COURT FILE/ESTATE NUMBERS	B301-191521 B301-191522 B301-191523 B301-191524 B301-191525 B301-191526
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PROCEEDING	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., SOLELY IN ITS CAPACITY AS LICENSED INSOLVENCY TRUSTEE OF THE BANKRUPT 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 OF THE APPLICANT**
PARTY FILING THIS DOCUMENT	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.
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Torys LLP 4600 Eighth Avenue Place East 525 - Eighth Ave SW Calgary, AB T2P 1G1 Attention: Kyle Kashuba / Bilal Qureshi Telephone No.: +1 403.776.3744 / +1 403.776.3769 Email: kkashuba@torys.com / bqureshi@torys.com Fax No.: +1 403.776.3800 File No.: 39586-2007

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PART I– INTRODUCTION

1. FTI Consulting Canada Inc. ("**FTI**") in its capacity as the licensed insolvency trustee (in such capacity, the "**Trustee**") of the bankrupt estates of Wolverine Energy and Infrastructure Inc. ("**WEI**"), Wolverine Equipment Inc., Wolverine Construction Inc., Western Canadian Mulching Ltd., HD Energy Rentals Ltd. and Liberty Energy Services Ltd. (collectively, the "**Debtors**") submits this Brief in support of its Application to set aside certain transactions (the "**Impugned Transactions**"): (i) pursuant to section 95 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the "**BIA**"); (ii) pursuant to the *Fraudulent Preferences Act*, RSA 2000, c F-24 (the "**FPA**") or the *Statute of Elizabeth*, 1571 (UK), 13 Eliz 1, c 5 (the "**SOE**"); (iii) pursuant to section 96 of the BIA; (iv) as unjust enrichments; and/or (v) section 101 of the BIA.

2. The Impugned Transactions are two individual payments, totaling $1,011,950.35, paid by WEI directly to 1586329 Alberta Ltd. ("**158 AB**") and Wolverine Management Services Inc. ("**WMSI**" and, collectively with 158 AB, the "**Douglas Corporations**"), and indirectly to Jesse Douglas ("**Mr. Douglas**", and, collectively with the Douglas Corporations, the "**Related Parties**") on July 5, 2023 and July 21, 2023, approximately 5 months prior to WEI's "date of the initial bankruptcy event" (the "**Look Back Period**").

3. The facts establish that the Douglas Corporations were mere instruments of Mr. Douglas' fraudulent or improper conduct. Acting as their alter ego, Mr. Douglas exercised complete domination and control over these entities, using them to facilitate payments from WEI and to shield funds that rightfully belong to its bankrupt estate.

4. In the event the Douglas Corporations lack sufficient funds equal to the Impugned Transactions, Mr. Douglas will be using them to shield those amounts from WEI's creditors, thereby attempting to withhold assets from creditor recovery through the corporate form.

5. This abuse of the corporate form to conceal and retain estate property warrants piercing the corporate veil.

6. At the time of each Impugned Transaction, WEI was insolvent and the Related Parties did not deal with WEI at arm's length. The Impugned Transactions occurred during the Look Back

Period, were made to the Related Parties and had the effect of giving the Related Parties a preference over other creditors of WEI, many of whom remain unpaid. As such, the elements of paragraph 95(1)(b) of the BIA are satisfied, rendering the Impugned Transactions void as against the Trustee.

7. The Impugned Transactions were also fraudulent or preferential payments made contrary to the FPA, and fraudulent transfers made contrary to the SOE. As such, the Impugned Transactions are void as against the Trustee.

8. Additionally, the Impugned Transactions constitute transfers at undervalue pursuant to paragraph 96(1)(b) of the BIA, as the Related Parties were not dealing at arm's length and the transfers occurred during the Look-Back Period. Consequently, all elements of paragraph 96(1)(b) of the BIA are satisfied. As the Trustee is of the opinion that the fair market value of the Impugned Transactions is nil, the Related Parties are therefore required to remit to the bankruptcy estate of WEI an amount equal to the difference between the value of the consideration received by WEI and the value of the consideration it provided.

9. The Related Parties were also unjustly enriched by the Impugned Transactions, with the creditors of WEI suffering a corresponding deprivation, as the Impugned Transactions were effected at their expense and without any juristic reason for such enrichment or deprivation.

10. Finally, the facts also support that the Impugned Transactions were made at a time when WEI was insolvent or was rendered insolvent, were conspicuously in excess of the fair market value of the consideration received by WEI and were made outside the ordinary course of business. Further, Mr. Douglas did not have reasonable grounds to believe that the Impugned Transactions occurred at a time when WEI was not insolvent or would not be rendered insolvent, were not conspicuously over the fair market value of the consideration received, or were made in the ordinary course of business.

11. Accordingly, all elements of subsection 101(2.01) of the BIA are satisfied. As such, this Court of King's Bench (the "**Court**") may grant judgment against Mr. Douglas in favour of the Trustee for the amounts of the Impugned Transactions, together with 5% per annum interest on such amounts pursuant to the *Interest Act*, RSC 1985, c I-15 (the "**Interest Act**").

12. The Trustee therefore seeks an Order piercing the corporate veil of the Douglas Corporations and compelling each of the Related Parties to return the value of the Impugned Transactions to WEI's bankrupt estate, ensuring that the recovered funds are distributed to WEI's creditors in accordance with their legal entitlements.

13. In the alternative, the Trustee seeks an Order compelling Mr. Douglas to return the value of the Impugned Transactions, plus 5% interest in annum, to the bankrupt estate of WEI, so that the funds may be distributed to WEI's creditors in accordance with their legal entitlements.

PART II– FACTS

A. The Parties

14. The Debtors were a diversified energy and infrastructure service provider in western Canada and the United States.[1] The Debtors were in the business of water management, energy rentals and services, environmental clearing and construction production testing, production rentals in Canada, as well as production testing and rentals in the United States.[2]

15. WEI was incorporated in Alberta on or about September 13, 2017, with its registered office in Calgary, Alberta.[3] WEI is the parent corporation and sole shareholder of each of the other Debtors and serves as the headquarters for all operations, providing general administrative, management, accounting and human resources functions for the other Debtors.[4]

16. On April 27, 2023, as a result of the Debtors' defaults, Canadian Western Bank ("**CWB**"), a secured creditor owed approximately $16.5 million at that time,[5] in its capacity as secured lender, issued a letter to the Debtors, addressed to Mr. Douglas, advising of its intent to terminate the banking relationship and demanding full repayment of the indebtedness by July 31, 2023 (the "**CWB Letter**").[6]

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1 The First Report of FTI Consulting Canada Inc. in its capacity as the licensed insolvency trustee of the bankrupt estates 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., dated August 29, 2025 ["**First Report**"], at para 1.

2 *Ibid.*

3 First Report, at para 18.

4 First Report, at para 17.

5 First Report, at para 23.

6 First Report, at para 19.

17. In August 2023, FTI was appointed as financial advisor (the "**FA Engagement**") to Fiera Private Debt Fund V LP and Fiera Private Debt Fund VI LP (collectively, "**Fiera**").[7] Fiera was a secured creditor of WEI and was owed approximately $54.6 million at that time.[8]

18. Throughout the FA Engagement, FTI's primary point of contact was Mr. Douglas, the Executive Chair and a director of WEI. Mr. Douglas was responsible for facilitating FTI's information requests and the presentation of WEI's restructuring plan and proposed "deleveraging" initiatives.[9]

19. As part of the FA Engagement, FTI requested various financial information from Mr. Douglas and WEI management, among which included: (i) copies of the borrowing base calculation and compliance certificates for July, August and September 2023 (the "**Borrowing Base Certificates**") as provided to CWB, another secured lender of WEI; and (ii) copies of the covenant waiver as referenced in the audited consolidated financial statements for the fiscal year-ended March 31, 2023 (the "**Audit Waiver**").[10]

20. The Borrowing Base Certificates indicated insufficient amounts to support the outstanding operating loan owed to CWB.[11]

21. The Audit Waiver was requested as Fiera advised FTI that they had not waived any of the financial covenants for the fiscal year ended March 31, 2023; however, the audited financial statements indicated a waiver had been provided.[12]

22. Ultimately, WEI was unable to address its financial difficulties, and on November 30, 2023 the Debtors, among other entities, sought and obtained an initial order (the "**Initial Order**") to commence proceedings (the "**CCAA Proceedings**") under the under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (the "**CCAA**").[13] The Initial Order provided, among other things,

7 First Report, at para 21.
8 First Report, at para 23.
9 First Report, at para 22.
10 First Report, at para 26.
11 First Report, at para 27.
12 *Ibid.*
13 First Report, at para 23.

a stay of proceedings until December 11, 2023, and Ernst & Young Inc. ("**E&Y**") being appointed as the monitor in the CCAA Proceedings.[14]

23. The following events occurred in the days leading up to the CCAA comeback hearing on December 8, 2023:

a) CWB provided FTI with the monthly borrowing base reporting packages dating back to March 2023, noting that "most of which [they] received from [Mr. Douglas] in late August and September," and FTI notes that each package was exclusively signed off by Mr. Douglas in his capacity as Executive Chair and director;

b) CWB, as secured lender to the Debtors, filed an application to appoint FTI as receiver and manager of the assets, properties and undertakings of the Debtors;

c) counsel to the Debtors consented to a receivership order in respect of the Debtors; and

d) on December 7, 2023, Fiera, as secured lender to the Debtors, filed an application to terminate the Initial Order.[15]

24. On December 8, 2023 (the "**Appointment Date**"), the Court granted an order, among other things:

a) terminating the CCAA Proceedings; and

b) appointing FTI as the receiver (in such capacity, the "**Receiver**") of all the assets, undertakings, and properties of the Debtors (the "**Receivership Proceedings**").[16]

25. On December 11, 2023, E&Y provided the Receiver with their draft desktop appraisal, the final report was received on February 28, 2024. Based on the desktop appraisal, the total recovery estimated under a forced liquidation value ("**FLV**") and an orderly liquidation value ("**OLV**") were

14 First Report, at para 2.
15 First Report, at para 30.
16 First Report, at para 4.

$30.9 million and $39.9 million, respectively.[17] The secured debt as at the Appointment Date was approximately $72.5 million.[18]

26. A sale and investment solicitation process commenced on January 4, 2024, and resulted in gross recovery to the Debtors' estate of approximately $24.4 million with the assets being sold on June 28, 2024.[19] Recovery from the asset sales was significantly below the FLV and OLV and the secured debt, resulting in: (i) a shortfall to the secured creditors, Fiera and CWB, of $26.9 million and $2.1 million, respectively; and (ii) no recoveries to the unsecured creditors.[20]

27. On February 21, 2025, the Court granted an order declaring the Debtors bankrupt and appointing FTI as trustee.[21]

28. Mr. Douglas resigned as President and Chief Executive Officer of WEI and was appointed as Executive Chair on May 27, 2021, and as at January 1, 2024, Mr. Douglas was still listed as a director and the Executive Chair of WEI.[22]

29. WEI's Management Information Circular dated November 1, 2022 (the "**2022 Information Circular**") states that Mr. Douglas, indirectly through two holding companies controlled by him, being WMSI and Wolverine Group Inc. ("**WGI**"), held 45.71% of the outstanding shares of WEI.[23]

30. Mr. Douglas was also the sole director and voting shareholder of 158 AB.[24] In addition, 158 AB was the sole voting shareholder of WMSI, and Mr. Douglas served as WMSI's sole director.[25] As of September 2, 2024, WMSI was struck and is no longer an active corporation.[26]

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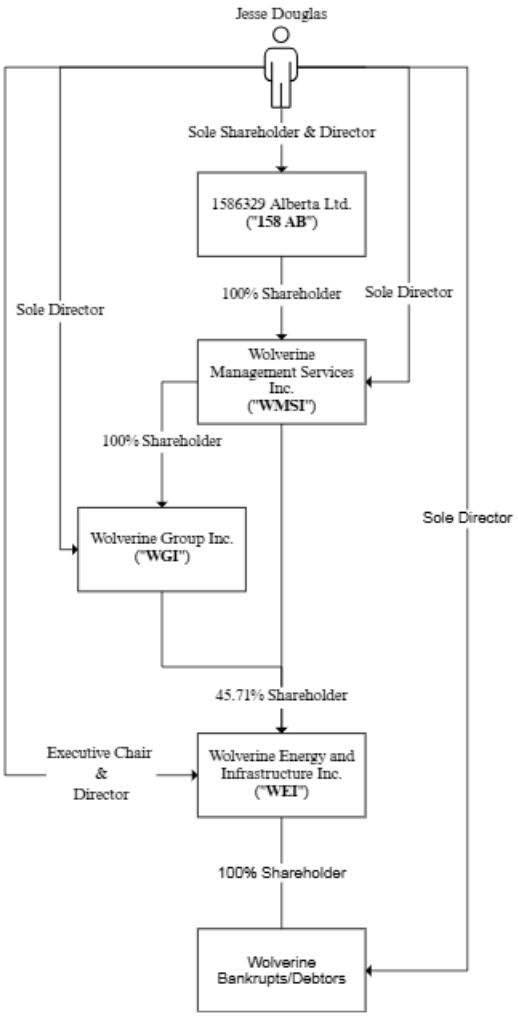
17 First Report, at para 31.
18 *Ibid.*
19 First Report, at para 25.
20 *Ibid.*
21 First Report, at para 5.
22 First Report, at para 64.
23 First Report, at para 60.
24 First Report, at para 42.
25 *Ibid.*
26 *Ibid.*

31. Mr. Douglas was also the sole director of WGI and WMSI was its sole shareholder.[27] As of October 2, 2024, WGI was struck and is no longer an active corporation.[28]

32. The relationship between WEI, the Related Parties and WGI described above is illustrated below:



[27] First Report, at para 61.
[28] *Ibid.*

B. The Impugned Transactions

33. On July 5, 2023, WEI made a payment totaling $486,950.35 to WMSI (the "**First Impugned Transaction**"); and on July 21, 2023, WEI made a payment totaling $525,000.00 to 158 AB (the "**Second Impugned Transaction**"), as summarized below:[29]

Invoice Date	Invoice Number	Invoice Description	Invoiced From	Paid By	Date Paid	Amount
July 5, 2023	20220528	Consulting Services	WMSI	WEI	July 5, 2023	$486,950
July 20, 2023	106202301	Settlement of Wages	158 AB	WEI	July 21, 2023	$525,000
Total						$1,011,950

34. The Trustee notes that the payments of the Impugned Transactions were made within a day of being submitted to WEI.[30] As at the Appointment Date, approximately 87% of the total Debtors' trade payables balances were outstanding greater than 60 days, as such, payment of the Impugned Transactions were made at a time when significant unsecured creditors remained outstanding greater than 60 days.[31]

35. The Trustee further notes that the 2022 Information Circular states that "during the financial year ended March 31, 2022, there were no contracts with external management companies in effect".[32] However, the Trustee notes that given that the First Impugned Transaction was made to WMSI and the Second Impugned Transaction invoice was paid to 158 AB, both external entities to WEI, this statement appears inconsistent with the Impugned Transactions.[33]

36. Specifically, regarding the First Impugned Transaction, the Trustee's investigation revealed the following:

a) On July 5, 2023, WEI received an invoice from WMSI describing "Consulting Services" as 23.19 months at $20,000 per month, totaling $463,762.24, inclusive of GST of $23,188.11, for an aggregate amount of $486,950.35.[34]

29 First Report, at para 40.
30 First Report, at para 74.
31 *Ibid.*
32 First Report, at para 79.
33 First Report, at para 82.
34 First Report, at para 45.

b) Email correspondence dated July 5th, 2023, between Alison Cowie ("**Cowie**"), Chief Financial Officer of WEI at the time of the Impugned Transactions, Darrell Peterson ("**Peterson**") and Jacquelyn Colville ("**Colville**"), both independent directors of WEI at the time of the Impugned Transactions (collectively, the "**Independent Directors of WEI**"), and Nik Keifer, the predecessor Chief Financial Officer to Cowie (the "**July 5th Email Correspondence**"), indicated that the invoice represented unpaid fees relating to Mr. Douglas' Executive Chair position from 2021 through to June 30, 2023. However, the July 5th Email Correspondence also gives rise to uncertainty as to the amounts purportedly owed to Mr. Douglas under the First Impugned Transactions:

> The bigger problems for comp start in F2022 when he became exec chair. That is where no one seems to have anything confirming a salary of $240k for that position. Instead it looks like he was being paid as any other director – infrequently and at a similar rate.
>
> Alison also notes a $144k cash bonus that is unpaid, that there should be an approval for.
>
> Assuming all of the above is accurate, WEII would owe Jesse about $428k for comp.[35]

c) Based on a reconciliation prepared by the Independent Directors of WEI and provided to Cowie under the assumption that the amounts owning are correct in the July 5th Email (the "**Reconciliation**"), the amount owing to Mr. Douglas was $427,884.93, which is approximately $59,070.67 less than the amount paid by WEI.[36]

d) Aside from the Reconciliation, despite their efforts, the Trustee was unable to locate any formal board minutes approving the amount of the First Impugned Transaction or its immediate payment.[37]

37. Specifically, regarding the Second Impugned Transaction, the Trustee's investigation revealed the following:

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35 First Report, at para 46.
36 *Ibid.*
37 First Report, at para 47.

a) On July 20, 2023, WEI received an invoice from 158 AB with a one-line description of "Settlement of Wages and Expenses" in the amount of $500,000, plus GST of $25,000, for a total payment of $525,000.[38]

b) An unsigned Executive Management Services Agreement (the "**ESA**") dated January 1, 2018, between WEI and 158 AB.[39] The ESA provided for an initial term ending March 31, 2019, with certain automatic renewal provisions, and set a "Basic Executive Fee" of $30,000 per month plus GST.[40]

c) On July 20, 2023, Mr. Douglas sent the Second Impugned Transaction invoice to Cowie, copying Peterson, and requested that it be paid that same day. Peterson replied to Cowie and Mr. Douglas by email, stating that the payment had "Board support" (collectively, the "**July 20th Emails**").[41]

d) Aside from the July 20th Emails, despite their efforts, the Trustee was unable to locate any formal board minutes approving the amount of the Second Impugned Transaction or its immediate payment.[42]

C. WEI's Financial Distress

38. On November 30, 2023, the Debtors, including WEI, voluntarily commenced the CCAA Proceedings.[43] At that point, the Debtors' financial difficulties had been long-standing, and they were deeply and admittedly insolvent.[44]

39. The affidavit of Shannon Ostapovich, President of WEI, filed on November 29, 2023 in support of the CCAA Proceedings, confirmed the financial difficulties and the insolvency of the Debtors.[45]

40. Prior to the CCAA Proceedings, WEI's unaudited consolidated financial statements for the period from September 30, 2022 to June 30, 2023 reflect working capital deficiencies and operating

38 First Report, at para 49.
39 First Report, at para 50.
40 *Ibid.*
41 First Report, at para 51.
42 First Report, at para 52.
43 First Report, at para 69.
44 *Ibid.*
45 *Ibid.*

losses throughout the entire period.[46] In addition, WEI was not in compliance with its financial covenants and required waivers at each quarter-end from September 30, 2022 onward.[47]

41. A summary of WEI's unaudited consolidated financial statements for the period from September 30, 2022 to June 30, 2023 is provided in the table below:[48]

(CAD 000's)	3-months Q2 2022 (Sept 30, 2022)	3-months Q3 2022 (Dec 31, 2022)	Audited FY ending (Mar 31, 2023)	3-months Q1 2023 (June 30, 2023)
Current Assets	$ 15,004	$ 18,723	$ 18,614	$ 11,466
Current Liabilities	45,205	47,725	48,322	40,171
Working Capital (deficiency)	(30,201)	(29,002)	(29,709)	(28,704)
Quarterly Operating Loss	(6,063)	(2,887)	(17,009)	(4,119)
Financial Covenant Default?	Not Compliant, Obtained Waivers	Not Compliant, Obtained Waivers[1]	Not Compliant, Obtained	Not Compliant, Obtained

[1] Financial Statements indicate waivers were obtained from the lender. Refer to Audit Waiver section for further discussion around the waivers.

[2] Financial Statements indicate waivers were obtained from the lender for the current quarter and up to March 31, 2024. Refer to Audit Waiver section for further discussion around the waivers.

42. The secured debt as at the Appointment Date was approximately $72.5 million and the Trustee notes that the Receivership Proceedings recoveries were insufficient to fully satisfy the claims of the Debtors' secured creditors, with no recovery available for unsecured creditors, demonstrating that the assets were worth less than the liabilities.[49] As of March 12, 2025, after the Debtors filed for bankruptcy, more than $24 million in secured debt remained outstanding against the bankruptcy estate of the Debtors, which includes WEI.[50]

The CWB Letter

43. On April 27, 2023, CWB, advised the Debtors of its intent to terminate the banking relationship and demanded full repayment of the indebtedness by July 31, 2023 in the CWB Letter.[51]

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46 *Ibid.*
47 *Ibid.*
48 *Ibid.*
49 First Report, at para 31.
50 Preliminary Report of FTI Consulting Canada Inc. in its capacity as the licensed insolvency trustee of the bankrupt estates 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., dated March 12, 2025, at para 21.
51 First Report, at para 19.

44. The Trustee notes that the Debtors, including WEI, failed to repay their indebtedness to CWB upon demand and, instead of satisfying their obligations, the Debtors commenced the CCAA Proceedings on November 30, 2023.[52]

Breach of financial covenants and the Audit Waiver

45. Note 19 of WEI's March 31, 2023 audited consolidated financial statements stated the following:

> At March 31, 2023, Wolverine is in breach of its financial covenants on its term debt, however has obtained waivers through March 31, 2024. There is no assurance that covenants will continue to be waived. If financial covenants are not met and the Company is unable to obtain waivers, the debt may become due on demand. This uncertainty may cast doubt with respect to the ability of the Corporation to continue as a going concern. Wolverine is in the process of negotiating covenant relief from its lenders. No agreements have been reached as of the date of the consolidated financial statements and therefore, there can be no assurance that such agreements will be reached…[53]

46. On November 4, 2022, Fiera sent an email to Mr. Douglas waiving principal payments for November and December 2022 and January and February 2023, as well as waiving **only** the September 30, 2022 financial covenants (the "**Original Waiver Email**").[54]

47. In reviewing WEI's books, records, and email history, the Trustee found correspondence dated July 12, 2023 between Deloitte, as WEI's auditor, Cowie, and Mr. Douglas discussing covenant waivers beyond September 30, 2022 (the "**Deloitte Email**").[55] Included in the Deloitte Emails is the Original Waiver Email; however, the wording had been doctored to include financial waivers for not only September, but also January and March: "We [Fiera] have also waived the Sept, **Jan and March** financial covenants."[56]

48. The Original Waiver Email only waived the September 30, 2022 financial covenant: "We [Fiera] have also waived the **Sept** financial covenants."[57] In Deloitte's email to Mr. Douglas, they

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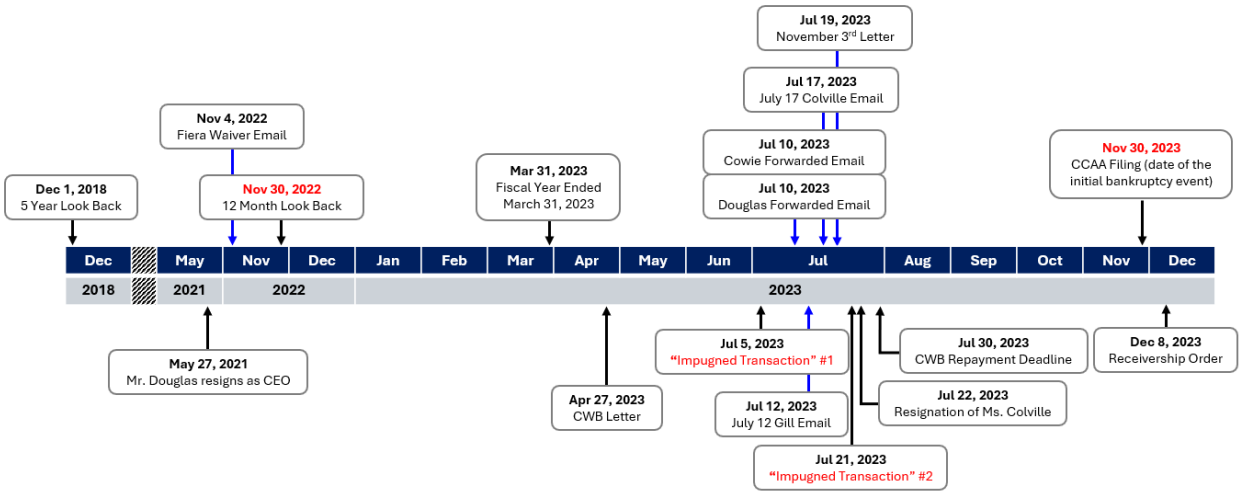
52 First Report, at para 23.
53 First Report, at para 69.
54 First Report, at para 34.
55 *Ibid.*
56 *Ibid.*
57 *Ibid.*

noted, "[Cowie] sent me the email below and I understand that you would prefer if we didn't reach out to [Fiera] directly."[58]

49. During the CCAA Proceedings, WEI provided the Trustee with the Audit Waiver, purporting to waive covenant breaches until the month ending March 2024.[59] Fiera has advised the Trustee, Mr. Douglas, and the Debtors that it has no record of the Audit Waiver and that it only has record of providing the waiver for the September 30 2022 financial covenants, as set out in the Original Waiver Email.[60]

50. The timeline described above and in the First Report is illustrated below:



PART III– ISSUES

51. The issues before this Court are:

A) Should the corporate veil be pierced to hold Mr. Douglas personally liable, in addition to the Douglas Corporations?

B) Are the Impugned Transactions preferential transactions pursuant to paragraph 95(1)(b) of the BIA and therefore void as against the Trustee?

58 *Ibid.*
59 *Ibid.*
60 *Ibid.*

C) Are the Impugned Transactions contrary to the FPA/SOE, such that this Court should order that their value be returned to the bankrupt estate of WEI?

D) Are the Impugned Transactions transfers at undervalue pursuant to section 96 of the BIA and therefore void as against the Trustee?

E) As a result of the Impugned Transactions, were the Related Parties unjustly enriched?

F) Do the Impugned Transactions give rise to a judgment against Mr. Douglas pursuant to subsection 101(2.01) of the BIA?

PART IV– ANALYSIS

A. The corporate veil should be pierced to hold Mr. Douglas personally liable, in addition to the Douglas Corporations

52. The BIA contains no provision preventing a trustee from seeking to pierce the corporate veil.

53. WEI made the First Impugned Transaction to WMSI and the Second Impugned Transaction to 158 AB. At the time of the Impugned Transactions, Mr. Douglas was the sole shareholder and director of 158 AB. WMSI was a wholly owned subsidiary of 158 AB, with Mr. Douglas serving as its sole director.

54. Although a corporation is a separate entity from its shareholders, directors and officers, the courts will pierce the corporate veil in certain circumstances where a sole shareholder and director is the alter ego of the corporation and uses it to perpetrate a fraud or improper conduct.[61] In such a case the impugned acts of the corporation will be deemed to be those of its controlling shareholder.[62]

55. The Ontario Court of Appeal has clearly articulated this exception:

> The Transamerica test is consistent with the principle reflected in the various business corporation statutes in Canada that corporate separateness is the rule. Where the corporate form is being abused to the point that the corporation is not a truly separate corporation and is being used to facilitate fraudulent or improper conduct, the law recognizes an exception to this rule.[63] [*emphasis added*]

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61 *Moody v Ashton*, 2004 SKQB 488, at para 172.

62 *Nedco Ltd v Clark and Communications Workers of Canada, Local No 4,* 1973 CanLII 892 (SK CA); *Saskatchewan Crop Insurance Corp v Greba (1997),* 1997 CanLII 17185 (SK KB).

63 *Yaiguaje v Chevron Corporation*, 2018 ONCA 472, at para 70.

The Douglas Corporations are alter egos of Mr. Douglas

56. The court in *Moody* considered whether the corporate veil should be pierced in the context of a fraudulent conveyance effected through a corporation.[64]

57. The court found that the defendant's transfer of funds through the corporation was a fraudulent act intended to shield those funds from creditors.[65] Moreover, the defendant, Ashton, was held to be the corporation's "alter ego" because he was its sole officer, director and shareholder.[66]

58. Analogously, Mr. Douglas is the alter ego of 158 AB, serving as its sole officer, director, and shareholder. As 158 AB is the sole shareholder of WMSI and Mr. Douglas is WMSI's sole director, Mr. Douglas' control also extends to WMSI.

59. In substance, both 158 AB and WMSI function as Mr. Douglas' alter egos, enabling him to direct and benefit from transactions as though the corporate entities did not exist. As in *Moody*, this complete domination and control, coupled with the use of the Douglas Corporations to effect transactions contrary to creditor interests, supports piercing the corporate veil.

The Douglas Corporations were used to facilitate fraud or improper conduct

60. The corporate veil may be pierced where those in control use the corporation as a shield for fraudulent or improper conduct. This principle was articulated in *Fleischer* and reaffirmed by the Ontario Court of Appeal in *Shoppers*:

> Typically, the corporate veil is pierced when the company is incorporated for an illegal, fraudulent or improper purpose. But it can also be pierced if when incorporated "those in control expressly direct a wrongful thing to be done": Clarkson Co. v. Zhelka at p. 578. Sharpe J. set out a useful statement of the guiding principle in Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co. (1996), 1996 CanLII 7979 (ON SC), 28 O.R. (3d) 423 at pp. 433-34 (Gen. Div.), affd [1997] O.J. No. 3754 (C.A.): "the courts will disregard the separate legal personality of a corporate entity where it is completely

64 *Moody v Ashton*, 2004 SKQB 488.
65 *Moody v Ashton*, at para 204.
66 *Moody v Ashton*, at para 38.

> dominated and controlled and being used as a shield for fraudulent or improper conduct."[67] [*emphasis added*]

61. Absent piercing the corporate veil, Mr. Douglas will be able to use the Douglas Corporations as shields for his fraudulent or improper conduct.

62. In *Moody*, the Court confirmed that an individual cannot invoke the corporate form to shield or withhold assets from creditors:

> It is not disputed that Brent is the alter ego of his holding company. I conclude that his utilization of it and the debenture in the fashion I have described, constitutes fraud that justifies piercing the corporate veil. The steps utilized to get the investment portfolio back into Susan's name to shelter it from Brent's creditors, were in reality Brent's actions, not those of his corporation. He cannot in law hide behind his shell corporation which was utilized by him as a sham to accomplish his fraudulent scheme that constitutes a fraudulent conveyance of the investment portfolio within the ambit of the Statute of Elizabeth. This conclusion applies regardless of which version of the facts is accepted respecting the agreement or the absence of any such agreement.[68] [*emphasis added*]

63. Similarly, in this case, if the Douglas Corporations lack sufficient funds equal to the Impugned Transactions, Mr. Douglas will be using them to shield those amounts from WEI's creditors, thereby attempting to withhold assets from creditor recovery through the corporate form.

64. Further, as the First Impugned Transaction was made by WEI to WMSI, and WMSI has since been struck, recoveries may be further limited to 158 AB unless the corporate veil is pierced, thereby preventing Mr. Douglas from continuing to use the Douglas Corporations as shields.

65. Mr. Douglas' fraudulent or improper conduct is evident. The Original Waiver Email to Deloitte was doctored to create the false appearance that Fiera had waived certain financial covenants when, in fact, no such waiver had been provided.

66. Mr. Douglas also produced the Audit Waiver and submitted it to Deloitte as purported evidence that Fiera had waived multiple financial covenant breaches. However, the Original Waiver Email indicates only that the September 2022 financial covenant may be waived, raising serious doubt

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67 *642947 Ontario Ltd v Fleischer*, 2001 CanLII 8623 (ON CA), at para 68; affirmed in *Shoppers Drug Mart Inc. v 6470360 Canada Inc (Energyshop Consulting Inc/Powerhouse Energy Management Inc)*, 2014 ONCA 85, at para 43.

68 *Moody*, at para 204.

as to why Fiera would issue a letter dated November 3, 2022 purporting to waive financial covenants until March 2024.

67. Additionally, despite CWB's demand for repayment, WEI failed to satisfy its indebtedness. Instead of paying its secured creditor, WEI diverted funds to the Douglas Corporations for the benefit of Mr. Douglas. Mr. Douglas, having received the CWB Letter addressed directly to him and knowing that WEI's obligations were due and payable by July 30, 2023, nevertheless prioritized payments to himself through the Douglas Corporations.

68. With respect to the Impugned Transactions:

a) The First Impugned Transaction is said to represent Mr. Douglas' unpaid fees for his role as Executive Chair from 2021 through June 30, 2023, amounts allegedly owed by WEI to Mr. Douglas personally. Yet, the Trustee could not locate board minutes authorizing any amount approving the First Impugned Transaction.

b) The Second Impugned Transaction is purportedly grounded in an unsigned ESA between WEI and 158 AB. While the July 20th Emails claim the payment had "Board support," the Trustee found no board minutes evidencing any formal approval of that amount.

69. Furthermore, given that the First Impugned Transaction was paid to WMSI and the Second Impugned Transaction was paid to 158 AB, both external entities to WEI, it is inconsistent to suggest that Mr. Douglas was owed any amounts under such an arrangement, as the 2022 Information Circular indicates otherwise.

70. These deficiencies are amplified by the statutory requirements under the Alberta *Business Corporations Act*, RSA 2000, c B-9 ("**ABCA**"), which mandate disclosure of the aggregate remuneration of directors in the prescribed form.[69] Particularly, the Alberta B*usiness Corporations Regulation*, Alta Reg 118/2000 requires that such disclosure be presented to shareholders at every annual meeting or included in, or appended to, the company's financial statements.[70] The failure to comply with these transparency obligations further supports that the Impugned Transactions were improper.

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69 *Business Corporations Act*, RSA 2000, c B-9, s 125(2).
70 *Business Corporations Regulation*, Alta Reg 118/2000, s 23.

71. The absence of formal board authorization, the lack of a signed ESA and the failure to make required statutory disclosures demonstrate Mr. Douglas' complete disregard for corporate governance and statutory obligations and support that the Impugned Transactions were designed to benefit him personally at the expense of WEI's creditors.

72. Accordingly, the Douglas Corporations have been used as shields for Mr. Douglas' fraudulent or improper conduct. Acting as their alter ego, Mr. Douglas exercised complete domination and control over the Douglas Corporations and caused WEI to make unauthorized payments to them without the required statutory disclosure. In doing so, the Douglas Corporations have been used to shield funds that rightfully belong to the bankrupt estate of WEI. This abuse of the corporate form to conceal and retain estate property warrants piercing the corporate veil.

B. The Impugned Transactions are preferential transactions pursuant to paragraph 95(1)(b) of the BIA and therefore void as against the Trustee

73. A preference occurs when a debtor with insufficient assets to satisfy all of its creditors pays one creditor preferentially over other creditors. Such payments are unfair because they undermine the scheme of distribution that would otherwise prevail in bankruptcy. One of the purposes of the BIA is to put all unsecured creditors on the same footing and a preference claim under section 95 of the BIA is "a means of carrying into effect that principle".[71]

74. Section 95(1) of the BIA states:

> **95(1) Preferences** A transfer of property made, a provision of services made, a charge on property made, a payment made, an obligation incurred, or a judicial proceeding taken or suffered by an insolvent person
>
> > (a) in favour of a creditor who is dealing at arm's length with the insolvent person, or a person in trust for that creditor, with a view to giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy; and
> >
> > (b) in favour of a creditor who is not dealing at arm's length with the insolvent person, or a person in trust for that creditor, that has the effect of giving that creditor a preference over another creditor is

[71] *Scott v Golden Oakes Enterprises Inc,* 2024 SCC 32 ["***Scott***"], at para 125; *BDO Dunwoody Ltd v Canada (Minister of National Revenue)*, 2011 MBCA 93, at para 18; and *Hudson v Benallack*, 1975 CanLII 158 (SCC), at page 175.

> void against – or, in Quebec, may not set up against – the trustee if it is made, incurred, taken or suffered as the case may be, during the period beginning on the day that is 12 months before the date of the initial bankruptcy event and ending on the date of the bankruptcy.[72] [*emphasis added*]

75. As above, in respect of creditors who dealt at arm's length with the debtor, section 95(1)(a) of the BIA requires that the payment in question was made "with a view" to give the creditor a preference. In contrast where a creditor is not dealing with the debtor at arm's length section 95(1)(b) of the BIA applies and instead requires only that the transaction had the effect of giving the creditor a preference.

76. Accordingly, under section 95(1)(b) of the BIA, there is no requirement for the Trustee to establish, or for the court to consider, whether WEI had the intent of giving the Related Parties a preference. It is an "effects-based test" rather than an "intention test".[73]

77. Section 95(1)(b) of the BIA was enacted pursuant to legislative amendments in 2007. The amendments were informed by the 2003 Senate Committee report *Debtors and Creditors Sharing the Burden*, which was commissioned pursuant to Parliament's statutory mandate to periodically review insolvency legislation. The report criticized the historical focus on proving intent, noting that such cases were difficult, costly, and time-consuming to prove. The report proposed a shift in focus from the debtor's intent to the effect of the transaction as a means of achieving a fairer and more efficient insolvency regime, a recommendation that was adopted through the enactment of section 95(1)(b) of the BIA in 2007.[74]

78. The elements required under section 95(1)(b) of the BIA are readily apparent based on the established facts:

a) the Douglas Corporations were creditors of WEI at the time the Impugned Transactions;

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72 *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ["**BIA**"], s 95(1).

73 Houlden, Morawetz & Sarra, *The 2024-2025 Annotated Bankruptcy and Insolvency Act*, (Toronto: Thomas Reuters, 2024) at page 594, C § 5:486.

74 *Debtors and Creditors Sharing the Burden*: *A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act, RSC 1985, c C-36,* Standing Senate Committee on Banking, Trade, and Commerce (November 2003) at page 220.

b) the Related Parties were not dealing at arm's length with WEI at the time of the Impugned Transactions;

c) WEI was an insolvent person at the time of each Impugned Transaction;

d) the Impugned Transactions were made during the 12-month period prior to the CCAA Proceedings (i.e. during the Look Back Period); and

e) the Impugned Transactions had the effect of giving the Douglas Corporations a preference over other creditors of WEI.

The Douglas Corporations were creditors of WEI at the time of the Impugned Transactions

79. A "creditor" for the purposes of section 95 of the BIA is defined as any person that has a "claim provable" under the BIA, and "claim provable" includes any claim or liability provable in proceedings under the BIA.[75]

80. Specifically, with respect to the Impugned Transactions:

a) WEI received an invoice for alleged unpaid fees relating to Mr. Douglas' Executive Chair position relating to the First Impugned Transaction; and

b) WEI received an invoice for alleged unpaid amounts relating to the Second Impugned Transaction.

81. While it is unclear whether such claims would ultimately be accepted by the Trustee under the bankruptcy proceedings, the definition of "creditor" under the BIA captures any claim, even if disputed, contingent, or unproven.

82. Accordingly, at the time of the Impugned Transactions, the Douglas Corporations each qualified as a "creditor" for the purposes of section 95 of the BIA.

[75] BIA, s 2.

The Related Parties were not dealing with WEI at arm's length

83. Related persons are deemed not to deal with each other at arm's length for the purposes of section 95(1)(b) of the BIA, in the absence of evidence to the contrary. "Related persons" is defined in subsection 4(2) of the BIA as follows:

> **Definition of related persons**
>
> (2) For the purposes of this Act, persons are related to each other and are related persons if they are
>
> (a) individuals connected by blood relationship, marriage, common-law partnership or adoption;
>
> (b) an entity and
>
> (i) a person who controls the entity, if it is controlled by one person,
>
> (ii) a person who is a member of a related group that controls the entity, or
>
> (iii) any person connected in the manner set out in paragraph (a) to a person described in subparagraph (i) or (ii); or
>
> (c) two entities
>
> (i) both controlled by the same person or group of persons,
>
> (ii) each of which is controlled by one person and the person who controls one of the entities is related to the person who controls the other entity,
>
> (iii) one of which is controlled by one person and that person is related to any member of a related group that controls the other entity,
>
> (iv) one of which is controlled by one person and that person is related to each member of an unrelated group that controls the other entity,
>
> (v) one of which is controlled by a related group a member of which is related to each member of an unrelated group that controls the other entity, or
>
> (vi) one of which is controlled by an unrelated group each member of which is related to at least one member of an unrelated group that controls the other entity.

84. A "related group" is defined in the BIA as "a group of persons each member of which is related to every other member of the group".[76] The Related Parties were a "related group" under the BIA at the time of the Impugned Transaction because:

a) Mr. Douglas, as the sole shareholder and sole director of 158 AB, exercised exclusive control over 158 AB; and

b) Mr. Douglas and 158 AB, being a "related group," exercised exclusive control over WMSI, with 158 AB as WMSI's sole shareholder and Mr. Douglas as its sole director.

85. Collectively, the Related Parties and WGI own 45.71% of the shares of WEI. The Trustee does not allege that the Related Parties had "control" over WEI for the purposes of the mechanical definition of "related persons" under the BIA (which requires *de jure* or majority control).[77]

86. However, subsection 4(4) of the BIA provides that whether persons not related to one another under the above definition were at the relevant time dealing with each other at arm's length is a question of fact:

> **Question of fact**
>
> **(4)** It 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.

87. The term "arm's length" is not defined in the BIA. The finding of fact mandated by subsection 4(4) of the BIA requires a determination, based on the totality of evidence, of whether the transaction involved generally accepted commercial incentives such as bargaining and negotiation in an adversarial format and the maximizing of a party's economic self-interest.[78] In the absence of any such indicia, the inference that arises is that the parties were not dealing at arm's length.[79]

88. This Court has previously defined a transaction at arm's length as one "where there are no bonds of dependence, control or influence" between the parties.[80] For a transaction to be considered

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76 BIA, s 4(1).

77 BIA, ss 4(2) and 4(5); *A Zimlet Ltd (Trustee of) v Woodbine Summit Ltd*, 1982 CarswellOnt 224, [1982] OJ No 2518; affirmed 1985 CarswellOnt 199, [1985] OJ No 1280; affirmed 1987 CarswellOnt 176, 64 CBR (NS) 89; *Green Gables Manor Inc, Re,* [1998] OJ No 2608, 41 BLR (2d) 299, at paras 16 to 17.

78 *National Telecommunications v Stalt,* 2018 ONSC 1101, at para 41.

79 *Scott*, at para 128.

80 *Hofer (Re)*, 2019 ABQB 405, at para 22.

arm's length, the relationship between the parties must be such that the transaction will "reflect ordinary commercial dealing between parties acting in their separate interests".[81]

89. Generally, courts examine the following three criteria in determining whether persons are dealing at arm's length for purposes of section 4(4) of the BIA: (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 by one over the other.[82]

90. All of these criteria are clearly present. As director of WEI, 158 AB, and WMSI, Mr. Douglas directed the bargaining on all sides of the Impugned Transactions. There was no independent negotiation or divergence of interest, WEI and the Related Parties acted in concert to advance Mr. Douglas' personal objectives rather than the separate, legitimate interests of each entity. At the time, WEI was insolvent, and an approximately $1 million payment to a director, made only months before the commencement of the CCAA Proceedings, was plainly contrary to WEI's best interests and those of its creditors.

91. Mr. Douglas' *de facto* control over WEI is further evidenced by the events during the Look Back Period. The Trustee confirmed that Mr. Douglas was involved in the restructuring efforts and attended the initial meetings between the Trustee, in its FA Engagement with Fiera, commencing in August 2023 and continuing up to the commencement of the CCAA Proceedings.

92. Further emphasizing Mr. Douglas' *de facto* control over WEI, at the time of the Impugned Transactions, WEI was the sole shareholder of each of the Debtors, with Mr. Douglas serving as the sole director of each Debtor. Although Mr. Douglas was not the sole director of WEI itself, he exercised singular authority over the other Debtors, which effectively constituted WEI's operating arms.

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81 *Ibid.*

82 *Scott*, at para 127; *Hofer (Re)*, 2019 ABQB 405, at para 22.

93. WEI functioned as the centralized headquarters, providing administrative, management, accounting, and human resources support to the Debtors. Notably, WEI did not generate revenue directly; rather, all operating revenues were produced by the Debtors under Mr. Douglas' direction.

94. Moreover, Mr. Douglas' *de facto* control over WEI is further emphasized as, in his capacity as the Executive Chair of WEI, he:

a) continued to sign-off on and send the Borrowing Base Certificates which were sent directly to CWB even though Mr. Douglas ceased to be the CEO in May 2021; and

b) was actively involved dealing with auditor requests and the correspondence regarding obtaining the Audit Waiver.

95. Accordingly, Mr. Douglas was the common mind directing the bargaining for all parties to the Impugned Transactions, the parties acted in concert without separate interests, and Mr. Douglas exercised *de facto* control over WEI in relation to the Impugned Transactions. The Related Parties and WEI were therefore related persons under the BIA and are deemed not to have been dealing at arm's length.

WEI was insolvent at the time of each Impugned Transaction

96. An "insolvent person" is defined in the BIA as follows:

> ***insolvent person*** means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and
>
> (a) who is for any reason unable to meet his obligations as they generally become due,
>
> (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due; (personne insolvable)

97. The definition sets out three disjunctive tests for insolvency, with either cash-flow insolvency or balance sheet insolvency being sufficient.

98. There is no question that WEI was an insolvent person as of November 30, 2023, when the CCAA Proceedings commenced. As set out above, the evidence demonstrates that WEI's insolvency arose well before that date, by at least September 2022, if not earlier.

WEI was cash-flow insolvent

99. For the purposes of the cash-flow insolvency test, a financially troubled corporation is insolvent if it is reasonably expected to run out of liquidity within a reasonable proximity of time as compared with the time reasonably required to implement a restructuring.[83] A looming liquidity crisis and a reasonably foreseeable inability to pay debts as they become due is sufficient.[84]

100. In *Stelco*, the court held that a liquidity crisis approximately *9* months away, where the debtor was projected to run out of operating cash, was sufficient to deem the corporation an "insolvent person" on a balance of probabilities.[85] WEI commenced the CCAA Proceedings only *5* months after the Impugned Transactions.

101. The CWB Letter reflects that WEI was already in financial distress, as CWB's decision to terminate the banking relationship arose from WEI's failure to meet its payment obligations under the lending facilities. The demand for immediate repayment by July 31, 2023, is a clear indication that CWB had determined WEI was unable to continue operating within the terms of its credit facilities.

102. Despite this demand, WEI failed to satisfy the amounts owing to CWB. Instead of curing its defaults or repaying the secured indebtedness as demanded, WEI sought protection under the CCAA Proceedings on November 30, 2023. This sequence of events further underscores WEI's insolvency and inability to meet its obligations as they became due.

103. Additionally, from September 30, 2022 to June 30, 2023, WEI incurred continuous operating losses. As of June 30, 2023, days before the Impugned Transactions and approximately 5 months prior to the commencement of the CCAA Proceedings, WEI had an operating loss of approximately $4.1 million.

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83 *Stelco Inc, Re*, 2004 CanLII 24933 (ON SC) [***Stelco***]; leave to CA appeal refused, 2004 CarswellOnt 2936, [2004] OJ No 1903; leave to appeal to SCC refused, 2004 CarswellOnt 5200, 2004 CarswellOnt 5201, at para 26.

84 *Ibid.*

85 *Stelco*, at paras 32 and 69.

104. Accordingly, WEI was an "insolvent person" under the cash-flow insolvency test at the time of the Impugned Transactions, as it was in a looming liquidity crisis that was evidenced by its filing for CCAA protection only 5 months later, which made it reasonably certain that it would be unable to meet its obligations as they became due.

WEI was balance sheet insolvent

105. For the purposes of the balance sheet insolvency test, WEI meets the condition where its total obligations exceed either (i) the fair valuation of its assets or (ii) the proceeds of a sale of its assets fairly conducted under legal process.[86]

106. WEI's unaudited consolidated financial statements for the period from September 30, 2022 to June 30, 2023 reflect continuous working capital deficiencies. WEI was also in breach of its financial covenants at each quarter-end from September 30, 2022 onward, requiring repeated waivers that were purportedly granted by way of doctored emails.

107. As of June 30, 2023, just days before the Impugned Transactions, WEI had a working capital deficiency of approximately $30 million. This deficiency is further emphasized by WEI's failure to repay the CWB debt upon demand and its subsequent decision to seek protection under the CCAA.

108. Additionally, as of the Appointment Date, approximately 5 months after the Impugned Transactions, WEI carried secured debt of approximately $72.5 million, while the total estimated recovery, even at the maximum OLV, was only $39.9 million.

109. This deficit ultimately materialized and proved worse than anticipated, as recoveries under the Receivership Proceedings amounted to only approximately $24.4 million, leaving a substantial shortfall to secured creditors and no recovery whatsoever for unsecured creditors.

110. Taken together, these facts demonstrate that the fair value of WEI's assets did not exceed its total obligations, thereby satisfying the balance-sheet insolvency test.

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86 BIA, s 2(c); and *Stelco*, at para 43.

The Impugned Transaction occurred during the Look Back Period

111. Paragraph 2(e) of the BIA defines the "date of the initial bankruptcy event" as the earliest of the specified dates, including, where applicable, the commencement of proceedings under the CCAA.

112. There is no dispute that the Impugned Transactions occurred on July 5, 2023 and July 21, 2023, within the 12-month period prior to the CCAA Proceedings that commenced on November 30, 2023.

The Impugned Transactions had the effect of giving a preference over other creditors

113. The Impugned Transactions had the effect of giving the Douglas Corporations a preference over other creditors of WEI. At its most basic, a preference occurs "when an insolvent debtor pays one or more creditors at the expense of other creditors".[87]

114. This is precisely what occurred here: despite CWB's demand for full repayment of its secured debt by July 31, 2023, as set out in the CWB Letter addressed to Mr. Douglas on behalf of WEI, WEI failed to satisfy its indebtedness to CWB and instead diverted funds to the Douglas Corporations for the benefit of Mr. Douglas, thereby preferring the Related Parties over WEI's secured lender.

115. At the time that each Impugned Transaction was made, the Debtors, including WEI, owed CWB and Fiera $72.5 million in secured debt. These debts were not paid during the Look Back Period, while over $1 million was paid to the Douglas Corporations.

116. Despite the restructuring opportunities available through the CCAA Proceedings and Receivership Proceedings to ensure creditors were repaid, they were not. Instead, over $1 million was paid to the Related Parties approximately 5 months before the commencement of the CCAA Proceedings. WEI and the other Debtors then filed for bankruptcy on February 21, 2025, and as of March 12, 2025, more than $24 million in secured debt remained outstanding against all estate of the Debtors, which includes WEI.

[87] *Urbancorp Cumberland 2 GP Inc, Re*, 2017 ONSC 7156, at para 33.

117. Recoveries from WEI's estate have been such that secured claims have not been paid in full and no recovery is available for unsecured creditors. If the Impugned Transactions had not been made, an additional $1 million could have been available for distribution to WEI's creditors in accordance with their legal entitlements. Therefore, the Impugned Transactions were preferential payments to the Related Parties at the expense of other creditors of WEI.

C. The Impugned Transactions are fraudulent preferences contrary to the FPA, and fraudulent transfers contrary to the SOE

118. In the first alternative, the facts show that the Impugned Transactions are fraudulent transfers, contrary to the FPA and the SOE.

119. The purpose of both the FPA and SOE is to strike down any conveyance made with the intent to defeat creditors, except for conveyances made for good consideration and bona fides to persons not having notice of fraud.[88] Although the test for each is slightly different, the present facts satisfy the requirements of both statutes.

120. Pursuant to section 2 of the FPA:

> **Intent to Prefer**
>
> **2** Subject to sections 6 and 9 [of the FPA], every gift, conveyance, assignment, transfer, delivery over or payment of goods, chattels or effects or of bills, bonds, notes or securities or of shares, dividends, premiums or bonus in any bank, company or corporation, or of any other property, real or personal, made
>
> (a) by a person at a time when the person is in insolvent circumstance or is unable to pay the person's debts in full or knows that the person is on the eve of insolvency, and
>
> (b) to or for a creditor with intent to give that creditor preference over the other creditors of the debtor or over any one or more of them,
>
> is void as against the creditor or creditors injured, delayed, prejudiced or postponed.[89]

121. Accordingly, to obtain a remedy under the FPA, the claimant must prove three elements: (i) a gift, conveyance, assignment, transfer, or other specified transaction occurred; (ii) it was made by a person in insolvent circumstances, that is unable to pay its debts in full or that knows that it is on the

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88 *Krumm v McKay*, 2003 ABQB 437 (CanLII)["***Krumm***"], at para 13.
89 *Fraudulent Preferences Act*, RSA 2000, c F-24 [**FPA**], s 2.

eve of insolvency; and (iii) the debtor had the intent to give that person a preference over one or more other creditors.

122. The test to obtain relief pursuant to the SOE is as follows:

a) there must be a conveyance of real or personal property;

b) for no or nominal consideration;

c) with intent to defraud, delay, or hinder creditors;

d) the party challenging the conveyance must be someone who was a creditor at the time of the conveyance or someone with a legal or equitable right to claim against the transferor; and

e) the conveyance had the intended effect.[90]

The Trustee has Standing under the FPA and SOE

123. As a preliminary matter, although the Trustee is not a creditor of WEI, it is settled law that creditors' ability to seek relief pursuant to either statute vests in the Trustee.[91] The Court of Appeal of Alberta has confirmed that there is nothing objectionable about a Trustee pursuing a remedy in respect of a fraudulent or preferential transaction on behalf of all creditors.[92]

WEI made payments to the Douglas Corporations

124. The FPA explicitly contemplates payments made as a form of fraudulent preference is intended to fall under its jurisdiction.[93] Both the FPA and SOE must be interpreted liberally and include any kind of transfers or conveyances made with the requisite intent, no matter their form.[94]

125. The Impugned Transactions, being transfers of cash to the Douglas Corporations, are property subject to the FPA and SOE.

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90 *Milavsky v Milavsky*, 2011 ABCA 231 ["***Milavsky***"], at para 31.
91 *Schlumpf v Corey*, 1994 CanLII 8975 (AB KB), at para 12.
92 *PricewaterhouseCoopers Inc v Perpetual Energy Inc*, 2021 ABCA 16, at paras 131 and 212.
93 FPA, s 2.
94 *Krumm*, at para 13.

WEI was insolvent or on the eve of insolvency at the time of the Impugned Transactions

126. Remedies under the SOE do not require any evidence of the transferor's financial position.[95] The FPA does not require that the transferor be insolvent at the time of the impugned transaction, rather it can be satisfied where the transferor is "in insolvent circumstances" or knows that it is "on the eve of insolvency".[96] The burden is met when the applicant can demonstrate facts that allow a reasonable inference of insolvency.[97]

127. As discussed above, WEI was insolvent at the time of the Impugned Transactions.

The Impugned Transactions were made with the requisite intent

128. The FPA and SOE require establishing the transferor's intent, either to give a preference or to defraud, delay, or hinder creditors. The intent of the transferor may be inferred from their circumstances and the circumstances of the transfer.[98] The fact that there was no consideration or voluntary consideration will in most cases justify the inference of the necessary intent absent evidence rebutting the inference.[99] Inference of intent will be strong if the transferor was insolvent at the time of the settlement or the settlement effectively "denuded [the transferor] of assets sufficient to cover existing obligations".[100] Whether there was an intent to defraud, delay, or hinder a creditor is "of course, largely a question of fact".[101]

129. The intent may be inferred from all the circumstances surrounding a transaction.[102] Both a close relationship between transferor and transferee,[103] and when a debtor makes a conveyance while a debtor is insolvent,[104] are *prima facie* evidence that a transfer, even one made for value, is made with fraudulent intentions.

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95 *Krumm*, at para 22.
96 FPA, s 2.
97 *Re Titan Investments Limited Partnership, (Judicature Act)*, 2005 ABQB 637, at para 15.
98 *Proulx v Proulx*, 2002 ABQB 151 (CanLII), at para 14.
99 *Ibid.*
100 *Ibid.*
101 *Milavsky*, 2011 ABCA 231, at para 30.
102 *Krumm*, at para 23.
103 *Krumm*, at para 22.
104 *Krumm*, at para 25.

130. The Supreme Court of Canada recently confirmed a list of non-exhaustive examples of badges of fraud, which are circumstances from which a court may infer the debtor's intent to defraud or delay a creditor, including:

a) the transfer was made to a non-arm's length party;
b) the debtor was facing actual or potential liabilities, was insolvent, or was about to enter a risky undertaking;
c) the deed of transfer had a self-serving and unusual provision;
d) the transfer was secret; and
e) the transfer was made with unusual haste.[105]

131. Such badges of fraud are evident. In particular, the Impugned Transactions were executed with unusual haste: both payments were made within a single day of WEI receiving the respective invoices, even as approximately 87% of the total trade payables of the Debtors remained outstanding for more than 60 days.

132. For all the reasons discussed above, the Trustee respectfully submits that each of the elements of the FPA and SOE are met based on the facts and circumstances surrounding the Impugned Transactions as set out above.

D. The Impugned Transactions are transfers at undervalue pursuant to paragraph 96(1)(b) of the BIA and therefore void as against the Trustee

133. In the second alternative, the Impugned transactions are transfers at undervalue pursuant to paragraph 96(1)(b) of the BIA and therefore void as against the Trustee.

134. In *Aquino*, the Supreme Court of Canada addressed the harm done by transfers at undervalue in the context of bankruptcy and insolvency proceedings:

> Transfers at undervalue frustrate the purposes of the BIA. They prejudice creditors by diminishing the value of a debtor's estate and reducing the funds available for distribution. They can also involve fraudulent debtors abusing the bankruptcy process by seeking a fresh start after trying to place assets beyond the reach of creditors, thereby undermining the integrity of the bankruptcy process (see, generally, Wood (2015), at pp. 188 and 190-91; L. W. Houlden, G. B. Morawetz and J. Sarra, Bankruptcy and Insolvency Law of Canada (4th ed. rev.

[105] *Aquino v Bondfield Construction*, 2024 SCC 31 ["***Aquino***"], at paras 44 to 45.

(loose-leaf)), vol. 2, at p. 5-959; J. D. Honsberger and V. W. DaRe, Honsberger's Bankruptcy in Canada (5th ed. 2017), at pp. 8-9).[106]

135. The statutory framework that pertains to transfers at undervalue is confined to section 96 of the BIA, which states:

> **Transfer at undervalue**
>
> **96 (1)** On application by the trustee, a court may declare that a transfer at undervalue is void as against, or, in Quebec, may not be set up against, the trustee — or order that a party to the transfer or any other person who is privy to the transfer, or all of those persons, pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor — if
>
> **(a)** the party was dealing at arm's length with the debtor and
>
> **(i)** the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and that ends on the date of the bankruptcy,
>
> **(ii)** the debtor was insolvent at the time of the transfer or was rendered insolvent by it, and
>
> **(iii)** the debtor intended to defraud, defeat or delay a creditor; or
>
> **(b)** the party was not dealing at arm's length with the debtor and
>
> **(i)** the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and ends on the date of the bankruptcy, or
>
> **(ii)** the transfer occurred during the period that begins on the day that is five years before the date of the initial bankruptcy event and ends on the day before the day on which the period referred to in subparagraph (i) begins and
>
> **(A)** the debtor was insolvent at the time of the transfer or was rendered insolvent by it, or
>
> **(B)** the debtor intended to defraud, defeat or delay a creditor.
>
> **Establishing values**
> **(2)** In making the application referred to in this section, the trustee shall state what, in the trustee's opinion, was the fair market value of the property or services and what, in the trustee's opinion, was the value of the actual consideration given or received by the debtor, and the values on which the

[106] *Aquino*, at para 37.

> court makes any finding under this section are, in the absence of evidence to the contrary, the values stated by the trustee.
>
> **Meaning of *person who is privy***
>
> **(3)** In this section, a ***person who is privy*** means a person who is not dealing at arm's length with a party to a transfer and, by reason of the transfer, directly or indirectly, receives a benefit or causes a benefit to be received by another person.

136. Accordingly, under paragraph 96(1)(b) of the BIA, a transfer at undervalue is void as against the Trustee where the parties were not dealing at arm's length and the transfer occurred within one year of the date of the initial bankruptcy event.

137. "Transfer at undervalue" is defined as "a disposition of property or provision of services for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor".[107]

138. The Trustee is of the opinion that the fair market value of the consideration received by WEI in connection with the Impugned Transactions, among other things discussed above, is nil because:

a) no formal board minutes could be located authorizing or approving the Impugned Transactions;

b) the Impugned Transactions directly contradict the representations in the 2022 Information Circular, which stated that no contracts with external management companies were in effect;

c) The July 5th Email Correspondence offers no support for the amounts calculated under the Reconciliation and instead assumes their accuracy – an assumption the Trustee was unable to verify despite their efforts; and

d) the Second Impugned Transaction was purportedly made pursuant to an unsigned ESA.

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[107] BIA, s 2.

139. As established above, WEI and the Related Parties were not dealing at arm's length, and the Impugned Transactions occurred within the Look Back Period. Accordingly, the Impugned Transactions constitute transfers at undervalue and are void as against the Trustee.

E. The Related Parties were unjustly enriched as a result of the Impugned Transactions

140. In the third alternative, the Related Parties were unjustly enriched as a result of the Impugned Transactions.

141. The test for unjust enrichment is well-established: (i) an enrichment of the defendant; (ii) a corresponding deprivation of the plaintiff; and (iii) an absence of juristic reason for the enrichment.[108]

142. A trustee in bankruptcy has standing to pursue third parties under equitable cause of action such as unjust enrichment.[109]

143. The Related Parties were enriched by the Impugned Transactions, and the creditors of WEI suffered a corresponding deprivation, as the Impugned Transactions were executed at WEI's creditors expense.

144. There is no juristic reason to justify the Impugned Transactions as the Trustee's review found no board minutes authorizing such payments. Accordingly, and as further discussed above, the absence of documentation, approval, or contractual entitlement demonstrates that the Impugned Transactions lacked any legitimate legal or commercial basis.

145. Accordingly, the Related Parties were enriched without juristic reason, while the creditors of WEI bore the corresponding deprivation.

F. The Impugned Transactions give rise to a judgment against Mr. Douglas pursuant to subsection 101(2.01) of the BIA

146. In the final alternative, the Impugned Transactions give rise to a judgment against Mr. Douglas pursuant to subsection 101(2.01) of the BIA.

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108 *Garland v Consumers' Gas Co*, 2004 SCC 25 at para 30.

109 *Doyle Salewski v Lalonde*, 2016 ONSC 5313, at paras 118-119, *Mercure v Marquette & Fils Inc*, 1975 CanLII 195 (SCC).

147. On November 1, 2019, amendments to section 101 of the *BIA* came into force, expanding the liability of directors in circumstances when their corporation becomes bankrupt. As a result, directors can be found liable if they authorize the payment of termination or severance pay, incentive benefits or other benefits to directors and officers in the 12 months preceding the date of initial bankruptcy event. Specifically, section 101 of the BIA states:

> **101 (1) Inquiry into dividends, redemption of shares or compensation**
> When a corporation that is bankrupt has paid a dividend, other than a stock dividend, redeemed or purchased for cancellation any of the shares of the capital stock of the corporation or has paid termination pay, severance pay or incentive benefits or other benefits to a director, an officer or any person who manages or supervises the management of business and affairs of the corporation within the period beginning on the day that is one year before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included, the court may, on the application of the trustee, inquire into the transaction to ascertain whether it occurred at a time when the corporation was insolvent or whether it rendered the corporation insolvent.

148. Pursuant to subsection 101(2.02) of the BIA, if a transaction referred to in subsection 101(1) of the BIA has occurred, the court may give judgment to the trustee against the directors of the corporation, jointly and severally, or solidarily, in the amount of the termination pay, severance pay or incentive benefits or other benefits, with interest on the amount, that has not been paid to the corporation. if the court finds that:

a) the payment

   (i) occurred at a time when the corporation was insolvent or rendered the corporation insolvent,

   (ii) was conspicuously over the fair market value of the consideration received by the corporation, and

   (iii) was made outside the ordinary course of business; and

b) the directors did not have reasonable grounds to believe that the payment

   (i) occurred at a time when the corporation was not insolvent or would not render the corporation insolvent,

   (ii) was not conspicuously over the fair market value of the consideration received by the corporation, and

(iii) was made in the ordinary course of business.[110]

149. Pursuant to section 3 of the Interest Act, whenever interest is payable by law and no rate is fixed by agreement or statute, the applicable rate shall be five per cent per annum.[111] Accordingly, as subsection 101(2.02) mandates the payment of interest but does not prescribe a specific rate, the applicable rate of interest is 5% per annum.

WEI was insolvent at the time of the Impugned Transactions

150. As evidenced above, at the time of the Impugned Transactions, WEI was insolvent. However, finding of director liability under subsection 101(2.01) of the BIA is satisfied even if WEI was solvent prior to the Impugned Transactions, as long as the Impugned Transactions rendered it insolvent.

151. The CWB Letter further supports this conclusion. WEI's failure to repay this debt upon demand, and its decision instead to seek protection under the CCAA, demonstrates that WEI was, at the very least, rendered insolvent as a result of the Impugned Transactions, having diverted funds to the Douglas Corporations for the benefit of Mr. Douglas rather than preserving sufficient assets to satisfy its secured obligations.

The Impugned Transactions were conspicuously over fair market value

152. As discussed above, the amounts paid under the Impugned Transactions should have been nil, and therefore, are conspicuously over fair market value.

The Impugned Transactions were outside the ordinary course of business

153. As at the Appointment Date, approximately 87% of the total Debtors' trade payables balances were outstanding greater than 60 days.

154. Conversely, the Impugned Transactions were processed and paid within a single day of WEI receiving the respective invoices, conduct that stands in direct contradiction to WEI's ordinary payment practices and further underscores the irregularity of these transactions.

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110 BIA, s 101(2.01).
111 *Interest Act*, RSC 1985, c I-15, s 3.

155. Additionally, the Impugned Transactions relate to amounts allegedly outstanding since 2021. It is neither ordinary nor commercially reasonable for such arrears to be paid in significant lump sums, let alone within a single day of the issuance of an invoice in the face of a demand for payment from its secured creditor which it has no ability to pay.

156. These circumstances strongly indicate that the Impugned Transactions were made outside the ordinary course of business

Onus of proof on Mr. Douglas

157. As required by paragraph 101(5.1)(b) of the BIA, the burden of proof shifts to Mr. Douglas to prove:

a) that the payment

   (i) occurred at a time when WEI was not insolvent or did not render WEI insolvent,

   (ii) was not conspicuously over the fair market value of the consideration received by WEI, or

   (iii) was made in the ordinary course of business; or

b) that Mr. Douglas had reasonable grounds to believe that the payment

   (i) occurred at a time when WEI was not insolvent or would not render WEI insolvent,

   (ii) was not conspicuously over the fair market value of the consideration received by WEI, or

   (iii) was made in the ordinary course of business.

PART V– CONCLUSION

158. WEI was deeply insolvent, on both a cash-flow and balance sheet basis, by its own admission well before the CCAA Proceedings commenced on November 30, 2023. WEI made two payments, totalling over $1 million to a closely related, non-arm's length parties. There is no evidence of ordinary commercial dealing between the WEI and the Related Parties; indeed, all evidence is to the contrary.

159. The Douglas Corporations were mere instruments of Mr. Douglas' fraudulent and improper conduct. This abuse of the corporate form to conceal and retain estate property warrants piercing the corporate veil.

160. All elements necessary to establish either:

a) a preference under paragraph 95(1)(b);

b) a preference under FPA and/or transfer under the SOE;

c) a transfer at undervalue pursuant to paragraph 96(1)(b); and/or

d) unjust enrichment,

are satisfied.

161. Accordingly, the Trustee respectfully submits that this Court should declare the Impugned Transactions void as against the Trustee and order each of the Related Parties to return the value of the Impugned Transactions to the estate of WEI, for the Trustee to distribute to the Debtors' creditors in accordance with their legal entitlements.

162. In the alternative, the Impugned Transactions give rise to a judgment against Mr. Douglas pursuant to Subsection 101(2.01) of the BIA, and the Trustee respectfully submits that this Court should order Mr. Douglas to return the value of the Impugned Transactions, plus 5% interest in annum, to the estate of WEI for the Trustee to distribute to the Debtors' creditors in accordance with their legal entitlements.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 29TH DAY OF AUGUST, 2025.

Torys LLP
Counsel for the Trustee

TABLE OF AUTHORITIES

27.	*Garland v Consumers' Gas Co*, 2004 SCC 25
28.	*Doyle Salewski v Lalonde*, 2016 ONSC 5313
29.	*Mercure v Marquette & Fils Inc,* 1975 CanLII 195 (SCC)