for constitutional questions to the Attorneys General of British Columbia and Canada could expire. I refused the adjournment on the basis that the constitutional question can be argued upon the expiry of the notice periods if it is still necessary to do so. Accordingly, my rulings at this stage are subject to the constitutional challenge by the Senior Secured Noteholders Committee and nothing I say in these Reasons for Judgment should be construed as a determination of the constitutional validity of such rulings.

3 The Doman Group has the following four principal types of creditors:

(a) the Senior Secured Noteholders which are owed US$160 million and who hold security over most, but not all, of the fixed assets of the Doman Group;

(b) the Unsecured Noteholders which are owed US$513 million;

(c) the lender which provides the Doman Group with an operating line of credit and which holds security against its current assets; and

(d) unsecured trade creditors which are owed in the range of $20 to $25 million.

4 The Reorganization Plan seeks to compromise only the indebtedness of the Unsecured Noteholders and the unsecured trade creditors. It is proposed that the unsecured trade creditors will be paid in full up to an aggregate ceiling or cap amount of $23.5 million. The Reorganization Plan provides that the Unsecured Noteholders are to receive US $112,860,000 Junior Secured Notes plus 85% of the shares in the Doman Group (with the existing shareholders retaining the remaining 15% of the shares). The Junior Secured Notes are to be secured in second position against the assets subject to the security of the Senior Secured Noteholders.

5 The Senior Secured Notes were issued pursuant to a Trust Indenture dated as of June 18, 1999 (the "Trust Indenture"). The principal amount of the Senior Secured Notes is due on July 1, 2004. The Doman Group is in default of the payment of the interest due on the Senior Secured Notes but it is intended that the overdue interest be paid upon implementation of the Reorganization Plan. The Trust Indenture has the usual types of events of default, including the commencement of proceedings under the *CCAA*, non-payment of principal or interest on indebtedness owed by the Doman Group to the Senior Secured Noteholders or to other parties and the failure to remedy a breach of any of the provisions of the Trust Indenture within 30 days after notice of the breach has been given to the Doman Group. It also has the usual provision enabling the Trustee under the Trust Indenture or a specified percentage of the holders of the Senior Secured Notes to accelerate payment of the indebtedness upon the occurrence of an event of default and to thereby make all monies owing on the notes to be immediately due and payable.

6 Sections 4.13 and 4.16 of the Trust Indenture are also relevant to the present applications. Section 4.13 reads as follows:

(a) The Company shall not, and shall not permit any of its Restricted Subsidiaries to, directly or indirectly, create, incur, assume or suffer to exist any Lien on any property or asset now owned or hereafter acquired, or any income or profits therefrom or assign or convey any right to receive income therefrom, except Permitted Liens (provided that Liens on Note Collateral or any portion thereof shall be governed by clause (b) of this Section 4.13) unless (i) in the case of Liens securing Indebtedness which is subordinated to the Notes and the Guarantees, the Notes and the Guarantees are secured by a Lien on such property, assets, income, profits or rights that is senior in priority to such Liens and (ii) in all other cases, the Notes and the Guarantees are equally and ratably secured.

> (b) The Company shall not, and shall not permit of its Restricted Subsidiaries to, directly or indirectly, create, incur, assume or suffer to exist any Lien on any property or asset now owned or hereafter acquired that constitutes Note Collateral, any income or profits from any Note Collateral or to assign or convey any right to receive income from any Note Collateral, except for Permitted Note Collateral Liens.

Section 4.16 reads, in part, as follows:

> Upon the occurrence of a Change of Control, each Holder of Notes shall have the right to require the Company to repurchase all or any part (equal to U.S. $1,000 or an integral multiple thereof) of such Holder's Notes pursuant to the offer described below (the "Change of Control offer") at an offer price in cash equal to 101% of the aggregate principal amount thereof plus accrued and unpaid interest, if any, and Liquidated Damages, if any, to the date of purchase (the "Change of Control Payment"). Within 10 days following any Change of Control, the Company shall mail a notice to each Holder stating: (1) that the Change of Control offer is being made pursuant to the covenant entitled "Change of Control" and that all Notes tendered will be accepted for payment; (2) the purchase price and the purchase date, which will be no earlier than 30 days nor later than 40 days from the date such notice is mailed and which shall be the same date as the Change of Control Payment Date with respect to the 1994 Notes and the 1997 Notes (the "Change of Control Payment Date"); ...
>
> On the Change of Control Payment Date, the Company shall, to the extent lawful, (1) accept for payment Notes or portions thereof tendered pursuant to the Change of Control Offer, (2) deposit with the Paying Agent an amount equal to the Change of Control Payment in respect of all Notes or portions thereof so tendered and (3) deliver or cause to be delivered to the Trustee the Notes so accepted ...

7 The Reorganization Plan does not seek to compromise the indebtedness owed to the Senior Secured Noteholders. However, the Senior Secured Noteholders maintain that they are affected or prejudiced by the Reorganization Plan. They point to sections 4.12, 6.2 and 6.3 of the Reorganization Plan, the relevant portions of which read as follows:

> **4.12 Waiver of Defaults and Permanent Injunction**
>
> From and after the Effective Date:
>
>> (a) all Creditors and other Persons (including Unaffected Creditors) shall be deemed to have waived any and all defaults of the Doman Entities then existing or previously committed by the Doman Entities or caused by the Doman Entities, or non-compliance with any covenant, warranty, representation, term, provision, condition or obligation, express or implied, in any contract, credit document, agreement for sale, lease or other agreement, written or oral, and any and all amendments or supplements thereto, existing between such Person and the Doman Entities, including a default under a covenant relating to any other affiliated or subsidiary company of Doman other than the Doman Entities, and any and all notices of default and demands for payment under any instrument, including any guarantee, shall be deemed to have been rescinded;
>>
>> (b) a permanent injunction shall be pronounced on the terms of the Final Order against Creditors and all other Persons (including Unaffected Creditors) having contractual relationships with any of the Doman Entities with respect to the exercise of any right or remedy contained in the instruments evidencing such contractual relationships or at law generally, which might otherwise be available to such Creditors or other Persons as a result of the filing of the CCAA Proceedings, the content of the Plan, implementation of the Plan, any action taken by the Doman Entities or any third party pursuant to the Plan or the Final Order either before or after the Plan Implementation Date, or any other matter whatsoever relating to the CCAA Proceedings, the Plan, or the transactions contemplated by the Plan; and
>>
>> (c) the Doman Entities may in all respects carry on as if the defaults, non-compliance, rights and remedies referred to in this section 4.12 had not occurred.

6.2 Effect of Final Order:

In addition to sanctioning the Plan, the Final Order shall, among other things:

. . . . .

(f) confirm that all executory contracts, security agreements and other contractual relationships to which the Doman Entities are parties are in full force and effect notwithstanding the CCAA Proceeding or this Plan and its attendant compromises, and that no Person party to such an executory contract, security agreement or other contractual relationship shall be entitled to terminate or repudiate its obligation under such contract or agreement, or to the benefit of any right or remedy, by reason of the commencement of the CCAA Proceeding or the content of the Plan, the Change of control of Doman resulting from the Plan, the compromises extended under the Plan, the issuance of the Junior Secured Notes, or any other matter contemplated under the Plan or the Final Order; and

(g) confirm and give effect to the waivers, permanent injunctions and other provisions contemplated by section 4.12 of the Plan.

6.3 Conditions Precedent to Implementation of Plan:

The implementation of this Plan shall be conditional upon the fulfilment of the following conditions:

(a) Court Approval

Pronouncement of the Final Order by the Court on the terms contemplated by Section 6.2 and otherwise acceptable to the Doman Entities.

The term "Unaffected Creditors" used in Section 4.12 includes the Senior Secured Noteholders.

8 The application of the Doman Group is relatively limited in scope because it simply seeks authorization to hold creditor meetings to consider the Reorganization Plan. However, it is common ground that I should not authorize the holding of the creditor meetings if the Reorganization Plan cannot be sanctioned by the Court following the holding of the creditor meetings or if the implementation of the Reorganization Plan is contingent on the Court granting an order which it has no jurisdiction to make or would not otherwise make.

9 Counsel for the Doman Group submitted that the sole issue is whether the Court has the jurisdiction to grant a stay under s. 11(4) of the *CCAA* in the form of the permanent injunction specified under clause (b) of the Section 4.12 of the Reorganization Plan. I do not agree. In particular, clause (a) of Section 4.12 purports to bind Unaffected Creditors, which include the Senior Secured Noteholders, by deeming them to have waived all defaults under instruments between them and the Doman Group. I agree with the counsel for the Senior Secured Noteholders Committee that creditors of debtor company under the *CCAA* cannot be bound by the provisions of a plan of compromise or arrangement if they have not been given the opportunity to vote on it: see *Menegon v. Philip Services Corp.*, [1999] O.J. No. 4080 (Ont. S.C.J. [Commercial List]) at para. 38. It would be inappropriate for me to authorize the calling of creditor meetings to consider the Reorganization Plan when I know that this Court would refuse to sanction it on the basis that it purports to bind parties who were not given the opportunity to vote on it.

10 However, my conclusion in this regard does not mean that I should accede to the request of the Senior Secured Noteholders Committee for the right to vote on the Reorganization Plan. In view of the submission made by the counsel for the Doman Group that the Plan was not intended to affect the rights of the Senior Secured Noteholders, I believe that the Doman Group should first be given the opportunity to propose a revised Reorganization Plan which does not include reference to Unaffected Creditors in clause (a) of Section 4.12 or any other provision which purports to bind parties who are not given the opportunity to vote on the Plan.

11 I next turn my attention to clause (b) of Section 4.12, which is the provision upon which I believe counsel for the Doman Group is relying to prevent Senior Secured Noteholders from acting on their security following the implementation of the Reorganization Plan. Although the permanent injunction contemplated in this clause is mentioned in the Reorganization Plan, it is not, strictly speaking, part of the Plan. Rather, the granting of the injunction is a condition precedent in the implementation of the Plan. The result of this distinction is that the Plan itself does not purport to bind the Senior Secured Noteholders in this regard and they are not entitled to vote on the Plan. Thus, the question becomes whether the Court has the jurisdiction to grant such an injunction because, if it does not have the jurisdiction, there would be no point in convening creditor meetings to consider a plan containing a condition precedent which cannot be fulfilled.

12 The Court is given the power to grant stays of proceedings by s. 11(4) of the *CCAA*, which reads as follows:

> (4) A court may, on an application in respect of a company other than an initial application, make an order on such term as it may impose,
>
>> (a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
>>
>> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>>
>> (c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

13 Since the re-emergence of the *CCAA* in the 1980s, the Courts have utilized the stay provisions of the *CCAA* in a variety of situations for a purpose other than staying creditors from enforcing their security or otherwise preventing creditors from attempting to gain an advantage over other creditors. One of the seminal decisions is *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 1 (Alta. Q.B.), where the Court stayed the ability of a joint venture partner of a debtor company from relying on the insolvency of the debtor company to replace it as the operator under a petroleum operating agreement.

14 Two other prominent examples are *T. Eaton Co., Re* (1997), 46 C.B.R. (3d) 293 (Ont. Gen. Div.) and *Playdium Entertainment Corp., Re* (2001), 31 C.B.R. (4th) 302 (Ont. S.C.J. [Commercial List]), as supplemented at (2001), 31 C.B.R. (4th) 309 (Ont. S.C.J. [Commercial List]). In the *T. Eaton Co.* case, tenants in shopping centres in which Eaton's was also a tenant were prevented during the restructuring period from terminating their leases on the basis of co-tenancy clauses in their leases requiring anchor stores such as Eaton's to stay open. In the *Playdium Entertainment Corp.* decision, the Court approved an assignment of an agreement in conjunction with a sale in a failed *CCAA* proceeding where the other party to the agreement, which had a contractual right to consent to an assignment, was objecting to the assignment. As the Court in the *Playdium Entertainment Corp.* case relied on s. 11(4) of the *CCAA*, I assume that the Order prevented the other party to the agreement from terminating the assigned agreement as a result of the failure to obtain its consent to the assignment. I was also referred to my decision in *Woodward's Ltd., Re* (1993), 17 C.B.R. (3d) 236 (B.C. S.C.), where I relied on the inherent jurisdiction of the court to stay the calling on letters of credit issued by third parties at the instance of the debtor company.

15 The law is clear that the court has the jurisdiction under the *CCAA* to impose a stay during the restructuring period to prevent a creditor relying on an event of default to accelerate the payment of indebtedness owed by the debtor company or to prevent a non-creditor relying on a breach of a contract with the debtor company to terminate the contract. It is also my view that the court has similar jurisdiction to grant a permanent stay surviving the restructuring of the debtor company in respect of events of default or breaches occurring prior to the restructuring. In this regard, I agree with the following reasoning of Spence J. at para. 32 of the supplementary reasons in *Playdium Entertainment Corp.* :

> In interpreting s. 11(4), including the "such terms" clause, the remedial nature of the CCAA must be taken into account. If no permanent order could be made under s. 11(4) it would not be possible to order, for example, that the insolvency defaults which occasioned the CCAA order could not be asserted by the Famous Players after the stay period. If such an order could not be made, the CCAA regime would prospectively be of little or no value because even though a compromise of creditor claims might be worked out in the stay period, Famous Players (or for that matter, any similar third party) could then assert the insolvency default and terminate, so that the stay would not provide any protection for the continuing prospects of the business. In view of the remedial nature of the CCAA, the Court should not take such a restrictive view of the s. 11(4) jurisdiction.

16 Spence J. made the above comments in the context of a third party which had a contract with the debtor company. In my opinion, the reasoning applies equally to a creditor of the debtor company in circumstances where the debtor company has chosen not to compromise the indebtedness owed to it. The decision in *Smoky River Coal Ltd., Re*, 1999 ABCA 179 (Alta. C.A.) is an example of a permanent stay being granted in respect of a creditor of the restructuring company.

17 Accordingly, it is my view that the court does have the jurisdiction to grant a permanent stay preventing the Senior Secured Noteholders and the Trustee under the Trust Indenture from relying on events of default existing prior to or during the restructuring period to accelerate the repayment of the indebtedness owing under the Notes. It may be that the court would decline to exercise its jurisdiction in respect of monetary defaults but this point is academic in the present case because the Doman Group does intend to pay the overdue interest on the Notes upon implementation of the Reorganization Plan.

18 The second issue is whether the court has the jurisdiction to grant a permanent stay to prevent the Senior Secured Noteholders and the Trustee under the Trust Indenture from relying on a breach of Section 4.13 of the Trust Indenture to accelerate payment of the indebtedness owed on the Notes. The potential breach under Section 4.13 would be occasioned by the Doman Group granting second ranking security to the Unsecured Noteholders upon the implementation of the Reorganization Plan. I use the term "potential breach" because counsel for the Doman Group takes the position that the granting of this security would not contravene the provisions of Section 4.13.

19 I have decided that I should decline to make a determination of this issue because I did not receive the benefit of detailed submissions on the interpretation of Section 4.13 and the defined terms used in that Section. Counsel for the Doman Group simply argued that the wording was circular or ambiguous and noted that the definition of Permitted Indebtedness could include a refinancing of the Unsecured Notes. Counsel for the Senior Secured Noteholders Committee took the position, without elaboration, that Section 4.13 would be breached if the proposed security were to be granted. If the granting of the security would not contravene Section 4.13, then it would not be necessary for the court to grant a permanent stay preventing the acceleration of the indebtedness owing on the Notes as a result of the granting of the security and the issue would be academic. In my opinion, it is not appropriate for me to decide a potentially academic issue and I decline to do so.

20 The third issue is whether the court has the jurisdiction to effectively stay the operation of Section 4.16 of the Trust Indenture. Although I understand that there is an issue as to whether the giving of 85% of the equity in the Doman Group to the Unsecured Noteholders as part of the reorganization would constitute a change of control for the purposes of the current version of the provincial forestry legislation, counsel for the Doman Group conceded that it would constitute a Change of Control within the meaning of Section 4.16.

21 The language of s. 11(4) of the *CCAA*, on a literal interpretation, is very broad and the case authorities have held that it should receive a liberal interpretation in view of the remedial nature of the *CCAA*. However, in my opinion, a liberal interpretation of s. 11(4) does not permit the court to excuse the debtor company from fulfilling its contractual obligations arising after the implementation of a plan of compromise or arrangement.

22 In my view, there are numerous purposes of stays under s. 11 of the *CCAA*. One of the purposes is to maintain the status quo among creditors while a debtor company endeavours to reorganize or restructure its financial affairs. Another purpose is to prevent creditors and other parties from acting on the insolvency of the debtor company or other contractual breaches caused by the insolvency to terminate contracts or accelerate the repayment of the indebtedness owing by the debtor company when it would interfere with the ability of the debtor company to reorganize or restructure its financial affairs. An additional purpose is to relieve the debtor company of the burden of dealing with litigation against it so that it may focus on restructuring its financial affairs. As I have observed above, a further purpose is to prevent the frustration of a reorganization or restructuring plan after its implementation on the basis of events of default or breaches which existed prior to or during the restructuring period. All of these purposes are to facilitate a debtor company in restructuring its financial affairs. On the other hand, it is my opinion that Parliament did not intend s. 11(4) to authorize courts to stay proceedings in respect of defaults or breaches which occur after the implementation of the reorganization or restructuring plan, even if they arise as a result of the implementation of the plan.

23 In the present case, the obligation of the Doman Group to make an offer under Section 4.16 of the Trust Indenture does not arise until ten days after the Change of Control. The Change of Control will occur upon the implementation of the Reorganization Plan, with the result that the obligation of the Doman Group to make the offer does not arise until a point in time after the Reorganization Plan has been implemented. This is a critical difference in my view between this case and the authorities relied upon by the counsel for the Doman Group.

24 Section 11(4) utilizes the verbs "staying", "Restraining" and "prohibiting". These verbs evince an intention of protecting the debtor company from the actions of others, including creditors and non-creditors, while it is endeavouring to reorganize its financial affairs. This wording is not intended, in my view, to relieve the debtor company from the performance of affirmative obligations which arise subsequent to the implementation of the plan of compromise or arrangement. In the context of this case, the Doman Group is endeavouring to rely on s. 11(4) to relieve itself of the obligation to make an offer to repurchase the Senior Secured Notes upon a Change of Control. In my opinion, this goes beyond any liberal interpretation of s. 11(4).

25 Counsel for Doman Group submitted that the proposed injunction is no more than a restriction upon an acceleration clause. Even if that is the case, it is an acceleration clause which does not become operative until after the restructuring has been completed. It is not a provision which the Senior Secured Noteholders are entitled to enforce as a result of an event of a default or breach occurring or existing prior to or during the restructuring period.

26 There is no doubt that courts have power under s. 11(4) to interfere with the contractual relations during the restructuring period. It is my opinion, however, that s. 11(4) does not give the power to courts to grant permanent injunctions as a means to permit a debtor company to unilaterally and prospectively vary the terms of a contract to which it is a party.

27 Counsel for the Doman Group also submitted that the court has the inherent jurisdiction to restrain the Doman Group from making the offer under Section 4.16 of the Trust Indenture, much in the same way as I exercised the court's inherent jurisdiction in *Woodward's Ltd.*, prior to the enactment of s. 11.2 of the *CCAA* to restrain third parties from calling on letters of credit issued by a financial institution at the instance of the debtor company. The court has the inherent jurisdiction during the restructuring period to "fill in gaps" in the *CCAA* or to "flesh out the bare bones" of the *CCAA* in order to give effect to its objects: see *Westar Mining Ltd., Re* (1992), 14 C.B.R. (3d) 88 (B.C. S.C.) at p. 93 and *Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List]) at p. 110. In my view, the Doman Group is not asking the court to fill in gaps in the *CCAA* during the restructuring period. Rather, it is asking the court to go beyond the type of stay contemplated by Parliament when it enacted s. 11(4) of the *CCAA*.

28 In the event that I am mistaken and the court does have the jurisdiction to grant a stay in respect of the operation of Section 4.16 of the Trust Indenture, I would exercise my discretion against the granting of such a stay on the basis of the current circumstances. The absence of a permanent injunction in relation to Section 4.16 will not necessarily frustrate the

restructuring efforts of the Doman Group. Apart from any compromise which may be negotiated between the Doman Group and the Senior Secured Noteholders, it is far from a certainty that the Senior Secured Noteholders will accept an offer made by the Doman Group under Section 4.16 to purchase the Notes at 101% of their face value. Indeed, counsel for the Doman Group suggested that in light of the 12% interest rate applicable to the Notes and prevailing interest rates, the Noteholders would not want to accept the offer of a 1% premium because they would not be able to reinvest the funds at an interest rate as high as 11%. Counsel went so far as to characterize the right of repurchase and associated premium as "illusory benefits". In addition, it may be possible for the Doman Group to restructure its financial affairs in a fashion which does not involve a Change of Control while the Senior Secured Notes are outstanding. Finally, the Doman Group has not made any effort to negotiate an accommodation with the Senior Secured Noteholders.

29 Although I have agreed with the reasoning of Spence J. at para. 32 of the *Playdium Entertainment Corp.* decision, I should not be interpreted as agreeing with the correctness of the conclusion in *Playdium Entertainment Corp.*. I have some reservations with respect to its conclusion but, as *Playdium Entertainment Corp.* is clearly distinguishable from the present case, it is not necessary for me to decide whether or not it should be followed.

30 For these reasons, I conclude that the court does not have the jurisdiction to grant the permanent injunction contemplated by Section 4.12 (b) of the Reorganization Plan, at least as it relates to Section 4.16 of the Trust Indenture. Hence, it would be inappropriate for me to authorize the calling of creditor meetings to consider the Reorganization Plan in its present form because the condition precedent contained in section 6.3(a) of the Plan cannot be satisfied. I dismiss the application of the Doman Group, with liberty to re-apply in respect of a revised Reorganization Plan.

31 In addition to seeking an order allowing them to vote on the Reorganization Plan, the Senior Secured Noteholder Committee applied for an order authorizing it to file a secured creditor plan of arrangement or compromise and an order directing the Doman Group to pay all of its costs.

32 The form of the proposed secured creditor plan was attached to one of the affidavits. In essence, it includes the terms upon which the Senior Secured Noteholders represented by the Committee are prepared to waive breaches of the Trust Indenture occasioned by the restructuring of the Doman Group and to amend the Trust Indenture to allow the restructuring. One of these terms is the payment of a fee equal to 3% of the face value of the Senior Secured Notes (approximately US$5 million).

33 I am not prepared to allow the Senior Secured Noteholders Committee to file its own plan. If such a plan were filed and approved by the Senior Secured Noteholders, they would accomplish the same thing which they are complaining that the Doman Group was endeavouring to achieve through the permanent injunction; namely, a unilateral variation of the terms of the Trust Indenture without the agreement of the other party to the Trust Indenture. Such a plan may also have the effect of giving the Senior Secured Noteholders a veto power in respect of the Doman Group's restructuring.

34 The Senior Secured Noteholders Committee has not demonstrated a basis for the requested order that the Doman Group should pay all of its costs. The committee was presumably formed so that the Noteholders could act to protect or advance their own interests. It is not a committee requested by the Doman Group or constituted by the Court. The Noteholders may be entitled to some or all of such costs pursuant to the provisions of the Trust Indenture but that issue is not before me. As to the costs of these applications in the context of the *Rules of Court*, there has been divided success and I direct that each party bear own costs.

35 I dismiss the applications of the Committee for an order in relation to a secured creditor plan and an order in relation to its costs.

36 If the Senior Secured Noteholders Committee still wishes to pursue the constitutional question, arrangements for a hearing may be made through Trial Division. However, as I am not granting the application of the Doman Group for an order authorizing the calling of creditor meetings to consider the Reorganization Plan in its present form, it would seem to me that any such hearing should await the issuance of a revised form of the Plan.

Order accordingly.

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

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SEARS CANADA INC., 9370-2751 QUEBEC 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.

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST
PROCEEDING COMMENCED AT TORONTO

BRIEF OF AUTHORITIES OF CERTAIN FORMER DIRECTORS OF SEARS CANADA INC.

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