COURT FILE NUMBERS	B301-191521 B301-191522 B301-191523 B301-191524 B301-191525 B301-191526
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE BANKRUPTCY OF WOLVERINE ENERGY AND INFRASTRUCTURE INC., WOLVERINE EQUIPMENT INC., WOLVERINE CONSTRUCTION INC., WESTERN CANADIAN MULCHING LTD., HD ENERGY RENTALS LTD., and LIBERTY ENERGY SERVICES LTD.
APPLICANT	FTI CONSULTING CANADA INC., in its capacity as Licensed Insolvency Trustee of the bankruptcy estate of WOLVERINE ENERGY AND INFRASTRUCTURE INC., WOLVERINE EQUIPMENT INC., WOLVERINE CONSTRUCTION INC., WESTERN CANADIAN MULCHING LTD., HD ENERGY RENTALS LTD., and LIBERTY ENERGY SERVICES LTD
RESPONDENTS	1586329 ALBERTA LTD., WOLVERINE MANAGEMENT SERVICES INC., and JESSE DOUGLAS
DOCUMENT	**BRIEF**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Blue Rock Law LLP 700, 215 9th Ave SW Calgary, AB T2P 1K3 David W. Mann, KC/Taylor A. Henschel T. 403.605.3992/587.229.5039 E. david.mann@bluerocklaw.com/ taylor.henschel@bluerocklaw.com File: 1767-00001

BRIEF OF THE RESPONDENTS
1586329 ALBERTA LTD., WOLVERINE MANAGEMENT SERVICES INC., and JESSE DOUGLAS

WITH RESPECT TO AN APPLICATION RETURNABLE
ON NOVEMBER 4th, 2025 AT 10:00 AM

BEFORE THE HONOURABLE JUSTICE C.D. SIMARD

Table of Contents

I. Introduction

1. The Respondents, 1586329 Alberta Ltd. ("158 AB Ltd.), Wolverine Management Services Inc. ("WMS"), and Jesse Douglas ("Mr. Douglas") oppose the Application of the Applicant, FTI Consulting Canada Inc. ("FTI").

2. The fact is that the Respondents do not and did not control Wolverine Energy and Infrastructure Inc. ("WEI"), *de jure*, *de facto*, or otherwise, and operated at arms length from WEI at all relevant and material times. As such, the impugned transactions, which occurred more than 3 months prior to any event of insolvency by WEI, are immune from judicial review.

3. Even if this were not so, and the transactions are set aside, there is no basis to pierce the corporate veil and hold Mr. Douglas liable for the relief sought. FTI not being able to recover sufficient funds for creditors is not a reason at law to pierce the corporate veil.

4. FTI has not put its best foot forward and relies on inadmissible hearsay, conjecture, and argument to tar a legitimate business structure supporting a publicly traded business as a sham. And in so doing, FTI is in effect accusing the Respondents, and particularly Mr. Douglas, of various types of fraud absent the requisite evidence.

II. Statement of key facts

<u>WEI background</u>

5. The Respondents disagree with the Applicant's characterization of the facts of this matter. Evidence is either mischaracterized to support a narrative that cannot be maintained, or is based on hearsay, argument, or conclusion. The key facts of this matter are as follows.

6. WEI was a publicly traded oil field services ("OFS") company founded by Mr. Douglas.[1] WEI was diversified by having several operating OFS subsidiaries.[2]

[1] Affidavit of Jesse Douglas sworn October 27, 2025 ("Douglas Affidavit") at paragraphs 5, 7.
[2] Affidavit of Nikolaus Kiefer sworn October 28, 2025 ("Kiefer Affidavit") at paragraph 6.

7. WMS and 158 AB Ltd. were legitimate business arms of WEI, and integral to the subsidiaries - WMS paid the leases for equipment used by WEI's subsidiaries, and paid the executives of WEI for a time.[3] 158 AB Ltd. is Mr. Douglas' personal investment company and the vehicle through which he consulted to, and provided capital for, WEI and its subsidiaries.[4]

8. The Respondent, WMS, and another entity,Wolverine Group Inc. ("WGI"), owned 50 million shares of WEI, which represented 45% of the voting shares of WEI, and were worth $50 Million at their peak.[5]

9. One subsidiary of WEI, Wolverine Equipment Inc., owned more than $40 Million worth of shares (the "GIP Shares") in a publicly traded biofuel business called Green Impact Partners Inc. ("GIP").[6] Mr. Douglas resigned from WEI in 2021 to focus on his duties as CEO of GIP, but stayed on the Board of Directors of WEI (the "Board") and that of its subsidiaries.[7] GIP is a successful business that trades publicly on the venture exchange.[8] Ownership of the GIP Shares provided WEI with a unique strategic asset that could be liquidated to either pay off debt or grow the business.[9]

<u>WEI finances</u>

10. WEI did not have positive working capital at any time in its history, and was regularly tight on cash flow.[10] However, WEIs trade creditors were regularly paid in 60-90 days.[11] WEI regularly negotiated and obtained waivers from its lenders,[12] one of which was granted in November, 2022.[13] There is no evidence of WEI requesting a waiver that was not granted.[14]

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[3] Douglas Affidavit, *supra* note 1 at paragraph 6; Kiefer Affidavit, *supra* note 2 at paragraph 17.
[4] Douglas Affidavit, *supra* note 1 at paragraph 5.
[5] *Ibid* at paragraphs 6-7.
[6] *Ibid* at paragraph 13.
[7] *Ibid* at paragraphs 3-4.
[8] Kiefer Affidavit, *supra* note 2 at paragraph 9.
[9] *Ibid*.
[10] Douglas Affidavit, *supra* note 1 at paragraph 10; Kiefer Affidavit, *supra* note 2 at paragraph 10.
[11] Douglas Affidavit, *supra* note 1 at paragraph 12.
[12] *Ibid* at paragraph 14; Kiefer Affidavit, *supra* note 2 at paragraph 9.
[13] Douglas Affidavit, *supra* note 1 at paragraph 25.
[14] *Ibid* at paragraph 26.

Impugned transactions identified, reviewed, and approved by independent directors

11. WEI appointed four independent professionals to sit with Mr. Douglas on the Board. At the relevant and material time for this dispute, the four independent directors each had decades of experience and included two lawyers, Darrell Peterson and Christopher Hoose, an accountant, Jacqueline Colville, and entrepreneur Dirk Le Poole. These individuals sat on committees of the Board, specifically the audit committee and the compensation committee, which operated independently from Mr. Douglas.[15]

12. In 2022, after resigning as President and CEO of WEI, Mr. Douglas was contacted by the WEIs Audit Committee to repay a shareholder loan payable by WMS. Mr. Douglas maintained that WMS and 158 AB Ltd. were owed millions of dollars from WEI. After undertaking an independent reconciliation, and deliberating amongst themselves, the Board determined that WMS and 158 AB Ltd. were owed approximately $1.3 million by WEI.[16]

13. In July 2023, Mr. Douglas compromised the amount he thought was owed, more than $2.6 Million, and agreed to resolve the issue of outstanding payments to 158 AB Ltd. and WMS for a discount. This compromised payment was reviewed, deliberated, and approved by the Board prior to being paid in July 2023.[17]

Negotiations with lenders

14. On April 27, 2023, the Canadian Western Bank (the "CWB") provided WEI with a letter advising it "wished to exit its banking relationship" with WEI. This letter expressly states that it "is not a demand for payment, and is not to be considered a demand for payment." Instead, WEI was to come up with a plan for repayment by July 31st, 2025.[18] Mr. Douglas planned to replace the CWB loans with his own money, but this strategy was rejected by the Board.[19]

[15] Douglas Affidavit, *supra* note 1 at paragraph 8, Exhibit "B".
[16] *Ibid* at paragraphs 17-19; Keifer Affidavit, *supra* note 2 at paragraphs 14-15, Exhibit "A".
[17] Douglas Affidavit, *supra* note 1 at Exhibits "C" and "D".
[18] *Ibid* at paragraph 23, Exhibit "F".
[19] *Ibid* at paragraph 24, Exhibit "G".

15. WEI continued to pay its employees, the CRA, and contractors at all material times, but voluntarily sought and obtained creditor protection on November 30, 2023.[20] Mr. Douglas opposed the Board's decision pursue relief under the CCAA.[21] The Financial Statements of WEI available up to this point in time, prepared by Deloitte, do not suggest WEI was insolvent.[22]

III. Issues

16. The issues to be resolved by this Court are fourfold:

    a. Can serious allegations of fraud be proven summarily in the face of legitimate credibility and evidentiary issues?

    b. Can the corporate veil of two corporate entities be pierced to satisfy the recovery concerns of secured creditors, absent any of the requisite indicia being satisfied?

    c. Can a non-executive director without a controlling share interest be found to exercise complete control over a publicly traded company?

    d. Can two payments by a solvent publicly traded company, vetted and approved by an independent audit committee of its board of directors, made more than 3 months prior to insolvency be set aside?

IV. Argument

<u>Evidence alleging fraud should be given little to no weight</u>

17. The Applicant is applying for summary judgment against the Respondents, and in essence obtain a factual determination from this Court that the Respondents, particularly Mr. Douglas, are culpable of multiple types of fraud.

18. The Applicant has not led its best evidence, nor met the evidentiary burden required, to prove such causes of action. Instead, the Trustee Report relied on is

[20] Douglas Affiavit, *supra* note 1 at paragraph 22.
[21] *Ibid* at paragraph 21.
[22] *Ibid* at Exhibit "E".

based hearsay, speculation, opinion, and conclusion, and actively misrepresents objective documentary evidence to support a narrative that cannot be maintained.

Fiera waivers

19. At paragraph 34 of the Trustee Report, the Trustee concludes that Mr. Douglas fraudulently altered an email from Mr. Penelas of Fiera dated November 4, 2022. The Trustee misconstrues the facts and fails to mention that there are two emails of November 4, 2022 – one from 2:23 PM and one from 12:23 PM.[23] The 12:23 PM earlier email grants the waiver requested by WEI for November and December 2022, and January and February 2023 principal repayments. It cannot be held, without error, that the waiver in question was not granted.

20. From this misrepresentation of the facts, the Applicant concludes that the November 3, 2022 Waiver Letter from Fiera, containing the same information from the 12:23 email replete with what appear to be wet ink signatures then scanned in, was not granted and was fabricated by Mr. Douglas. This is pure conjecture and should be given little to no weight. There is no expert report analyzing the two emails, the waiver letter, or signatures. There is no firsthand evidence swearing to these facts. Further, the French Affidavit is inadmissible, or should be given little to no weight, as it breaches the implied undertaking rule, is unfiled, and is attached as an Appendix to insulate the evidence from testing.

21. As a publicly traded company, WEIs financial statements were available to Fiera on SEDAR. If Fiera was in fact defrauded, you would expect to see the vitriolic response of a lender scorned. Instead, what you see is additional waivers in the form forbearance while the parties worked out matters amongst themselves.[24] Where are the correspondences or demand letters from December 2022 onward raising this issue?

22. The Respondents have provided firsthand knowledge from Mr. Douglas and Mr. Kiefer. There are clear issues of credibility that this Court will have difficultly resolving summarily, even considering the unique discretion afforded in insolvency

[23] First Report of the Trustee at Appendix "G".
[24] Douglas Affidavit, *supra* note 1 at paragraphs 21, 28.

proceedings. This Court is without the requisite evidence to conclude, and absent error of law is precluded from concluding, that the Waivers were procured because of fraud, or that the abnormalities are attributable to any of the Respondents.

23. From November 2022 to November 2023, one would expect a person engaging in fraud similarly situated to act to further their financial interests. Mr. Douglas did no such thing – he could have sold his shares for millions, but did not.[25] With signing authority on WEIs accounts, he could have paid himself the nearly $3 Million he thought he was owed, but did not.[26]

CWB letter

24. The Applicant has misrepresented the content of the CWB Letter of April 27, 2023 to suggest the existence of a July 31st, 2023 repayment deadline that did not exist – the letter clearly says on page two that, "*this is not a demand for payment, and is not to be considered as a demand for payment*."[27] All that was required by July 31st, 2023 was a proposed repayment plan. In conjunction with the prior misrepresentations concerning the waivers, the intent is clearly to suggest a trying financial situation earlier than can be objectively established, to try and extend the period from which transactions may be reviewed under the *BIA*.

25. The Respondents suggest that this approach of becoming an advocate has brought the Trustee offside their duties as an officer of the Court, having advanced a claim based on misrepresented facts they know to be wrong. And despite being in possession and control of all the WEI documentation and records, a full picture has not been provided to the Court.

[25] Douglas Affidavit, *supra note 1* at paragraph 21.
[26] *Ibid* at paragraph 16.
[27] *Ibid* at JDA0109.

Corporate Veil cannot be pierced in this case

What is the Corporate Veil and when can it be pierced?

26. Single shareholder corporations such as WMS and 158 AB Ltd. are separate legal personalities from their shareholders. In ***Swanby***,[28] the Alberta Court of Appeal considered the concept of a separate legal personality, also known as the Corporate Viel, at paragraphs 32-34, and held that Courts can pierce the Corporate Veil in extraordinary circumstances:

> *[32] The concept of separate legal personality was established in Salomon v. Salomon $ Co [1897] AC 22, 22-32, 51-54 (HL), in which the Court said: "either the limited company [is] a legal entity or it [is] not. If it [is], the business belong[s] to it and not to Mr. Saloman;" and further, "the company is at law a different person altogether from subscribers to the memorandum." That distinction is the "corporate veil" between the company and its owner.*
>
> *[33] The Alberta Business Corporations Act, RSA 2000, c B-9, ss 16(1), 46(1), provides for a corporation establishing a separate corporate personality from its shareholders, with no exception for single shareholder corporations. Additionally, the Interpretation Act, RSA 2000, c I-8, s 16, provides that the establishment of a corporation vests in the corporation the right to contract and be contracted with in its corporate name, makes the corporation liable to be sued in its corporate name, and exempts from personal liability individual members of the corporation.*
>
> *[34] Courts are generally unwilling to lift or pierce the corporate veil unless required to do so by statute or in the face of extraordinary circumstance… It requires a Court to disregard the fundamental principle of separate identity, and view the corporation as an agent or puppet of its controlling shareholder.*[29]

27. In ***Driving Force***,[30] our Court of Appeal considered the frequently cited *Transamerica*[31] Ontario Court of Appeal case and held at paragraphs 53, and 55-56 that the Corporate Veil cannot be pierced due to sole ownership alone:

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[28] *Swanby v. Tru-Square Homes Ltd.*, 2023 ABCA 224, 2023 CarswellAlta 224 [**Tab 1**] ("*Swanby*").
[29] *Swanby*, *supra* [**Tab 1**] at paragraphs 32-34.
[30] *Driving Force Inc. v. I Spy-Eagles Eyes Safety Inc.*, 2022 ABCA 25, 2022 CarswellAlta 189 [**Tab 2**] ("*Driving Force*").
[31] *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.*, 1997 CarswellOnt 3496 [Not reproduced].

> *[53]…. Transamerica confirms at pp. 433-34 that mere control, which in this context means "complete domination," is not sufficient to lift the corporate veil. There must be some additional element of fraud, improper purpose, or improper activity which caused the Plaintiff's loss….*
>
> *[55] It is sometimes said that the corporate veil will be lifted where the corporation is merely a "sham" or is just the "alter ego" of its controlling shareholders. This equally imprecise test is not often helpful, unless the corporation never, from the beginning, had any legitimate business or assets of its own and was merely being used as a pretext…*
>
> *[56] One thing is clear. It is an error of principle to equate "control" of the corporation with the corporation merely being the alter ego of the shareholders. The Alberta Business Corporations Act, RSA 2000, c. B-9 permits "one person corporations" and gives them a separate legal personality just like any other corporation. It is an error to conclude that the corporation has no "real" independent existence simply because one person, being the sole shareholder and director, controls the corporation and is the ultimate beneficiary of any economic value within the corporation…*[32]

WMS and 158 AB Ltd. are separate entities that served legitimate purposes for WEI

28. It cannot be held that the Respondent companies, WMS and 158 AB Ltd., are shams or serve no legitimate purpose. 158 AB Ltd. is a legitimate company owned by Mr. Douglas, used to finance WMS and as a consulting vehicle to WEI and its subsidiaries, and for other entrepreneurial pursuits. It was not incorporated for the sole purpose of receiving the impugned payment, and neither was WMS. Like 158 AB Ltd., WMS was a legitimate business – it was a shareholder of WEI, paid the leases for equipment used by WEI subsidiaries, and paid WEI staff for a time.

The Respondents did not control WEI, operated at arms length, and are not related persons

29. In ***Scott***,[33] the Supreme Court of Canada set out the list of criteria for a Court to determine whether unrelated persons are dealing at arm's length at paragraph 127:

> *[127] Courts generally examine the following criteria in determining whether unrelated persons are dealing at arm's length: (i) whether there was a common mind that directed the bargaining for both*

[32] *Driving Force*, *supra* [**Tab 2**] at paragraphs 53, 55-56.
[33] *Scott v. Golden Oaks Enterprises Inc.*, 2024 SCC 32, 2024 CarswellOnt 15330 [**Tab 3**] ("*Scott*").

> *parties to a transaction; (ii) whether the parties to a transaction were acting in concert without separate interests; and (iii) whether there was de facto control...*[34]

30. While it is true that Mr. Douglas was a director of WMS, 158 AB Ltd., WEI, and its subsidiaries, our Court of Appeal in ***Piikani,*** [35] held that the fact that a creditor is a director of a company is not in itself a conclusive indicator that he is not acting at arm's length.[36] So long as the corporation is represented by independent individuals, the director would be dealing at arm's length.[37] WEI had four independent directors on their Board of five.

31. ***Piikani***, *supra* is similar to this case in the sense that it involved two payments made to two directors – one via consulting company but the other directly – just prior to the company at issue going into a conservatorship. The Court of Appeal reversed the decision of the lower Court, who erroneously held that the directors were not acting at arm's length. In ***Piikani***, *supra*, there was no evidence of board meetings or resolutions approving the transactions, and yet the transactions withstood scrutiny.[38] Here, the Respondents can show more than that – there are significant deliberations via email, and a reconciliation by accounting staff.

32. The Applicant admits that the Respondents did not control WEI, having only 45% equity control. All the indicia required by section 4(2)(b) and (c) of the *BIA* require control to establish related personage. If the Respondents do not control WEI, they cannot be held to be related. If they are not related, they are dealing at arm's length.

33. WEI was a publicly traded company, replete with institutional investors, an independent board of directors, and independent sub-committees. Mr. Douglas was not on the compensation committee of WEI, nor the audit committee that instigated

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[34] *Scott*, *supra* [**Tab 3**] at para 127 citing *Canada v. McLarty* 2008 SCC 26 at paras 43 and 62*, Montor Business Corp. (Trustee of) v. Goldfinger*, 2016 ONCA 406 at para 68 citing *Piikani Nation v. Piikani Energy Corp.*, 2013 ABCA 293 at para 29.
[35] *Piikani Nation v. Piikani Energy Corp.*, 2013 ABCA 293, 2013 CarswellAlta 1567 [**Tab 4**] ("*Piikani*").
[36] *Piikani*, *supra* [**Tab 4**] at para 36.
[37] *Ibid* at para 35.
[38] *Ibid* at paras 37-41.

the reconciliation. Mr. Douglas resigned from WEI in 2021 to run GIP, and held but one of five votes on the Board.[39]

34. Crucially, Mr. Douglas did not get his way on key WEI decisions, all of which suggest the Respondents did not control WEI:

a. Mr. Douglas maintained that WMS and 158 AB Ltd. were owed $2.6 Million. The Board disagreed, and agreed to pay less than half of the amount sought. Mr. Douglas had signing authority over WEIs accounts, and had he dominated WEI would have received the amount asked;[40]

b. Mr. Douglas wanted to make an investment into WEI in the summer of 2023 to take out the CWB Loans, but this approach was rejected by the Board;[41] and

c. Mr. Douglas disagreed with the Board, and did not want WEI to file for CCAA protection on November 30, 2023, believing the company was poised to have a great future. WEI filed for CCAA protection despite his protest.[42]

35. Mr. Douglas maintained signing authority over WEI accounts, there is no evidence of him making unauthorized payments to himself. Nor is there evidence of him selling WEI shares for his own benefit – he rode them all the way down to $0.[43]

36. While Mr. Douglas featured prominently in negotiations with lenders, who else were the lenders to speak to? Mr. Douglas founded the company, remained involved as a director, and likely was the proper and most effective point of contact. Were they to speak with the CFO with less than a year experience in the role, who was still receiving assistance from the former CFO, Mr. Kiefer?

[39] Douglas Affidavit, *supra* note 1 at paragraphs 8, 5.
[40] *Ibid* at paragraph 19.
[41] *Ibid* at paragraph 24.
[42] *Ibid* at paragraph 21.
[43] *Ibid*.

Impugned transactions are not fraudulent or improper and cannot be set aside under section 95 or 96 BIA

Transactions evidence independent business judgment of an informed board of directors

37. There is no evidence that the Board made decisions based solely on input from Mr. Douglas. What the evidence suggests is the exercise of legitimate business judgment, grounded in deliberation and reliance on independent professionals and committees. There is evidence of negotiation, and no evidence of one common mind directing the bargaining. If it was determined that the impugned payments could not be made, the evidence suggests they would not have been.

38. The Audit Committee determined that WMS and 158 AB Ltd. should be paid their outstanding receivables relating to services provided for the benefit of WEI for years.[44] It is not reasonable now, years later, for FTI to determine that the value of those services is NIL to buttress its application.

39. There is no evidence of an intent to prefer WEI or 158 AB Ltd. At the time of the impugned transactions, all similar contractors were brought current.[45] As well, WEI historically paid trade creditors on a 60-90 day basis,[46] and the evidence of Mr. Douglas is that he deferred his own compensation to aid the company, at times.[47] The transactions were brought up by the Audit Committee,[48] not Mr. Douglas, and because of their reconciliation found a net amount owing to WMS and 158 AB Ltd. This suggests ordinary commercial dealing and negotiation of parties with separate interests and negotiation, not control.

40. The Applicant seeks to impugn the business judgment of Darrell Peterson and the Board for not having minutes for day-to-day decisions. There is no evidence that such strictures were required for WEI, or for every company, for every decision. The practical benefit of assembling the Board, which had members in Calgary and Edmonton, to pass every aged payable and provide minutes of each decision would

[44] Kiefer Affidavit, *supra* note 2 at paragraphs 14-17, Exhibit "A".
[45] *Ibid* at paragraph 17.
[46] Douglas Affidavit, *supra* note 1 at paragraph 12.
[47] *Ibid* at paragraphs 9, 12; Kiefer Affidavit, *supra* note 2 at paragraph 8;
[48] Douglas Affidavit, *supra* note 1 at paragraph 17; Kiefer Affidavit, *supra* at paragraph 14.

be overly cumbersome and does not reflect the realities of a fluid oil field services business.

Not insolvent prior to November 30, 2023

41. The Respondents submit that WEI was not insolvent until it filed for creditor protection on November 30, 2023. WEI was still paying its trade creditors, staff, and the CRA prior to that time.[49] The Respondents submit that they were non-related parties and operated at arm's length from WEI. As such, section 95(a) of the *BIA* is operable, and the impugned transactions made more than 3 months prior to November 30th, 2023, are immune from judicial review.

42. Contrary to the allegations of the Applicant, CWB did not demand repayment before July 31, 2023. July 31, 2023 was the date that WEI was to come up with a proposal to pay back CWB,[50] which is exactly what it did – with Mr. Douglas proposing to inject capital.[51] This July 31st date has no bearing on the decision to make the two payments.

43. The argument by the Applicant that WEI was insolvent prior to November 30, 2023 fails to properly account for the wholistic value of the entire company, and focuses only on a narrow financial metric. That metric does not account for the value of the GIP shares and the fact that Mr. Douglas was prepared to provide additional financing.

Fraudulent Preference Act and *Statute of Elizabeth*

44. Both the tests under the *Fraudulent Preference Act* and *Statute of Elizabeth* require intent. That requisite intent to defeat, hinder, delay or prejudice creditors is not evidence. The evidence is that these transactions were made to address a long-standing accounts payable issue,[52] and that the payments themselves were delayed due to the accounting team not making them a priority.[53]

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[49] Douglas Affidavit, *supra* note 1 at paragraph 22.
[50] Douglas Affidavit, *supra* note 1at paragraph 23, Exhibit "F".
[51] *Ibid* at paragraph 24, Exhibit "G".
[52] Kiefer Affidavit, *supra* note 2 at paragraph 16.
[53] *Ibid* at paragraph 17.

45. There is no evidence to conclude the requisite intent to prefer. If the theory is that these transactions were made to defraud creditors, why is Mr. Douglas proposing to inject more money into WEI thereafter, and continuing to negotiate with creditors and obtain forbearances? A fraudster would have taken all their money out.

No unjust enrichment

46. The two impugned payments were made for juristic reasons being repayment of what are in essence shareholders loans and consulting fees to the Board. It cannot be argued that WEI and its subsidiaries did not benefit from the services provided by Mr. Douglas through 158 and WMS. WEI received the benefit of the services provided by WMS, 158 AB Ltd. and Mr. Douglas for years, and the Board determined the fair value of the consideration to be paid. There is no deprivation of WEI that the Trustee can now seek redress for. Neither of the two transactions were made with the requisite intent, and were reviewed independently such that they were bona fide payments for good consideration.

No basis for personal judgment against Mr. Douglas pursuant to s. 101(2.01) BIA

47. In response to the argument by the Applicant that one director should be held liable with a judgment for the impugned transactions, the Board and Audit Committee authorized the two payments, not Mr. Douglas himself. The other directors of WEI are not named as Respondents to this application, and this Court cannot grant judgment against them absent them being notified that relief is sought against them.

48. The two payments cannot be said to have rendered WEI insolvent. WEI's directors relied on the findings of an independent Audit Committee and had Audited Financial Statements to rely on prior to authorizing the payments, and thus had reasonable basis to conclude the payments were not offside and in the ordinary course of business. Similarly, trade creditors were regularly paid 60-90 days, Mr. Douglas regularly deferred his compensation, and the quantum was below the amount the independent committee found owing.

V. Conclusion

49. The Respondents, 1586329 Alberta Ltd., Wolverine Management Services Inc., and Jesse Douglas, respectfully request that this honourable Court dismiss the Application and award the Respondents with one set of solicitor-client (full-indemnity) costs.

All of which is respectfully submitted this 29th day of October, 2025.

BLUE ROCK LAW LLP

Per: _____

Taylor A. Henschel
Solicitors for the Respondents
1586329 Alberta Ltd.
Wolverine Management Services Inc,
and Jesse Douglas

VI. List of authorities

Tab	Citation
1	*Swanby v. Tru-Square Homes Ltd.*, 2023 ABCA 224, 2023 CarswellAlta 224
2	*Driving Force Inc. v. I Spy-Eagles Eyes Safety Inc.*, 2022 ABCA 25, 2022 CarswellAlta 189
3	*Scott v. Golden Oaks Enterprises Inc.*, 2024 SCC 32, 2024 CarswelLOnt 15330
4	*Piikani Nation v. Piikani Energy Corp.*, 2013 ABCA 293, 2013 CarswellAlta 1567

2023 ABCA 224
Alberta Court of Appeal

Swanby v. Tru-Square Homes Ltd

2023 CarswellAlta 2051, 2023 ABCA 224, [2023] A.W.L.D. 4283, [2023] A.W.L.D. 4359, [2024] 3 W.W.R. 453, 2023 A.C.W.S. 3862, 43 B.L.R. (6th) 76, 484 D.L.R. (4th) 736, 60 Alta. L.R. (7th) 269

Craig Swanby and Georgina Swanby (Respondents / Plaintiffs / Defendants by Counterclaim) and Tru-Square Homes Ltd. (Not Party to the Appeal / Defendant / Plaintiff by Counterclaim) and James Frederick Metcalfe (Appellant / Defendant / Plaintiff by Counterclaim)

Frans Slatter, Kevin Feehan, Bernette Ho JJ.A.

Heard: May 5, 2023
Judgment: July 28, 2023
Docket: Calgary Appeal 2201-0099AC

Proceedings: reversing *Swanby v. Tru-Square Homes Ltd* (2022), 28 C.L.R. (5th) 199, 2022 ABQB 215, 2022 CarswellAlta 896, M. David Gates J. (Alta. Q.B.)

Counsel: C.C. Babiuk, B. Frenken, for Respondents
J.F. Metcalfe, Appellant, for himself

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

Related Abridgment Classifications

Business associations

I Nature of business associations
I.3 Nature of corporation
I.3.a Distinct existence
I.3.a.i From owner
I.3.a.i.A Lifting the corporate veil

Torts

XV Negligence
XV.5 Joint and independent tortfeasors
XV.5.a Joint and several liability

Headnote

Torts --- Negligence — Joint and independent tortfeasors — Joint and several liability

Plaintiff purchasers wished to build family home on land — Personal defendant owned 99 per cent of corporate defendant's shares — Plaintiffs entered into one or more contracts with corporate defendant — Contracts were always only with corporate defendant, not personal defendant — Personal defendant signed contracts as principal of corporate defendant — Parties agreed that corporate defendant would build house to specified stage — Issue arose with respect to water leakage into home from soffits and windows; corporate defendant took position that fixing windows was not its responsibility, and left construction site without returning — Plaintiffs hired different general contracting firm and moved into fully remediated home more than two years after initial occupancy date — Plaintiffs brought action alleging that corporate and personal defendants were liable to them in negligence and had engaged in fraudulent conduct — Claim advanced was pure economic loss claim — Trial judge found that personal defendant was jointly and severally liable in tort along with corporate defendant — Basis for this finding rested on piercing of corporate veil, along with apparent determination that corporate and personal defendants were jointly liable in tort — Personal defendant appealed — Appeal allowed — Case was not one of piercing corporate veil, but was one of alleged concurrent liability in tort — Analysis for each is completely different — Personal liability on behalf of personal

V. Standard of Review

31 The standard of review on questions of law is correctness, on questions of fact is palpable and overriding error, and on questions of mixed law and fact is palpable and overriding error unless there is an extricable error of law: *Housen v Nikolaisen*2002 SCC 33, paras 7-37, [2002] 2 SCR 235.

VI. Analysis

32 The concept of separate legal personality was established in *Salomon v Salomon & Co*[1897] AC 22, 22-32, 51-54 (HL), in which the court said: "either the limited company [is] a legal entity or it [is] not. If it [is], the business belong[s] to it and not to Mr. Salomon"; and further, "the company is at law a different person altogether from subscribers to the memorandum". That distinction is the "corporate veil" between the company and its owner.

33 The Alberta *Business Corporations Act*, RSA 2000, c B-9, ss 16(1), 46(1), provides for a corporation establishing a separate corporate personality from its shareholders, with no exception for single shareholder corporations. Additionally, the *Interpretation Act*, RSA 2000, c I-8, s 16, provides that the establishment of a corporation vests in the corporation the right to contract and be contracted with in its corporate name, makes the corporation liable to be sued in its corporate name, and exempts from personal liability individual members of the corporation.

34 Courts are generally unwilling to lift or pierce the corporate veil unless required to do so by statute or in the face of extraordinary circumstances: Kevin P McGuinness, *Canadian Business Corporations Law*, 3rd ed (Toronto: LexisNexis, 2017), vol 1, 7.47. It requires a court to disregard the fundamental principle of separate identity and view the corporation as an "agent" or "puppet" of its controlling shareholder.

35 However, this is not truly a case of piercing the corporate veil. It is a case of alleged concurrent liability in tort. The analysis is completely different. The fundamental flaw in the trial judge's reasoning is his failure to distinguish between these two distinct doctrines, an error in principle.

36 The two separate concepts are discussed in *Driving Force Inc v I Spy-Eagle Eyes Safety Inc*2022 ABCA 25, paras 48-49, 466 DLR (4th) 292:

> Liability in tort is primarily personal; a tort arises when the tortfeasor breaches a duty imposed on him or her by the law of tort. Corporations are considered to be separate legal persons, with their own rights and obligations; their shareholders and directors are not personally liable for the corporation's obligations. Corporations, however, can only act through human agents, and any corporate tort generally involves concurrent human actions. There is thus a conflict between these two basic principles: personal liability in tort, and the separate legal personality of corporations.
>
> This engages two separate but overlapping concepts. There are some occasions where the law will "lift the corporate veil", and find the directing minds behind the corporation responsible for the liabilities and obligations of the corporation. These situations are, however, an exception to the general rule that there is no personal liability for corporate obligations. The related concept is when the corporation and its human agents are concurrently liable in tort. When an individual is found to be concurrently liable for a tort committed in the name of a corporation, this is not truly an instance of "lifting the corporate veil". The liability of the individual is based on his or her breach of an individual duty owed in tort, not by lifting the corporate veil to impose the corporation's duty or liability on the individual.

37 As set out in *Hogarth v Rocky Mountain Slate Inc*, 2013 ABCA 57, para 110, 542 AR 289 and *Hall v Stewart*, 2019 ABCA 98, para 18, 82 Alta LR (6th) 233, there are a number of factors to be considered in determining whether concurrent personal liability should be imposed for corporate torts:

> (a) Whether the negligent act was committed while engaged in the business of the corporation, and whether the negligence of the employee was contemporaneous with that of the corporation;

2022 ABCA 25
Alberta Court of Appeal

Driving Force Inc v. I Spy-Eagle Eyes Safety Inc

2022 CarswellAlta 189, 2022 ABCA 25, [2022] 3 W.W.R. 380, [2022] A.W.L.D. 1045, [2022] A.W.L.D. 1046, [2022] A.W.L.D. 950, [2022] A.W.L.D. 955, [2022] A.W.L.D. 961, 342 A.C.W.S. (3d) 239, 37 Alta. L.R. (7th) 218, 466 D.L.R. (4th) 292

The Driving Force Inc. (Appellant / Cross-Respondent) and I Spy-Eagle Eyes Safety Inc. and Loretta Juneau (Respondents / Cross-Appellants)

Jack Watson, Frans Slatter, Frederica Schutz JJ.A.

Heard: January 7, 2022
Judgment: January 21, 2022
Docket: Edmonton Appeal 2103-0005AC

Proceedings: affirmed *Driving Force Inc v. I Spy-Eagles Eyes Safety Inc* (2020), 2020 CarswellAlta 2757, [2022] A.W.L.D. 4352 ((Alta. Q.B.))

Counsel: J.A. Delgado, M. Harris, for Appellant / Cross-Respondent
R.K. Omura, for Respondents / Cross-Appellants

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

Related Abridgment Classifications

Business associations

III Specific matters of corporate organization
  III.1 Directors and officers
    III.1.h Liabilities
      III.1.h.viii Miscellaneous

Civil practice and procedure

XXIV Costs
  XXIV.8 Scale and quantum of costs
    XXIV.8.i Miscellaneous

Contracts

IX Performance or breach
  IX.6 Breach
    IX.6.g Miscellaneous

Torts

IV Conversion
  IV.1 Availability
    IV.1.a Against particular party
      IV.1.a.vii Miscellaneous

Torts

IV Conversion
  IV.1 Availability
    IV.1.c Joint conversion

Many subsequent cases have noted that stating that the test is whether the result is "too flagrantly opposed to justice, convenience or the interests of the Revenue" cannot be a workable test. It is more in the nature of a background principle or policy objective, to be balanced against the reluctance of the courts to undermine the concept of the separate corporate legal personality.

52 In *Prest v Petrodel Resources Ltd.*, 2013 UKSC 34 at para. 106, [2013] 2 AC 415 Lord Walker questioned whether "piercing the corporate veil" was a doctrine at all, or only a label or metaphor applied to cases not covered by other discrete principles, representing at best " . . . a small residual category in which the metaphor operates independently [where] no clear example has yet been identified". And as noted by Lord Walker, concurrent liability in tort does not, strictly speaking, invoke this concept.

53 A frequently cited case is *Transamerica Life Insurance Company of Canada v Canada Life Assurance Company*, (1996), 28 OR (3d) 423, aff'd [1997] OJ No 3754 (CA). It concluded at p. 431 that *Kosmopoulos* did not signal a departure from the traditional rule set out in *Salomon v Salomon & Co.*, [1897] AC 22:

> There are undoubtedly situations where justice requires that the corporate veil be lifted. The cases and authorities already cited indicate that it will be difficult to define precisely when the corporate veil is to be lifted, but that lack of a precise test does not mean that a court is free to act as it pleases on some loosely defined "just and equitable" standard . . . (at p. 433)

Transamerica confirms at pp. 433-34 that mere control, which in this context means "complete domination", is not sufficient to lift the corporate veil. There must additionally be some element of fraud, improper purpose, or improper activity which caused the plaintiff's loss: see ***Aubin v Petrone***, 2020 ABCA 13 at paras. 23-26, 100 Alta LR (6th) 10; ***Yaiguaje v Chevron Corporation***, 2018 ONCA 472 at paras. 67, 70, 141 OR (3d) 1, leave refused April 4, 2019, SCC #38183.

54 In the absence of a unifying test, lifting-the-veil cases tend to be decided based on their own facts and circumstances: *XY, LLC v Zhu*, 2013 BCCA 352 at paras. 86-87, 366 DLR (4th) 443, leave refused [2014] 1 SCR xiii. For example, cases like *Aubin v Petrone* and *Prest v Petrodel Resources* are relevant in the specific context of matrimonial property disputes. They deal with the situation where the divisible matrimonial wealth is located in corporations that are controlled by one of the spouses, and they have little to offer outside that context. These decisions are often coloured by considerations of corporate oppression.

55 It is sometimes said that the corporate veil will be lifted where the corporation is merely a "sham", or is just the "alter ego" of its controlling shareholders. This equally imprecise test is not often helpful, unless the corporation never, from the beginning, had any legitimate business or assets of its own and was merely being used as a pretext. As noted by Lord Neuberger of Abbotsbury PSC in *VTB Capital plc v Nutritek International Corp.*, [2013] UKSC 5 at para. 124, [2013] 2 AC 337:

> 124 . . . Words such as "façade", and other expressions found in the cases, such as "the true facts", "sham", "mask", "cloak", "device", or "puppet" may be useful metaphors. However, such pejorative expressions are often dangerous, as they risk assisting moral indignation to triumph over legal principle, and, while they may enable the court to arrive at a result which seems fair in the case in question, they can also risk causing confusion and uncertainty in the law . . .

In law, the corporation is a separate person, not an alter ego. In this appeal, at a factual level I Spy was not merely an alter ego, because it clearly had real business interests separate from those of its shareholder.

56 One thing is clear. It is an error of principle to equate "control" of the corporation with the corporation merely being the alter ego of the shareholders. The Alberta *Business Corporations Act*, RSA 2000, c. B-9, permits "one person corporations" and gives them a separate legal personality just like any other corporation. It is an error to conclude that the corporation has no "real" independent existence simply because one person, being the sole shareholder and director, controls the corporation and is the ultimate beneficiary of any economic value within the corporation. *Kosmopoulos*, at p. 11 cautioned against recognizing an "indefensible distinction" between single person corporations and other corporations.

57 This point was made in the seminal case *Salomon v Salomon & Co.*, where the corporation was controlled by Aron Solomon, and was incorporated expressly to carry on the business he previously carried on personally. The House of Lords

KeyCite treatment
Most Negative Treatment: Recently added (treatment not yet designated)
Most Recent Recently added (treatment not yet designated): Yen v. Ghahramani | 2025 BCSC 1778, 2025 CarswellBC 2732 | (B.C. S.C., Sep 15, 2025)

2024 SCC 32, 2024 CSC 32
Supreme Court of Canada

Scott v. Golden Oaks Enterprises Inc.

2024 CarswellOnt 15331, 2024 CarswellOnt 15330, 2024 CSC 32, 2024 SCC 32, 16 C.B.R. (7th) 211, 175 O.R. (3d) 800 (note), 2024 A.C.W.S. 3398, 497 D.L.R. (4th) 1, 56 B.L.R. (6th) 175

Lorne Scott, Janet Arsenault, Jeremy Mitchell, Josée Bouchard, Le Thu Nguyen, Mark McKenna, Judy McKenna, Susan McKillip, 1531425 Ontario Inc., Joe Messa and Ernest Toste (Appellants) and Doyle Salewski Inc., in its capacity as Trustee in Bankruptcy of Golden Oaks Enterprises Inc., and Joseph Gilles Jean Claude Lacasse (Respondents) and Attorney General of Ontario and Insolvency Institute of Canada (Interveners)

Wagner C.J.C., Karakatsanis, Côté, Rowe, Martin, Jamal, O'Bonsawin JJ.

Heard: December 5, 2023
Judgment: October 11, 2024
Docket: 40399

Proceedings: affirming *Golden Oaks Enterprises Inc. v. Scott* (2022), 162 O.R. (3d) 295, 1 C.B.R. (7th) 532022 ONCA 5092022 CarswellOnt 9234, G.R. Strathy C.J.O., L. Sossin J.A., L.B. Roberts J.A. (Ont. C.A.); additional reasons at *Golden Oaks Enterprises Inc. v. Scott* (2022), 2022 CarswellOnt 10724, 1 C.B.R. (7th) 932022 ONCA 568, G.R. Strathy C.J.O., L. Sossin J.A., L.B. Roberts J.A. (Ont. C.A.); reversing in part *Doyle Salewski Inc. v. Scott* (2019), 2019 CarswellOnt 14145, 2019 ONSC 510876 C.B.R. (6th) 3, S. Gomery J. (Ont. S.C.J.); additional reasons at *Salewski v. Scott* (2020), 2020 ONSC 195, 2020 CarswellOnt 26876 C.B.R. (6th) 144, Sally Gomery J. (Ont. S.C.J.)

Counsel: Charles R. Daoust, for Appellants
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Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Insolvency; Restitution
Related Abridgment Classifications
Bankruptcy and insolvency
IX Proving claim
IX.3 Practice and procedure
IX.3.b Right to set-off
Bankruptcy and insolvency
XI Avoidance of transactions prior to bankruptcy
XI.5 Miscellaneous
Civil practice and procedure
VII Limitation of actions
VII.4 Actions in contract or debt
VII.4.a Statutory limitation periods
VII.4.a.iii When statute commences to run

(See also Wood, at p. 215; Honsberger and DaRe, at p. 387.)

126 The *BIA* does not define an arm's length transaction. It does, however, stipulate that "[i]t is a question of fact whether persons not related to one another were at a particular time dealing with each other at arm's length" (s. 4(4)). A finding of non-arm's length dealing attracts a high level of appellate deference and is reviewable only for palpable and overriding error (*Housen v. Nikolaisen* 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 36).

127 Courts generally examine the following criteria in determining whether unrelated persons are dealing at arm's length: (i) whether there was a common mind that directed the bargaining for both parties to a transaction; (ii) whether the parties to a transaction were acting in concert without separate interests; and (iii) whether there was *de facto* control (*Canada v. McLarty* 2008 SCC 26, [2008] 2 S.C.R. 79, at paras. 43 and 62; *Montor Business Corp. (Trustee of) v. Goldfinger* 2016 ONCA 406, 36 C.B.R. (6th) 169, at para. 68, citing *Piikani Nation v. Piikani Energy Corp.* 2013 ABCA 293, 86 Alta. L.R. (5th) 203, at para. 29; Wood, at pp. 204-5).

(2) The Trial Judge Did Not Err in Finding Non-Arm's Length Dealing

128 The trial judge correctly addressed the question of non-arm's length dealing under s. 95(1)(b) of the *BIA*. I agree with the Court of Appeal that although the trial judge was required to focus on the transactions at issue between Golden Oaks and Mr. Scott, it was appropriate for her to consider these transactions in the overall context of the parties' relationship, including the Ponzi scheme that these transactions facilitated and Mr. Scott's role in that scheme. In *McLarty*, this Court rejected a "restrictive approach" under which a trial judge could examine only an impugned transaction, but not the parties' relationship at any other time or the facts relating to any other transaction (para. 65). Likewise, here, the trial judge was entitled to consider the totality of the evidence in determining whether parties were dealing at arm's length (see *National Telecommunications Inc., Re* 2017 ONSC 1475, 45 C.B.R. (6th) 181, at para. 48; *National Telecommunications v. Stalt* 2018 ONSC 1101, 59 C.B.R. (6th) 263, at para. 41).

129 I also see no palpable and overriding error in the trial judge's findings that Mr. Scott and Golden Oaks were not dealing at arm's length and were acting in concert under Mr. Lacasse's direction to perpetuate the Ponzi scheme. The trial judge found that Mr. Scott participated in Golden Oaks' operations in 2012 and regularly represented the company or acted on its behalf. She also found that Mr. Scott knew that he was helping to prop up a Ponzi scheme. She quoted text messages from Mr. Scott to another real estate agent in which he described Golden Oaks as a "pyramid", "Ponzie [*sic*] like", and "a house of cards" (para. 319). Mr. Scott understood, to quote his own words, that if "[o]ne day investors stop, the whole house of cards would collapse" (para. 319 (emphasis deleted)).

130 The trial judge's factual and credibility findings were extensive. She rejected most of Mr. Scott's evidence, noting that he "was not in any way a credible witness", and concluding that "[h]is account of his involvement with Lacasse and Golden Oaks in his affidavits was manifestly untrue" (para. 276). She found that he "lied to the court" (para. 276), and highlighted "gross inconsistencies" between his evidence and other evidence that she found credible (para. 291). As a result, the trial judge said she gave "no weight to any of Scott's testimony", unless it was corroborated by other evidence that she did accept (para. 291). I see no basis for this Court to intervene with any of these findings.

(3) Conclusion

131 The trial judge had ample basis in the record to find as fact that Mr. Scott and Golden Oaks were not acting at arm's length in the impugned transactions.

VI. Disposition

132 I would dismiss the appeal with costs.

KeyCite treatment
Most Negative Treatment: Distinguished
Most Recent Distinguished: PricewaterhouseCoopers Inc v. Perpetual Energy Inc | 2021 ABCA 16, 2021 CarswellAlta 119, 457 D.L.R. (4th) 1, 14 B.L.R. (6th) 161, 327 A.C.W.S. (3d) 20, 20 Alta. L.R. (7th) 23, [2021] A.W.L.D. 640, [2021] A.W.L.D. 641, [2021] A.W.L.D. 642, [2021] A.W.L.D. 643, [2021] A.W.L.D. 644, [2021] A.W.L.D. 645, 86 C.B.R. (6th) 9 | (Alta. C.A., Jan 25, 2021)

2013 ABCA 293
Alberta Court of Appeal

Piikani Nation v. Piikani Energy Corp.

2013 CarswellAlta 1567, 2013 ABCA 293, [2013] 12 W.W.R. 436, [2013] A.W.L.D. 4727, 230 A.C.W.S. (3d) 728, 367 D.L.R. (4th) 173, 556 A.R. 200, 584 W.A.C. 200, 5 C.B.R. (6th) 185, 86 Alta. L.R. (5th) 203

Grant Thornton Alger Inc. (Estates formerly accepted under the responsibility of Alger & Associates Inc.), in its Capacity as Trustee of Piikani Energy Corporation, Respondent (Applicant) and 607385 Alberta Ltd. and Dale McMullen, Appellants (Respondents) and Stephanie Ho Lem, Not a Party to the Appeal (Respondent)

Piikani Nation, Not a Party to the Appeal (Applicant) and Piikani Energy Corporation, Not a Party to the Appeal (Respondent)

Piikani Nation and Chief Reg Crow Shoe, Not a Party to the Appeal (Plaintiff) and Piikani Investment Corporation, Not a Party to the Appeal (Defendant)

Frans Slatter, Patricia Rowbotham, Barbara Lea Veldhuis JJ.A.

Heard: March 6, 2013
Judgment: August 29, 2013
Docket: Calgary Appeal 1201-0072-AC, 1201-0073-AC

Proceedings: reversing *Piikani Nation v. Piikani Energy Corp.* (2012), (sub nom. *Piikani Energy Corp. (Bankrupt), Re)* 537 A.R. 211, 2012 CarswellAlta 459, 2012 ABQB 187, 88 C.B.R. (5th) 1, 58 Alta. L.R. (5th) 219 (Alta. Q.B.)

Counsel: K.L. Fellowes, for Appellant, 607385 Alberta Ltd.
A.R. Robertson, Q.C., for Appellant, Dale McMullen
R.J. Gilborn, Q.C., L. Chan, for Respondents

Subject: Insolvency; Civil Practice and Procedure; Contracts; Corporate and Commercial; Torts
Related Abridgment Classifications
Bankruptcy and insolvency
XI Avoidance of transactions prior to bankruptcy
XI.1 Fraudulent preferences
XI.1.d Miscellaneous
Headnote
Bankruptcy and insolvency --- Avoidance of transactions prior to bankruptcy — Fraudulent preferences — Time within which avoidable — Related persons
P Nation agreed to allow lands to be used for development of dam, including power plant — P Nation received $36.3 M, which was settled into P Trust — HL conducted consulting business through 607 Ltd. — HL and M become directors of PE Corp. — PE Corp. entered into consulting agreement stipulating that 607 Ltd. receive annual fee of $150,000 — Legal disputes led to P Nation appointing investigator, A Inc., for P investment — A Inc. terminated consulting agreement and demanded HL repay

Arm's Length" (June 8, 2004) contains the following "useful criteria that have been developed and accepted by the courts": (i) was there a common mind which directs the bargaining for both parties to a transaction; (ii) were the parties to a transaction acting in concert without separate interests; and (iii) was there *de facto* control: *Swiss Bank Corp.* at para 62.

30 We are of the view that the above mentioned factors provide helpful guidance and apply in the *BIA* context to determine whether, as a question of fact, two parties dealt with each other at arm's length. While some of the definitions offered in past case law, including *Tremblay* and *Skalbania (Trustee of)*, might contain helpful illustrations of these concepts, courts should approach their task of characterizing a relationship between a creditor and a bankrupt in light of these principles.

(iii) Are directors presumed to be non-arm's length with the corporation they serve?

31 The chambers judge placed significant emphasis on Ho Lem's and McMullen's roles as directors of Piikani Energy and on the effect that this role had on whether they were at arm's length with Piikani Energy.

32 In *Gestion Yvan Drouin Inc. c. R.* (2000), 12 B.L.R. (3d) 21 (T.C.C. [General Procedure]) and its companion case, *Zameck v. R.*, [2001] 1 C.T.C. 2586 (T.C.C. [Informal Procedure]), Archambault TCJ considered a corporation's payment of dividends to its shareholding (but non-controlling) directors. Citing the three criteria for assessing whether a transaction occurred at arm's length that the Supreme Court endorsed in *McLarty*, Archambault J held that "in the absence of special circumstances, the fact that a taxpayer was at once a shareholder, a director and an officer of a corporation [does not] necessarily mean [...] that there was a *de facto* non-arm's length relationship between the taxpayer and the corporation": at para 83.

33 The Court in *Del Grande v. R.* (1992), 93 D.T.C. 133 (T.C.C.) reached a similar conclusion. There, Bowman J held that a shareholder, director and officer of a corporation holding 25% of the common shares of the corporation, with an option to acquire a further 25%, nevertheless dealt at arm's length with that corporation: at para 141. He stated:

> Ultimately the question resolves itself into one of fact, whether the relationship between Mr. Del Grande and the two corporations was such that it could be said that he was the directing mind of the corporations or whether he and the McCleery family acted so closely in concert that he exercised a degree of control over the corporations vastly disproportionate to his minority position so as to be able to induce the corporations to confer benefits upon him that they would not otherwise have done.

34 In *Galaxy Sports Inc., Re*, 2004 BCCA 284 (B.C. C.A.), the Court considered the phrase "arm's length" in s 109(6), *BIA*, noting that the term "has generally been defined to mean that there are no bonds of dependence, control or influence, between the corporation and the person in question:" at para. 56. In *Galaxy Sports Inc., Re*, the court overturned a decision that three board members, who did not individually or collectively have a controlling interest, could not vote at a creditors' meeting. That initial decision was based on a view that the directors in question, unlike some directors, were "active managers of the company": 2003 BCSC 493 (B.C. S.C.) at para 11. The Court of Appeal recognized that directors may have some influence over a company by virtue of their position, but ultimately concluded that being a director of a company does not necessarily mean that there is a non-arm's length relationship with the company:

> 56 [The chambers judge] drew a distinction ... between "passive" and "active" directors, finding that Messrs. Watson and Dewar were active managers and that "Each could influence the direction of Galaxy." With respect, I doubt that the *BIA* intended that a distinction be drawn between individual directors on that basis. All directors are required to devote their best efforts to the company's affairs, and every director can by the very nature of his or her office 'influence' those affairs.[...] This does not mean, without more, that each was able to control the company or that the company was dependent on him.

35 While a director might frequently not be at arm's length with the corporation, the *Business Corporations Act*, RSA 2000, c. B-9 recognizes that this is not invariably the case. Section 102 of the *Business Corporations Act* generally requires a director to disclose any conflicts of interest, and to refrain in voting on any related director's resolutions. But the *Act* recognizes a number of exceptions:

> 102(6) A director referred to in subsection (1) shall not vote on any resolution to approve the contract or transaction unless the contract or transaction is [...]
>
> > (b) a contract or transaction relating primarily to the director's remuneration as a director, officer, employee or agent of the corporation or an affiliate, [...]

Section 102(6)(b) recognizes that when directors are negotiating their own compensation (or severance arrangements) their interests are recognizably adverse to those of the corporation. So long as the corporation is represented by independent individuals, the director would be dealing at arm's length in such negotiations.

36 Thus, the fact that a creditor is a director of a company is not in itself a conclusive indicator that he is not acting at arm's length. If Parliament had intended to establish such a presumption, it could easily have done so by including directors within the definition of "related parties".

(iv) Were Ho Lem and McMullen at arm's length with Piikani Energy?

37 As discussed, the finding that Ho Lem and McMullen did not deal with Piikani Energy at arm's length was based on errors of law. The error was in concluding that the concept of "insiders" was relevant, that the jurisprudence under the *ITA* was irrelevant, and that a director could never be at arm's length to the corporation, regardless of the nature of the transaction.

38 The burden of proving preferential treatment was on the Trustee. The chambers judge had limited evidence before him of how the decisions to pay Ho Lem and McMullen arose. He noted that there was no evidence of board meetings, resolutions or corporate actions, nor was there any evidence from any other directors, officers or employees, besides the evidence of the recipients of the payments. However, his ultimate conclusion regarding Ho Lem's and McMullen non-arm's length status is based on his observations that both Ho Lem and McMullen were key employees and together constituted 50% of Piikani Energy's Board of Directors. This latter finding is clearly in error, as Piikani Energy had five directors, not four as the chambers judge found.

39 In our view, the chambers judge erred in concluding that McMullen and Ho Lem were non-arm's length with Piikani Energy. It is difficult to understand how he reached this conclusion in the absence of evidence about Ho Lem's and McMullen's specific roles in making the impugned payments, particularly where Ho Lem and McMullen were only two of five directors and where another director signed McMullen's termination letter. The fact that Ho Lem and McMullen were directors and key employees of Piikani Energy does not on its own lead to the conclusion that they were not acting at arm's length in relation to Piikani Energy with respect to the disputed payments. The chambers judge himself noted that the only evidence about the circumstances of the payments came from Ho Lem and McMullen; there is no suggestion that this evidence was contradicted. Nonetheless, the chambers judge disregarded this evidence and concluded that Ho Lem and McMullen were non-arm's length by reference to their directorship and the timing of the payments. This, in our view, is a reviewable error.

40 The evidence before the chambers judge about the circumstances surrounding the impugned payments consisted of affidavit evidence from McMullen and Ho Lem. The evidence was that the payment to 607 was made approximately two weeks before the payment was due on January 1, 2010, as it was more convenient to transact business before Christmas. Further, the consulting agreement between Piikani Energy and 607 stipulated that the annual fee under that agreement could be paid on January 1, 2010, or on another day agreed to by the parties. This explanation is not entirely implausible, given the impending Christmas season and the fact that businesses often close over the holidays. Further, there is no evidence that Ho Lem had any involvement in or control over the early payment of the annual retainer. Accordingly, we find that Ho Lem was acting at arm's length at the time of the payment to 607.

41 With respect to the payment to McMullen, the evidence was that McMullen's letter of termination was signed by another director. McMullen's severance payment was contemplated in his employment agreement (dated February 1, 2009), which was negotiated well before the date on which his severance was contemplated and the severance payment was made (on December 19, 2009). The evidence was that the letter of termination was authored by someone other than McMullen himself and the

severance payment was the consequence of the termination of employment. While McMullen may have played a key role in Piikani Energy, there is no evidence that he directed the payment or that he had any role in his own termination, which would trigger the severance payment. We therefore find that McMullen was at arm's length with Piikani Energy at the time of the severance payment.

Other Issues

42 Given the conclusion that the appellants were dealing at arm's length with Piikani Energy, it is not necessary to consider the many other arguments made. Specifically, it is not necessary to consider whether Piikani Energy was in fact insolvent at the time of the payments. It is also not necessary to consider whether the payments were a "preference". The *BIA* does not make any payment within 12 months of the bankruptcy void, only those that result in a preference. While intention to grant a preference is no longer a requirement, the *BIA* still contemplates that there are payments that can legitimately be made, and others that are improperly preferential.

Conclusion

43 The appeal is allowed, the judgments against the appellants are set aside, and the application of the Trustee is dismissed.

Appeal allowed.