Court File No. CV-16-11242-00CL

*ONTARIO*
**SUPERIOR COURT OF JUSTICE**
**(COMMERCIAL LIST)**

IN THE MATTER OF THE LIQUIDATION OF

LWP CAPITAL INC. PURSUANT TO SECTION 211 OF THE *CANADA BUSINESS CORPORATIONS ACT,* R.S.C. 1985, c. C-44, AS AMENDED

and

KSV ADVISORY INC. IN ITS CAPACITY AS LIQUIDATOR OF LWP CAPITAL INC.

**APPLICANT**

# BOOK OF AUTHORITIES OF THE APPLICANT

January 5, 2016

**OSLER, HOSKIN & HARCOURT LLP**
Box 50, 1 First Canadian Place
Toronto, Canada M5X 1B8

Marc Wasserman (LSUC#44066M)
Tel: 416.862.4908

Sonja Pavic (LSUC #: 64558U)
Tel: 416.862.5661
Fax: 416.862.6666

Lawyers for the Applicant,
KSV Advisory Inc.

# Index

# INDEX

# Tab 1

Court File No. CV-13-10282-00CL

*ONTARIO*
**SUPERIOR COURT OF JUSTICE**
**COMMERCIAL LIST**

| | | |
|---|---|---|
| THE HONOURABLE MR. | ) | FRIDAY, THE 18TH DAY |
| | ) | |
| JUSTICE MORAWETZ | ) | OF OCTOBER, 2013 |

**IN THE MATTER OF THE WINDING-UP OF DIVERSINET CORP.**

**APPLICATION UNDER SECTION 207 OF THE *BUSINESS CORPORATIONS ACT*, R.S.O. 1990, c. B.16, AS AMENDED**

**WINDING-UP ORDER**

**THIS APPLICATION**, made by Duff & Phelps Canada Restructuring Inc., in its capacity as the liquidator (in such capacity, the "**Liquidator**") of Diversinet Corp., pursuant to section 207 of the *Business Corporations Act*, R.S.O. 1990, c. B.16, as amended (the "**OBCA**"), for an Order, among other things, continuing under the supervision of this Court the voluntary winding-up of Diversinet Corp. pursuant to the Plan of Liquidation and Distribution approved by the shareholders of Diversinet Corp. and adopted by the directors of Diversinet Corp. effective September 23, 2013 and attached hereto as **Schedule "A"** (the "**Liquidation Plan**"), was heard this day at 330 University Avenue, Toronto, Ontario.

**ON READING** the First Report to this Court of the Liquidator dated October 4, 2013 (the "**First Report**") and the affidavit of David Hackett sworn October 17, 2013, and on hearing the submissions of counsel for the Liquidator and counsel for Diversinet Corp., no one appearing for any other person on the service list, although duly served as appears from the affidavit of Eunice Baltkois sworn October 4, 2013, filed,

**SERVICE**

1. **THIS COURT ORDERS** that the time for service of the Notice of Application and the Application Record is hereby abridged and validated so that this Application is properly returnable today and hereby dispenses with further service thereof.

**APPLICATION**

2. **THIS COURT ORDERS AND DECLARES** that the Liquidation Plan (and the appointment of the Liquidator and the Inspectors thereunder) be and is hereby approved and affirmed.

3. **THIS COURT ORDERS** that any capitalized terms not otherwise defined in this Order shall have the meaning ascribed to them in the Liquidation Plan.

4. **THIS COURT ORDERS** that that the winding-up of Diversinet Corp. shall continue to be effected and implemented under the supervision of this Court and in accordance with the terms of the Liquidation Plan and any further order of this Court.

5. **THIS COURT ORDERS** that, for greater certainty, the Liquidator hereby has and shall have all of the powers and authorities as provided to it under the Liquidation Plan and the OBCA and any further order of this Court.

**NO PROCEEDINGS AGAINST DIVERSINET OR ITS PROPERTY**

6. **THIS COURT ORDERS** that from the date of this Order until further order of this Court (the "**Stay Period**"), no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**") shall be commenced or continued against or in respect of Diversinet Corp., any of its subsidiaries or affiliates (collectively, "**Diversinet**"), or the Liquidator, or affecting any of Diversinet's current or future assets, undertakings or properties of every nature and kind whatsoever, and wherever situate, including all proceeds thereof (collectively, the "**Property**"), except with the written consent of the Liquidator, or with leave of this Court, and any and all Proceedings currently under way against or in respect of Diversinet or affecting the Property are hereby stayed and suspended pending further order of this Court.

**NO EXERCISE OF RIGHTS OR REMEDIES**

7. **THIS COURT ORDERS** that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of Diversinet or the Liquidator, or affecting the Property, are hereby stayed and suspended except with the written consent of the Liquidator, or leave of this Court, provided that nothing in this Order shall: (i) empower the Liquidator to carry on any business which Diversinet is not lawfully entitled to carry on; (ii) exempt the Liquidator from compliance with statutory or regulatory provisions relating to health, safety or the environment; (iii) prevent the filing of any registration to preserve or re-perfect an existing security interest; or (iv) prevent the registration of a claim for lien.

**NO INTERFERENCE WITH RIGHTS**

8. **THIS COURT ORDERS** that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, lease, sub-lease, licence or permit in favour of or held by Diversinet, except with the written consent of the Liquidator, or leave of this Court.

**CONTINUATION OF SERVICES**

9. **THIS COURT ORDERS** that during the Stay Period, all Persons having oral or written agreements with Diversinet or statutory or regulatory mandates for the supply of goods and/or services, including, without limitation, all computer software, communication and other data services, centralized banking services, payroll services, insurance, employee benefits, transportation services, utility, leasing or other services to Diversinet, are hereby restrained until further order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Liquidator, and that the Liquidator shall be entitled to the continued use of Diversinet's current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Liquidator in accordance with normal payment practices of Diversinet or such other practices as

may be agreed upon by the supplier or service provider and the Liquidator, or as may be ordered by this Court.

**PROCEEDINGS AGAINST DIRECTORS AND OFFICERS**

10. **THIS COURT ORDERS** that during the Stay Period, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of Diversinet with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of Diversinet whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers of Diversinet.

**THE LIQUIDATOR**

11. **THIS COURT ORDERS** that the Liquidator shall provide any creditor or shareholder of Diversinet with information provided by Diversinet in response to reasonable requests for information made in writing by such creditor or shareholder addressed to the Liquidator or its legal counsel. The Liquidator shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Liquidator has been advised by Diversinet or the Inspectors is confidential or otherwise material, non-public information, the Liquidator shall not provide such information to creditors or shareholders unless otherwise directed by this Court, or on such terms as the Liquidator and the Inspectors may agree.

12. **THIS COURT ORDERS** that, in addition to the rights and protections afforded the Liquidator under the OBCA and the Liquidation Plan, the Liquidator shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order or the Liquidation Plan, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Liquidator by the OBCA, the Liquidation Plan or any applicable legislation.

13. **THIS COURT ORDERS** that the Liquidator and its counsel shall be paid their reasonable fees and disbursements incurred both before and after the making of this Order, in each case at their standard rates and charges, by Diversinet as part of the costs of these

proceedings. The Liquidator is hereby authorized and directed to pay its accounts and the accounts of its counsel as and when such accounts are rendered and approved by the Inspectors.

14. **THIS COURT ORDERS** that the Liquidator and its counsel shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of $100,000, as security for their professional fees and disbursements incurred at the standard rates and charges of the Liquidator and its counsel, both before and after the making of this Order in respect of these proceedings. The Administration Charge shall constitute a first charge on the Property and shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person.

15. **THIS COURT ORDERS** that the filing, registration or perfection of the Administration Charge shall not be required, and that the Administration Charge shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Administration Charge coming into existence, notwithstanding any such failure to file, register, record or perfect.

16. **THIS COURT ORDERS** that the Administration Charge shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Administration Charge shall not otherwise be limited or impaired in any way by: (a) the pendency of these proceedings; (b) the provisions of any federal or provincial statutes; or (c) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds Diversinet, and notwithstanding any provision to the contrary in any Agreement:

(a) the creation of the Administration Charge shall not create or be deemed to constitute a breach by Diversinet of any Agreement to which it is a party;

(b) none of the chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Administration Charge; and

(c) the payments made by Diversinet pursuant to this Order and the granting of the Administration Charge do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable, reviewable, void or voidable transactions under any applicable law.

**SERVICE AND NOTICE**

17. **THIS COURT ORDERS** that the Liquidator be at liberty to serve this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or electronic transmission to Diversinet's creditors or other interested parties at their respective addresses as last shown on the records of Diversinet and that any such service or notice by courier, personal delivery or electronic transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

18. **THIS COURT ORDERS** that the Liquidator, and any party who has filed a Notice of Appearance may serve any court materials in these proceedings by e-mailing a PDF or other electronic copy of such materials to counsels' email addresses as recorded on the Service List from time to time, and the Liquidator may post a copy of any or all such materials on its website at www.duffandphelps.com.

**DISPENSING WITH AUDITED FINANCIAL STATEMENTS**

19. **THIS COURT ORDERS AND DECLARES** that Diversinet and the Liquidator are not required to produce or place before Diversinet's shareholders any further audited financial statements as required under subsections 154(1) and 160(1) of the OBCA or otherwise and that Diversinet and the Liquidator be and are hereby exempt from the requirements of Part XII of the OBCA regarding the appointment and duties of an auditor.

**GENERAL**

20. **THIS COURT ORDERS** that Liquidator may from time to time apply to this Court for advice and directions in the discharge of its powers and duties under this Order.

21. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Liquidator and its respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Liquidator, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Liquidator in any foreign proceeding, or to assist the Liquidator and its respective agents in carrying out the terms of this Order.

22. **THIS COURT ORDERS** that the Liquidator be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Liquidator is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

23. **THIS COURT ORDERS** that any interested party (including the Liquidator) may apply to this Court to vary or amend this Order on not less than seven (7) days notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

24. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. Eastern Daylight Time on the date of this Order.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

OCT 10 2013

MB

**Schedule "A"**
**Plan of Liquidation and Distribution**

Attached.

# Schedule "A"

## DIVERSINET CORP.
## PLAN OF LIQUIDATION AND DISTRIBUTION

WHEREAS the board of directors of Diversinet Corp. (the "**Board**") has concluded that it is in the best interests of Diversinet Corp. ("**Diversinet**" or "**Company**") to be wound up voluntarily pursuant to the *Business Corporations Act* (Ontario) in accordance with the terms of this Liquidation Plan (as defined below);

AND WHEREAS the Board has passed a resolution authorizing the Company to seek shareholder approval for the winding up of the Company and hold a special meeting of shareholders to consider and vote to require the Company to be wound up voluntarily and, in connection therewith, approve this Liquidation Plan;

NOW THEREFORE THIS Liquidation Plan is adopted by the Board as of the last date set forth below, having the terms and conditions as set out herein.

### ARTICLE 1
### INTERPRETATION

**1.1 Definitions**

In this Liquidation Plan:

"**Assets**" means all of the property, assets and undertaking of Diversinet;

"**Board**" has the meaning given to it in the recitals of this Liquidation Plan;

"**Business Day**" means a day, other than a Saturday or Sunday, on which banks are generally open for business in Toronto, Ontario;

"**Calendar Day**" means any day, including a Saturday, Sunday or statutory holiday in Toronto, Ontario;

"**Canadian Dollars**" or "**CDN$**" means dollars denominated in lawful currency of Canada;

"**Claim**" means

(a) any right of any Person against Diversinet in connection with any indebtedness, liability or obligation of any kind of Diversinet and any interest accrued thereon or costs payable in respect thereof, whether liquidated, unliquidated, reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, present, future, known or unknown, by guarantee, surety or otherwise, and whether or not such right is executory or anticipatory in nature, including any claim made or asserted against Diversinet through any affiliate, associate or any right or ability of any Person to advance a claim for contribution or indemnity or otherwise with respect to any matter, action, cause or chose in action, whether existing at present or commenced in the future with respect to any matter, action, cause or chose in action; and

(b) any existing or future right of any Person against any one or more of the Directors which arose or arises as a result of such Director's position, supervision, management or involvement as a Director or otherwise in any other capacity in connection with Diversinet whether such right, or the circumstances giving rise to it, arose before or after the Effective Date and whether enforceable in any civil, administrative or criminal proceeding;

"**Claims Process**" means the process established by the Liquidator and approved by the Court for the identification, resolution and barring of certain Claims, including *inter alia* the issuance of a final order of the Court establishing the Claims;

"**Clearance Certificates**" mean:

(a) a certificate issued by the Minister pursuant to subsection 159(2) of the Income Tax Act, R.S.C. 1952, c. 148 (the "ITA"), or any equivalent thereto, certifying that all amounts for which Diversinet is, or can reasonably be expected to become, liable under the ITA and the Taxation Act, 2007, S.O. 2007, c. 11, Sched. A, up to and including the date of distribution have been paid, or that the Minister has otherwise accepted security for payment;

(b) a certificate issued by the Minister pursuant to subsection 23(5) of the Canada Pension Plan, R.S.C. 1985, c. C-8 (the "CPP"), or any equivalent thereto, certifying that all amounts for which Diversinet is liable under the CPP up to and including the date of distribution, have been paid or that security for the payment thereof has been accepted by the Minister;

(c) a certificate issued by the Minister pursuant to subsection 86(3) of the Employment Insurance Act, S.C. 1996, c. 23 (the "EIA"), or any equivalent thereto, certifying the payment, or acceptance by the Minister of security for payment, of all amounts for which Diversinet is liable under the EIA up to and including the date of distribution;

(d) a certificate issued by the Minister pursuant to subsection 81(1) of the Excise Tax Act, R.S.C. 1985, c. E-15 (the "ETA"), or any equivalent thereto, certifying that no tax, penalty, interest or other sum under the ETA, chargeable against or payable by the Liquidator or chargeable against or payable in respect of the Assets, remains unpaid or that security for the payment thereof has, in accordance with section 80.1 of the ETA, been accepted by the Minister;

(e) a certificate issued by the Minister pursuant to subsection 270(3) of the ETA, or any equivalent thereto, certifying that all amounts payable or remittable under Part IX of the ETA by Diversinet in respect of the reporting period during which the distribution is made or any previous reporting period, and all amounts that are, or can reasonably be expected to become, payable or remittable under Part IX of the ETA by the Liquidator in respect of the reporting period during which the distribution is made, has been paid or that security for the payment thereof has been accepted by the Minister;

(f) a certificate issued by the Ontario Minister of Finance pursuant to subsection 19(2) of the Employer Health Tax Act, R.S.O. 1990, C. E. 11 (the "EHTA"), or any equivalent thereto, certifying that all taxes, interest and penalties that have been assessed under the EHTA and are chargeable against or payable out of the property of Diversinet have been paid or that security for the payment thereof in a form acceptable to the Ontario Minister of Finance has been given; and

(g) a certificate issued by pursuant to subsection 107(2) of the Corporations Tax Act, R.S.O. 1990, C.40 ("CTA"), or any equivalent thereto, certifying that all taxes, interest, penalties and other amounts payable by Diversinet under the CTA have been paid or that security for the payment thereof in a form acceptable to the Ontario Minister of Finance has been given under section 103 of the CTA;

"**Common Shares**" means the common shares in the capital of Diversinet;

"**Court**" means the Ontario Superior Court of Justice (Commercial List);

"**Diversinet**" or "**Company**" has the meaning given to it in the recitals of this Liquidation Plan;

"**Creditor**" means any Person with a Claim;

"**Directors**" means all individuals who were, on or at any time before the Effective Date, directors or officers of Diversinet, and the term "**Director**" shall mean any one of them;

"**Dissolution Date**" means the date on which the Company is dissolved pursuant to the OBCA or by order of the Court;

"**Effective Date**" means the date to be established by a resolution of the Board upon which the implementation of the Liquidation Plan shall commence;

"**Employees**" means the employees of Diversinet;

"**Governmental Authority**" means any nation or government, any province, state or other political subdivision thereof, any entity exercising executive, legislative, judicial, regulatory or administrative functions of or pertaining to government or any Legal Requirement and any corporation or other entity owned or controlled, through capital stock or otherwise by any of the foregoing;
"**Inspectors**" has the meaning given to it in Section 6.1;
"**Legal Requirement**" means any statute, law, treaty, rule, regulation, order, decree, writ, injunction or determination of any arbitrator, court, Governmental Authority or securities exchange and, with respect to any Person, includes all such Legal Requirements applicable or binding upon such Person, its business or the ownership or use of any of its assets;
"**Liquidator**" means the Person appointed from time to time pursuant to Sections 4.1, 4.5, or 4.6 in its capacity as liquidator of Diversinet;
"**Liquidation Date**" means the date on which the Shareholders pass the Resolution;
"**Liquidation Plan**" means this plan of liquidation and distribution as it may be amended, modified, supplemented, restated or otherwise modified in accordance with its terms;
"**Minister**" means the Minister of National Revenue;
"**OBCA**" means the *Business Corporations Act* (Ontario);
"**OBCA Director**" means the Director appointed under Section 278 of the OBCA;
"**OTCQB**" means the marketplace of the Over The Counter exchange for venture companies known as "OTCQB";
"**Person**" means any individual, partnership, limited partnership, joint venture, trust, corporation, unincorporated organization, government, agency, regulatory body or instrumentality thereof, legal personal representative or litigation guardian, or any other judicial entity howsoever designated or constituted domiciled;
"**Public Trustee**" means the Public Guardian and Trustee pursuant to the *Public Guardian and Trustee Act*, R.S.O. 1990, Chapter P.51;
"**Resolution**" means the special resolution of the Shareholders authorizing the voluntary winding up of Diversinet made in accordance with the OBCA and approving this Liquidation Plan;
"**Shareholders**" means all holders of Common Shares shown from time to time in the registers maintained by or on behalf of Diversinet by the Transfer Agent in respect of the Common Shares and, unless otherwise specified, includes all beneficial owners of Common Shares;
"**Tax Return**" means any report, return or other information required to be supplied to a taxing authority in connection with (a) all taxes, charges, fees, levies and other assessments (whether federal, provincial, local or foreign), including income, gross receipts, excise, property, sales, use, transfer, license, payroll, franchise, withholding, social security and unemployment taxes, and (b) any interest, penalties and additions related to the foregoing;
"**Transfer Agent**" means Computershare Investor Services Inc., as transfer agent for the Common Shares of the Company; and
"**TSXV**" means the board of the TSX Venture Exchange known as "TSXV";
"**US Dollars**" or "**US$**" means dollars denominated in lawful currency of the United States;

### 1.2 Certain Rules of Interpretation

In this Liquidation Plan and the Schedules hereto:

(a) all references to currency are to US Dollars, except as otherwise expressly indicated;
(b) the division of this Liquidation Plan into articles, sections, subsections and clauses and the insertion of headings and a table of contents are for convenience of reference only and shall not affect the construction or interpretation of this Liquidation Plan. The terms "this Liquidation Plan", "hereof", "hereunder", "herein" and similar expressions refer to this Liquidation Plan and not to any particular article, section, subsection or clause and include any plan supplemental hereto. Unless otherwise indicated, any reference in this Liquidation Plan to an article, section, subsection, clause or schedule refers to the specified article, section, subsection, clause or schedule of or to this Liquidation Plan;
(c) the use of words in the singular or plural, or with a particular gender, shall not limit the scope or exclude the application of any provision of this Liquidation Plan or a schedule hereto to such Person (or Persons) or circumstances as the context otherwise permits;
(d) the words "includes" and "including" and similar terms of inclusion shall not, unless expressly modified by the words "only" or "solely", be construed as terms of limitation, but rather shall mean "includes without limitation" and "including without limitation", so that references to included matters shall be regarded as illustrative without being either characterizing or exhaustive;
(e) unless otherwise specified, all references to time herein and in any document issued pursuant hereto mean local time in Toronto, Ontario and any reference to an event occurring on a Business Day shall mean prior to 5:00 p.m., on such Business Day. Unless otherwise specified, the time period within or following which any payment is to be made or act is to be done shall be calculated by excluding the day on which the period commences and including the day on which the period ends and by extending the period to the next succeeding Business Day if the last day of the period is not a Business Day. Whenever any payment to be made or action to be taken under this Liquidation Plan is required to be made or to be taken on a day other than a Business Day, such payment shall be made or action taken on the next succeeding Business Day;
(f) unless otherwise specified, where any reference to an event occurring within any number of "days" appears in this Liquidation Plan, such reference means Calendar Days and not Business Days; and
(g) unless otherwise provided, any reference to a statute, or other enactment of parliament or a legislature includes all regulations made thereunder, all enactments to or re-enactments of such statute or regulations in force from time to time, and, if applicable, any statute or regulation that supplements or supersedes such statute or regulation.

## ARTICLE 2
## PURPOSE OF THE PLAN

### 2.1 Purpose

The purpose of this Liquidation Plan is to provide for a plan of liquidation and distribution of the Assets, payment or settlement of all Claims and dissolution of the Company.

### 2.2 Commencement of Winding Up

The voluntary winding up of the Company shall commence on and as of the Effective Date.

### 2.3 Affected Persons

This Liquidation Plan will be implemented under the OBCA and, as of the Effective Date will be binding on the Company, the Directors, the Inspectors, the Liquidator and the Shareholders in accordance with its terms. On the Liquidation Date, each Shareholder shall be deemed to have consented and agreed to all of the provisions of this Liquidation Plan in their entirety.

## ARTICLE 3
## EFFECT OF PLAN

### 3.1 Share Transfers

On and as of the Effective Date, to the extent permitted by the OTCQB and the Liquidator, the Common Shares will continue to trade on the OTCQB until such time as the Liquidator determines in accordance with Section 4.2(e).

### 3.2 Company to Cease Business

On and as of the Effective Date, the Company shall cease to carry on its undertaking, except in so far as may be required as beneficial for the winding up thereof in the discretion of the Liquidator, but its corporate existence and all its corporate powers, even if it is otherwise provided by its articles or by-laws, shall continue until its affairs are wound up.

### 3.3 Resignation of Directors

On and as of the Effective Date, all the powers of the Directors shall cease and the Directors shall be deemed to have resigned.

## ARTICLE 4
## THE LIQUIDATOR

### 4.1 Appointment of Liquidator

On and as of the Effective Date, Duff & Phelps Canada Restructuring Inc. is hereby appointed as the liquidator of the estate and effects of the Company ("**Liquidator**") for the purpose of winding up its business and affairs and distributing its Assets, after satisfying all Claims, all in accordance with the terms of this Liquidation Plan, and who shall serve until removal and replacement in accordance with this Liquidation Plan. The Liquidator shall be the agent and attorney-in-fact of the Company and shall act for and on behalf of the Company with the authority to enter into agreements and execute documents for and on behalf of the Company in such capacity pursuant to the powers and obligations of the Liquidator as contained in this Liquidation Plan or otherwise under the OBCA.

### 4.2 Mandatory Obligations of the Liquidator

The Liquidator is expressly directed, empowered and authorized to, and shall:

(a) deposit all money that the Liquidator has belonging to the Company and amounting to $100 or more in any bank of Canada listed in Schedule I or II to the Bank Act (Canada) or in any trust corporation or loan corporation that is registered under the Loan and Trust Corporations Act or in any other depository approved by the Court, and as approved by the Inspectors, which deposit shall not be made in the name of the Liquidator individually, but shall be a separate deposit account in the Liquidator's name as Liquidator of the Company and in the name of the Inspectors, and such money shall be withdrawn only by order for payment signed in accordance with such signing authorities as may be determined by the Liquidator in consultation with the Inspectors;

(b) at every meeting of the Shareholders, produce a pass-book, or statement of account showing the amount of the deposits, the dates at which they were made, the amounts withdrawn and the dates of withdrawal, and mention of such production shall be made in the minutes of the meeting, and the absence of such mention shall be admissible in evidence as proof, in the absence of evidence to the contrary, that the pass-book or statement of account was not produced at the meeting;

(c) forthwith after the Effective Date, maintain the listing of the Common Shares on the OTCQB (and the Liquidator hereby consents to the continued trading of the Common Shares on the OTCQB until the completion of the Claims Process, subject to compliance with the listing requirements of the OTCQB);

(d) establish and implement a Claims Process;

(e) following the completion of the Claims Process, implement the de-listing of the Common Shares from trading on the OTCQB and provide at least two weeks advance notice to the Shareholders by press release, filed at www.sedar.com and generally disseminated within Canada, of the date on which the Common Shares shall cease trading and whereupon, pursuant to Section 198 of the OBCA, all transfers of Common Shares thereafter shall be void unless made with the explicit sanction of the Liquidator;

(f) with the approval of the Inspectors, pay or otherwise satisfy all Claims from the Assets;

(g) after satisfying all Claims, distribute the remaining Assets rateably among the registered Shareholders according to their rights and interests in the Company;

(h) cause to be filed with the appropriate Governmental Authority all Tax Returns required to be filed by Diversinet, its subsidiaries and, if necessary, any trusts or special purpose entities for which Diversinet continues to have responsibility under applicable Legal Requirements;

(i) remit all taxes required to be remitted by Diversinet in accordance with all applicable statutes, all outstanding CPP contributions and EIA premiums, including any associated interest and penalties and obtain the Clearance Certificates;

(j) cause to be filed with the appropriate Governmental Authority all financial statements and reports required to be filed by Diversinet;

(k) maintain the continuous disclosure requirements applicable to the Company under all applicable securities laws;

(l) meet with the Inspectors regularly and shall call such meetings by providing at least two days written notice to the Inspectors which notice period may be waived by such Inspectors in their discretion;

(m) subject to the approval of the Inspectors, maintain appropriate director and officer type insurance in place for the Liquidator and the Inspectors; and

(n) make up an account showing the manner in which the winding up has been conducted and the Assets disposed of, and thereupon shall call a meeting of the Shareholders for the purpose of having the account laid before them and hearing any explanation that may be given by the Liquidator, and the meeting shall be called in the manner prescribed by the articles or by-laws of the Company or, in default thereof, in the manner prescribed by the OBCA for the calling of meetings of shareholders, and within ten days after the meeting is held file a notice in the prescribed form under the OBCA with the OBCA Director stating that the meeting was held and the date thereof and shall forthwith publish the notice in The Ontario Gazette.

### 4.3 Discretionary Powers of the Liquidator

The Liquidator is expressly empowered and authorized, but not obligated, to do any of the following:

(a) with the prior approval of the Inspectors, bring or defend any action, suit or prosecution, or other legal proceedings, civil or criminal, in the name and on behalf of the Company, provided that the Inspectors, in their sole discretion, may determine to oversee and manage the administration of any such proceedings and, if the Inspectors so determine, the Inspectors (and not the Liquidator) shall have full carriage of the administration and management of such proceedings (which may include any proceedings with respect to any Claim) including the ability to settle or otherwise compromise any or all of the matters subject to such proceedings;

(b) carry on the business of the Company so far as may be required as beneficial for the winding up of the Company;

(c) sell any of the Assets by public auction or private sale or, where applicable, through a stock exchange, and receive payment of the purchase price either in cash or otherwise;

(d) do all acts and execute, in the name and on behalf of the Company, all documents, and for that purpose use the seal of the Company, if any;

(e) draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the Company;
(f) raise upon the security of the Assets any requisite money;
(g) call meetings of the Shareholders for any purpose the Liquidator thinks fit;
(h) with the approval of the Shareholders or the Inspectors, make such compromise or other arrangement as the Liquidator thinks expedient with any creditor or person claiming to be a creditor or having or alleging that he, she or it has a Claim whereby the Company may be rendered liable;
(i) with the approval of the Shareholders or the Inspectors, compromise all debts and liabilities capable of resulting in debts, and all claims, whether present or future, certain or contingent, liquidated or unliquidated, subsisting or supposed to subsist between the Company and any contributory, alleged contributory or other debtor or person who may be liable to the Company and all questions in any way relating to or affecting the Assets, or the winding up of the Company, upon the receipt of such sums payable at such times and generally upon such terms as are agreed, and the Liquidator may take any security for the discharge of such debts or liabilities and give a complete discharge in respect thereof;
(j) at any time, make an application to the Court under Section 207 of the OBCA to have the liquidation of the Company supervised by the Court if the Liquidator considers such an application advisable under the circumstances then existing;
(k) at any time after the affairs of the Company have been fully wound up, make an application to the Court for an order dissolving the Company;
(l) make or cause to be made, from time to time, any interim distributions or distributions in kind of portions of the Assets to the registered Shareholders rateably among the registered Shareholders according to their rights and interests in the Company, as considered appropriate and approved by the Inspectors, and while maintaining such reserves as are reasonably necessary to provide for all Claims;
(m) at any time after the Effective Date, request the Transfer Agent to refrain from making any changes to the registers maintained by the Transfer Agent in respect of the Common Shares, except to the extent necessary as a result of the continued trading of the Common Shares on the OTCQB;
(n) wind up or dissolve all wholly-owned subsidiaries of the Company; and
(o) do and execute all such other things as are necessary for winding up the business and affairs of the Company and distributing the Assets.

**4.4 Reporting Obligations**

The Liquidator shall report to the Shareholders at such times and intervals as the Liquidator may deem appropriate with respect to matters relating to the Assets, Diversinet and such other matters as may be relevant to this Liquidation Plan.

**4.5 Removal of the Liquidator**

The Liquidator may be removed by:
(a) order of the Court;
(b) resolution of the majority of the Inspectors; or
(c) ordinary resolution of the Shareholders at a meeting called for the purpose of removing the Liquidator, but only if such order of the Court or resolution of Shareholders or Inspectors appoints another liquidator in the Liquidator's stead which successor liquidator shall become the Liquidator under this Liquidation Plan.

**4.6 Resignation of the Liquidator and Filling Vacancy**

If the Liquidator resigns, then a successor liquidator shall be appointed by resolution of the majority of Inspectors, by ordinary resolution of the Shareholders at a meeting called for the purpose of appointing a successor liquidator, or by order of the Court, and such successor liquidator shall become the Liquidator under this Liquidation Plan.

**4.7 Fees of the Liquidator**

The Liquidator shall be paid its reasonable fees and disbursements, in each case at its standard rates and charges, from the Assets as and when the Liquidator renders an account to the Company and such account is approved by the Inspectors, all as more particularly described in the Liquidator's retainer letter attached as Schedule "A" hereto. With the agreement of the Liquidator, amendments to the Liquidator's retainer letter may be made if the Inspectors approve of such amendments. Pursuant to Section 222 of the OBCA, the costs, charges and expenses of the winding up, including the remuneration of the Liquidator, are payable out of the Assets in priority to all other Claims.

**4.8 Indemnity**

The Company hereby releases, holds harmless, and indemnifies the Liquidator from and against all liabilities, claims and costs of any nature arising from the Liquidator's execution of this Liquidation Plan, save and except any such liabilities, claims or costs arising as a result of the Liquidator's fraud, gross negligence or wilful misconduct.

## ARTICLE 5
## TERMINATION OF EMPLOYEES

**5.1 Termination of Employment**

All Employees shall be terminated on the Effective Date, other than those Employees who are requested by the Liquidator to remain in service and assist in the implementation of this Liquidation Plan and agree to do so which Employees shall remain Employees of the Company.

**5.2 Employment Agreements**

In connection with the termination of all Employees, Diversinet shall honour and fully comply with all existing agreements with such Employees.

## ARTICLE 6
## INSPECTORS

**6.1 Appointment of Inspectors**

On and as of the Effective Date, David Hackett, Albert Wahbe and Jay Wigdale are hereby appointed as inspectors of the Company's liquidation pursuant to Section 194 of the OBCA (the "**Inspectors**").

**6.2 Approval of Inspectors**

For any action or inaction which requires the approval of the Inspectors under this Liquidation Plan or the OBCA, such approval shall exist if a majority of the Inspectors approve of the action or inaction by vote at a meeting of Inspectors or otherwise by written resolution signed by a majority of the Inspectors.

**6.3 Meetings of Inspectors**

The Liquidator or any one of the Inspectors may call a meeting of Inspectors by providing all of the Inspectors with two days written notice of such meeting, which notice may be waived by the Inspectors in their discretion. Such meetings may be held by teleconference. Quorum for any meeting of Inspectors shall be a majority of the Inspectors. Each of the Inspectors shall have one vote at any such meetings. The Liquidator shall have no vote at such meetings but may chair such meetings with the approval of a majority of the Inspectors. Where the Liquidator is not in attendance at such meetings, the Inspectors may decide among themselves which one shall act as chair of the meeting.

**6.4 Removal of Inspectors**

An Inspector may be removed by:

(a) order of the Court; or

(b) ordinary resolution of the Shareholders at a meeting called for the purpose of removing an Inspector.

**6.5 Filing Vacancies of Inspectors**

There shall always be at least one Inspector and not more than three Inspectors at any time. Any vacancy in the number of permissible Inspectors may be filled by election by the majority of remaining Inspectors.

**6.6 Remuneration of Inspectors**

The compensation paid to Inspectors shall be $25,000 per Inspector per year, plus $1,500 per Inspector per day on which meetings of Inspectors are held for attendance at such meetings in person or, if attended by conference call, $1,000 per Inspector per day. In addition, Inspectors may charge supplementary fees in the form of hourly rates, per diem fees or other formats, as determined by the Inspectors, acting reasonably, in consultation with the Liquidator. Inspectors shall also be reimbursed for their reasonable expenses and shall participate in the insurance arrangement, if any, described in Section 4.2(m).

**6.7 Indemnity**

The Company hereby releases, holds harmless, and indemnifies the Inspectors from and against all liabilities, claims and costs of any nature arising from the Inspector's actions as an Inspector under the Liquidation Plan and pursuant to the OBCA, save and except any such liabilities, claims or costs arising as a result of the Inspector's fraud, gross negligence or wilful misconduct.

## ARTICLE 7
## DISTRIBUTIONS

**7.1 Delivery of Distribution to Shareholders**

Unless otherwise directed, distributions to registered Shareholders shall be made by the Liquidator at the addresses set forth in the registers maintained by the Transfer Agent in respect of the Common Shares as at the date of any such distribution, or if applicable, and to the extent differing from the foregoing, at the address of such registered Shareholder's respective legal representatives, in trust for such registered Shareholder. Beneficial holders of Common Shares shall be entitled to receive distributions only through the applicable registered Shareholder on the registers maintained by the Transfer Agent in respect of the Common Shares.

**7.2 Undeliverable Distributions to Shareholders**

Where the Liquidator is unable to distribute rateably the Assets among the registered Shareholders because a registered Shareholder is unknown or a registered Shareholder's whereabouts is unknown, the share of the Assets of such registered Shareholder may, by agreement with the Public Trustee, be delivered or conveyed by the Liquidator to the Public Trustee to be held in trust for the registered Shareholder, and such delivery or conveyance shall be deemed to be a distribution to that registered Shareholder of his, her or its rateable share for the purpose of this Liquidation Plan.

**7.3 Interim Distributions**

Any distributions to registered Shareholders (other than any final distribution on the cancellation of the Common Shares) shall be either as a reduction of stated capital, subject to satisfying the applicable solvency tests in the OBCA, or as a dividend. The determination as to whether or not to make any such interim distribution and whether or not any such interim distribution is made as a reduction of stated capital or as a dividend shall be made by the Inspectors.

## ARTICLE 8
## COMPLETION OF THE LIQUIDATION PLAN

**8.1 Discharge of Liquidator and Inspectors**

At the Dissolution Date, the Liquidator and Inspectors shall be discharged and shall have no further obligations or responsibilities, except only with respect to any remaining duties or power required to implement and give effect to the terms of this Liquidation Plan.

## ARTICLE 9
## GENERAL PROVISIONS

**9.1 Liquidation Plan Amendment**

(a) The Liquidator and Inspectors may, at any time prior to the Dissolution Date, agree to amend, modify and/or supplement this Liquidation Plan without the approval of the Shareholders, (i) in order to correct any clerical or typographical error, (ii) as required to maintain the validity or effectiveness of this Liquidation Plan as a result of any change in any Legal Requirement, or (iii) in order to make any change that in the opinion of the Inspectors is administrative in nature and does not materially change the terms of this Liquidation Plan.

(b) Subject to the ability of the Liquidator and Inspectors to agree to amend, modify and/or supplement or amend this Liquidation Plan without the approval of the Shareholders as provided in Section 9.1(a), the Liquidator and Inspectors reserve the right, at any time prior to the Dissolution Date, to amend, modify and/or supplement this Liquidation Plan, provided that any such amendment, modification or supplement shall not be effective until approved by a special resolution of the Shareholders at a meeting of Shareholders called for the purposes of approving such amendment, modification or supplement.

**9.2 Severability**

In the event that any provision in this Liquidation Plan is held by the Court to be invalid, void or unenforceable, the Court shall have the power to alter and interpret such term or provision to make it valid and enforceable to the maximum extent practicable, consistent with the original purpose of the term or

provision held to be invalid, void or unenforceable, and such term or provision shall then be applicable as altered and interpreted. Notwithstanding any such holding, alteration or interpretation, the remainder of the terms and provisions of this Liquidation Plan shall remain in full force and effect and shall in no way be affected, impaired or invalidated by such holding, alteration or interpretation.

**9.3 Paramountcy**

From and after the Liquidation Date, any conflict between: (A) this Liquidation Plan; and (B) any information summary in respect of this Liquidation Plan, or the covenants, warranties, representations, terms, conditions, provisions or obligations, express or implied, of any contract, document or agreement, written or oral, and any and all amendments and supplements thereto existing between Diversinet and any of the Shareholders, Directors, Liquidator, and Inspectors as at the Liquidation Date, will be deemed to be governed by the terms, conditions and provisions of this Liquidation Plan, which shall take precedence and priority.

**9.4 Responsibilities of the Liquidator**

The Liquidator will have only those powers granted to it by this Liquidation Plan, by the OBCA and by any order of the Court.

**9.5 Notices**

Any notice or communication to be delivered hereunder shall be in writing and shall reference this Liquidation Plan and may, subject as hereinafter provided, be made or given by personal delivery, by fax, courier or e-mail addressed to the respective parties as follows:

(i) if to a Shareholder:
at the addresses set forth in the securities register kept at the Transfer Agent;

(ii) if to a Creditor:
at the addresses set forth in the books and records of the Company or the proofs of claim filed by such Creditor in accordance with the Claims Process

(iii) if to the Liquidator:
Duff & Phelps Canada Restructuring Inc.
333 Bay Street, 14th Floor
Toronto, Ontario, M5H 2R2
Attention: David Sieradski
Fax: (647) 497-9470
E-mail: David.Sieradzki@duffandphelps.com

(iv) if to the Inspectors:
Attention: □□
Fax: □□
E-mail: □□

or to such other address as any party may from time to time notify the others in accordance with this Section 9.5. All such notices and communications which are delivered shall be deemed to have been received on the date of delivery. Any such notices and communications which are faxed shall be deemed to be received on the date faxed if sent before 5:00 p.m. Eastern Standard Time on a Business Day and otherwise shall be deemed to be received on the Business Day next following the day upon which such fax was sent. Any notice or other communication sent by mail shall be deemed to have been received on the fifth Business Day after the date of mailing. The unintentional failure by the Liquidator to give a notice contemplated hereunder shall not invalidate any action taken by any Person pursuant to this Liquidation Plan.

**9.6 Governing Law**

This Liquidation Plan shall be governed by and construed in accordance with the laws of the Province of Ontario and the federal laws of Canada applicable therein without regard to conflict of laws. All questions as to the interpretation or application of this Liquidation Plan and all proceedings taken in connection with this Liquidation Plan and its provisions shall be subject to the exclusive jurisdiction of the Court.

The foregoing Liquidation Plan being adopted by the Board as of this day of , 2013.

**BY ORDER OF THE BOARD**
By: /s/ David Hackett
Name: David Hackett
Title: Secretary

**IN THE MATTER OF THE WINDING-UP OF DIVERSINET CORP.**

**APPLICATION UNDER SECTION 207 OF THE *BUSINESS CORPORATIONS ACT*, R.S.O. 1990, c. B.16, AS AMENDED**

Court File No. CV-13-10282-00CL

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**
**COMMERCIAL LIST**

Proceeding commenced at Toronto

**WINDING-UP ORDER**


**AIRD & BERLIS LLP**
Barristers and Solicitors
Brookfield Place
181 Bay Street, Suite 1800
Toronto, Ontario M5J 2T9

**Steven L. Graff (LSUC # 31871V)**
Tel: 416.865.7726
Fax: 416.863.1515
Email: sgraff@airdberlis.com

**Ian Aversa (LSUC # 55449N)**
Tel: 416.865.3082
Fax: 416.863.1515
Email: iaversa@airdberlis.com

*Lawyers for Duff & Phelps Canada Restructuring Inc.*

**IN THE MATTER OF THE WINDING-UP OF DIVERSINET CORP.**

**APPLICATION UNDER SECTION 207 OF THE *BUSINESS CORPORATIONS ACT*, R.S.O. 1990, c. B.16, AS AMENDED**

Oct 17-13

Court File No. CV-13-10282-00CL

I. Aversa for Duff + Phelps October 18, 2013

G. Bachtold for Diversinet Corp.

The Application was not opposed. Having reviewed the record, including the Affidavit of David Hackett, I am satisfied that the Applicant is a solvent entity and that the proposed process to wind up the affairs of the Applicant is an appropriate step to be taken in the circumstances.

OCT 18 2013

15391632.1

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**
**COMMERCIAL LIST**

Proceeding commenced at Toronto

**APPLICATION RECORD**
**(returnable October 17, 2013)**


**AIRD & BERLIS LLP**
Barristers and Solicitors
Brookfield Place
181 Bay Street, Suite 1800
Toronto, Ontario M5J 2T9

**Steven L. Graff (LSUC # 31871V)**
Tel: 416.865.7726
Fax: 416.863.1515
Email: sgraff@airdberlis.com

**Ian Aversa (LSUC # 55449N)**
Tel: 416.865.3082
Fax: 416.863.1515
Email: iaversa@airdberlis.com

*Lawyers for Duff & Phelps Canada Restructuring Inc.*

The proposed claim procedure should ensure that all creditor claim will be resolved prior to a distribution to shareholders.

The Application is granted. Two orders have been signed (1) Winding-Up Order and (2) Claim Procedure Order. The Orders have been signed in the form presented.

# Tab 2

Court File No. CV-12-9594-00CL

*ONTARIO*

**SUPERIOR COURT OF JUSTICE – COMMERCIAL LIST**

| | | |
|---|---|---|
| THE HONOURABLE MR. | ) | WEDNESDAY, THE 15TH DAY |
| | ) | |
| JUSTICE MORAWETZ | ) | OF FEBRUARY, 2012. |

DUFF & PHELPS CANADA RESTRUCTURING INC. IN ITS CAPACITY AS LIQUIDATOR OF COVENTREE INC.

Applicant

APPLICATION UNDER SECTION 207 OF THE *BUSINESS CORPORATIONS ACT*, R.S.C. 1990, c. B.16, AS AMENDED

IN THE MATTER OF THE WINDING-UP OF COVENTREE INC.

**WINDING-UP ORDER**

THIS APPLICATION, made by the Applicant under section 207 of the *Business Corporations Act*, R.S.C. 1990, c. B.16, as amended (the "**OBCA**") to have the voluntary winding-up of Coventree Inc. pursuant to the plan of liquidation and distribution in the form attached hereto as Schedule "A" (the "**Liquidation Plan**") continued under the supervision of this Court was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the first report to this Court of Duff & Phelps Canada Restructuring Inc. in its capacity as the liquidator of Coventree Inc. as appointed pursuant to the Liquidation Plan (the "**Liquidator**") dated February 7, 2012 (the "**Report**"), and on hearing the submissions of counsel for the Applicant and Mr. Dean Tai; Alkyon Corporation and Alkyon Holdings Corporation, no one appearing for any other person on the service list, although properly served as appears from the Affidavits of Service filed:

**SERVICE**

1. THIS COURT ORDERS that the time for service of the Notice of Application and the Application Record is hereby validated so that this Application is properly returnable today and hereby dispenses with further service thereof.

**APPLICATION**

2. THIS COURT ORDERS AND DECLARES that the Liquidation Plan (and the appointment of the Liquidator and the Inspectors thereunder) be and is hereby approved and affirmed.

3. THIS COURT ORDERS that all capitalized terms used herein and not otherwise defined in this Order shall have the meaning ascribed to them in the Liquidation Plan.

4. THIS COURT ORDERS that the winding up of Coventree Inc. shall continue to be effected and implemented under the supervision of this Court and in accordance with the terms of the Liquidation Plan and such further orders of this Court.

5. THIS COURT ORDERS that, for greater certainty, the Liquidator hereby has and shall have all of the powers and authorities as provided to it under the Liquidation Plan and the OBCA and any further Order of this Court.

6. THIS COURT ORDERS that the Liquidator be and is hereby relieved from complying, and need not comply, with Sections 4.2(c) and 4.2(e) of the Liquidation Plan, but hereby affirms that, pursuant to Section 198 of the OBCA, all transfers of Common Shares on or after the date of this Order shall be void unless made with the explicit sanction of the Liquidator.

**NO PROCEEDINGS AGAINST THE APPLICANT OR THE PROPERTY**

7. THIS COURT ORDERS that from the date of this Order until further Order of this Court (the "**Stay Period**"), no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**") shall be commenced or continued against or in respect of Coventree Inc., any of its subsidiaries or affiliates (collectively, "**Coventree**" or the "**Company**"), or the Liquidator, or

affecting any of Coventree's current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**") except with the written consent of the Liquidator, or with leave of this Court.

**NO EXERCISE OF RIGHTS OR REMEDIES**

8. THIS COURT ORDERS that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of Coventree or the Liquidator, or affecting the Property, are hereby stayed and suspended except with the written consent of the Liquidator, or leave of this Court, provided that nothing in this Order shall (i) empower the Liquidator to carry on any business which Coventree is not lawfully entitled to carry on, (ii) exempt the Liquidator from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

**NO INTERFERENCE WITH RIGHTS**

9. THIS COURT ORDERS that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by Coventree, except with the written consent of the Liquidator, or leave of this Court.

**CONTINUATION OF SERVICES**

10. THIS COURT ORDERS that during the Stay Period, all Persons having oral or written agreements with Coventree or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, employee benefits, transportation services, utility or other services to Coventree, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Liquidator (including, where a notice of termination may have been given with an effective date after the date of this Order), and that the

Liquidator shall be entitled to the continued use of Coventree's current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Liquidator in accordance with normal payment practices of Coventree or such other practices as may be agreed upon by the supplier or service provider and the Liquidator, or as may be ordered by this Court.

**PROCEEDINGS AGAINST DIRECTORS AND OFFICERS**

11. THIS COURT ORDERS that during the Stay Period no Proceeding may be commenced or continued against any of the former, current or future directors or officers of Coventree with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of Coventree whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers of Coventree.

**THE LIQUIDATOR**

12. THIS COURT ORDERS that the Liquidator shall provide any creditor or shareholder of Coventree with information provided by Coventree in response to reasonable requests for information made in writing by such creditor or shareholder addressed to the Liquidator. The Liquidator shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Liquidator has been advised by Coventree or the Inspectors is confidential or is otherwise material, non-public information, the Liquidator shall not provide such information to creditors or shareholders unless otherwise directed by this Court or on such terms as the Liquidator and the Inspectors may agree.

13. THIS COURT ORDERS that, in addition to the rights and protections afforded the Liquidator under the OBCA and the Liquidation Plan, the Liquidator shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order or the Liquidation Plan, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Liquidator by the OBCA, the Liquidation Plan or any applicable legislation.

14. THIS COURT ORDERS that the Liquidator, and counsel to the Liquidator, shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by Coventree as part of the costs of these proceedings. The Liquidator is hereby authorized and directed to pay its accounts and those of its counsel as and when such accounts are rendered and approved by the Inspectors.

15. THIS COURT ORDERS that the Liquidator and its counsel shall pass their accounts from time to time, and for this purpose the accounts of the Liquidator and its counsel are hereby referred to a judge of this Court and such passing of their accounts in this manner shall be considered full compliance with Section 212 of the OBCA.

16. THIS COURT ORDERS that the Liquidator and its counsel shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of $200,000, as security for their professional fees and disbursements incurred at the standard rates and charges of the Liquidator and such counsel, both before and after the making of this Order in respect of these proceedings. The Administration Charge shall constitute a first ranking charge on the Property and shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person.

17. THIS COURT ORDERS that the filing, registration or perfection of the Administration Charge shall not be required, and that the Administration Charge shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Administration Charge coming into existence, notwithstanding any such failure to file, register, record or perfect.

18. THIS COURT ORDERS that Administration Charge shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Administration Charge shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings; (b) the provisions of any federal or provincial statutes; or (c) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to

lease or other agreement (collectively, an "**Agreement**") which binds Coventree, and notwithstanding any provision to the contrary in any Agreement:

(a) neither the creation of the Administration Charge shall create or be deemed to constitute a breach by Coventree of any Agreement to which it is a party;

(b) none of the chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Administration Charge; and

(c) the payments made by Coventree pursuant to this Order and the granting of the Administration Charge, do not and will not constitute fraudulent preferences, fraudulent conveyances, oppressive conduct, settlements or other challengeable, voidable or reviewable transactions under any applicable law.

**SERVICE AND NOTICE**

19. THIS COURT ORDERS that the Liquidator be at liberty to serve this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or electronic transmission to Coventree's creditors or other interested parties at their respective addresses as last shown on the records of Coventree and that any such service or notice by courier, personal delivery or electronic transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

20. THIS COURT ORDERS that the Liquidator, and any party who has filed a Notice of Appearance may serve any court materials in these proceedings by e-mailing a PDF or other electronic copy of such materials to counsels' email addresses as recorded on the Service List from time to time, in accordance with the E-filing protocol of the Commercial List to the extent practicable, and the Liquidator may post a copy of any or all such materials on its website at www.duffandphelps.com/restructuringcases.

**GENERAL**

21. THIS COURT ORDERS that the Liquidator may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

22. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Liquidator and its respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Liquidator, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Liquidator in any foreign proceeding, or to assist the Liquidator and its respective agents in carrying out the terms of this Order.

23. THIS COURT ORDERS that the Liquidator be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order.

24. THIS COURT ORDERS that any interested party may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

25. THIS COURT ORDERS that this Order and all of its provisions are effective as of 12:01 a.m. Eastern Standard Time on the date of this Order.

ENTERED AT / INSCRIT A TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

FEB 15 2012

# Schedule A

**COVENTREE INC.**

# PLAN OF LIQUIDATION AND DISTRIBUTION

**JANUARY 23, 2012**

# TABLE OF CONTENTS

**COVENTREE INC.**

**PLAN OF LIQUIDATION AND DISTRIBUTION**

WHEREAS the board of directors of Coventree Inc. (the "**Board**") has concluded that it is in the best interests of Coventree Inc. (the "**Company**") to be wound up voluntarily pursuant to the *Business Corporations Act* (Ontario) in accordance with the terms of this Liquidation Plan (as defined below);

AND WHEREAS the Board has passed a resolution authorizing the Company to seek shareholder approval for the winding up of the Company and hold a special meeting of shareholders to consider and vote to require the Company to be wound up voluntarily and, in connection therewith, approve this Liquidation Plan;

NOW THEREFORE THIS Liquidation Plan is adopted by the Board as of the last date set forth below, having the terms and conditions as set out herein.

## ARTICLE 1
## INTERPRETATION

### 1.1 Definitions

In this Liquidation Plan:

"**Assets**" means all of the property, assets and undertaking of Coventree;

"**Board**" has the meaning given to it in the recitals of this Liquidation Plan;

"**Business Day**" means a day, other than a Saturday or Sunday, on which banks are generally open for business in Toronto, Ontario;

"**Calendar Day**" means any day, including a Saturday, Sunday or statutory holiday in Toronto, Ontario;

"**Canadian Dollars**" or "**CDN$**" means dollars denominated in lawful currency of Canada;

"**Claim**" means

(a) any right of any Person against Coventree in connection with any indebtedness, liability or obligation of any kind of Coventree and any interest accrued thereon or costs payable in respect thereof, whether liquidated, unliquidated, reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, present, future, known or unknown, by guarantee, surety or otherwise, and whether or not such right is executory or anticipatory in nature, including any claim made or asserted against Coventree through any affiliate, associate or any right or ability of any Person to advance a claim for

contribution or indemnity or otherwise with respect to any matter, action, cause or chose in action, whether existing at present or commenced in the future with respect to any matter, action, cause or chose in action; and

(b) any existing or future right of any Person against any one or more of the Directors which arose or arises as a result of such Director's position, supervision, management or involvement as a Director or otherwise in any other capacity in connection with Coventree whether such right, or the circumstances giving rise to it, arose before or after the Effective Date and whether enforceable in any civil, administrative or criminal proceeding;

"**Claims Process**" means the process established by the Liquidator and approved by the Court for the identification, resolution and barring of certain Claims, including *inter alia*, the issuance of a final order of the Court establishing the Claims;

"**Clearance Certificates**" mean:

(a) a certificate issued by the Minister pursuant to subsection 159(2) of the *Income Tax Act*, R.S.C. 1952, c. 148 (the "**ITA**"), or any equivalent thereto, certifying that all amounts for which Coventree is, or can reasonably be expected to become, liable under the ITA and the *Taxation Act*, 2007, S.O. 2007, c. 11, Sched. A, up to and including the date of distribution have been paid, or that the Minister has otherwise accepted security for payment;

(b) a certificate issued by the Minister pursuant to subsection 23(5) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (the "**CPP**"), or any equivalent therto, certifying that all amounts for which Coventree is liable under the CPP up to and including the date of distribution, have been paid or that security for the payment thereof has been accepted by the Minister;

(c) a certificate issued by the Minister pursuant to subsection 86(3) of the *Employment Insurance Act*, S.C. 1996, c. 23 (the "**EIA**"), or any equivalent thereto, certifying the payment, or acceptance by the Minister of security for payment, of all amounts for which Coventree is liable under the EIA up to and including the date of distribution;

(d) a certificate issued by the Minister pursuant to subsection 81(1) of the *Excise Tax Act*, R.S.C. 1985, c. E-15 (the "**ETA**"), or any equivalent thereto, certifying that no tax, penalty, interest or other sum under the ETA, chargeable against or payable by the Liquidator or chargeable against or payable in respect of the Assets, remains unpaid or that security for the payment thereof has, in accordance with section 80.1 of the ETA, been accepted by the Minister;

(e) a certificate issued by the Minister pursuant to subsection 270(3) of the ETA, or any equivalent thereto, certifying that all amounts payable or remittable under Part IX of the ETA by Coventree in respect of the reporting period during which

the distribution is made or any previous reporting period, and all amounts that are, or can reasonably be expected to become, payable or remittable under Part IX of the ETA by the Liquidator in respect of the reporting period during which the distribution is made, has been paid or that security for the payment thereof has been accepted by the Minister;

(f) a certificate issued by the Ontario Minister of Finance pursuant to subsection 19(2) of the *Employer Health Tax Act*, R.S.O. 1990, C. E. 11 (the "**EHTA**"), or any equivalent thereto, certifying that all taxes, interest and penalties that have been assessed under the EHTA and are chargeable against or payable out of the property of Coventree have been paid or that security for the payment thereof in a form acceptable to the Ontario Minister of Finance has been given; and

(g) a certificate issued by pursuant to subsection 107(2) of the *Corporations Tax Act*, R.S.O. 1990, C.40 ("**CTA**"), or any equivalent thereto, certifying that all taxes, interest, penalties and other amounts payable by Coventree under the CTA have been paid or that security for the payment thereof in a form acceptable to the Ontario Minister of Finance has been given under section 103 of the CTA;

"**Common Shares**" means the common shares in the capital of Coventree;

"**Court**" means the Ontario Superior Court of Justice (Commercial List);

"**Coventree**" or "**Company**" has the meaning given to it in the recitals of this Liquidation Plan;

"**Creditor**" means any Person with a Claim;

"**Directors**" means all individuals who were, on or at any time before the Effective Date, directors or officers of Coventree, and the term "**Director**" shall mean any one of them;

"**Dissolution Date**" means the date on which the Company is dissolved pursuant to the OBCA or by order of the Court;

"**Effective Date**" means the date to be established by a resolution of the Board upon which the implementation of the Liquidation Plan shall commence.

"**Employees**" means the employees of Coventree;

"**Governmental Authority**" means any nation or government, any province, state or other political subdivision thereof, any entity exercising executive, legislative, judicial, regulatory or administrative functions of or pertaining to government or any Legal Requirement and any corporation or other entity owned or controlled, through capital stock or otherwise by any of the foregoing;

"**Inspectors**" has the meaning given to it in Section 6.1;

"**Legal Requirement**" means any statute, law, treaty, rule, regulation, order, decree, writ, injunction or determination of any arbitrator, court, Governmental Authority or securities exchange and, with respect to any Person, includes all such Legal Requirements applicable or binding upon such Person, its business or the ownership or use of any of its assets;

"**Liquidator**" means the Person appointed from time to time pursuant to Sections 4.1, 4.5, or 4.6 in its capacity as liquidator of Coventree;

"**Liquidation Date**" means the date on which the Shareholders pass the Resolution;

"**Liquidation Plan**" means this plan of liquidation and distribution as it may be amended, modified, supplemented, restated or otherwise modified in accordance with its terms;

"**Minister**" means the Minister of National Revenue;

"**NEX**" means the board of the TSX Venture Exchange known as "NEX";

"**OBCA**" means the *Business Corporations Act* (Ontario);

"**OBCA Director**" means the Director appointed under Section 278 of the OBCA;

"**Person**" means any individual, partnership, limited partnership, joint venture, trust, corporation, unincorporated organization, government, agency, regulatory body or instrumentality thereof, legal personal representative or litigation guardian, or any other judicial entity howsoever designated or constituted domiciled;

"**Proven Claim**" means a Claim finally determined or accepted in accordance with the provisions of the Claims Process;

"**Public Trustee**" means the Public Guardian and Trustee pursuant to the *Public Guardian and Trustee Act*, R.S.O. 1990, Chapter P.51;

"**Resolution**" means the special resolution of the Shareholders authorizing the voluntary winding up of Coventree made in accordance with the OBCA and approving this Liquidation Plan;

"**Shareholders**" means all holders of Common Shares shown from time to time in the registers maintained by or on behalf of Coventree by the Transfer Agent in respect of the Common Shares and, unless otherwise specified, includes all beneficial owners of Common Shares;

"**Tax Return**" means any report, return or other information required to be supplied to a taxing authority in connection with (a) all taxes, charges, fees, levies and other assessments (whether federal, provincial, local or foreign), including income, gross receipts, excise, property, sales, use, transfer, license, payroll, franchise, withholding,

social security and unemployment taxes, and (b) any interest, penalties and additions related to the foregoing;

"**Transfer Agent**" means Equity Transfer & Trust Company, as transfer agent for the Common Shares of the Company; and

"**Xceed Shares**" means the shares in the capital of Xceed Mortgage Corporation which are owned by the Company.

1.2 **Certain Rules of Interpretation**

In this Liquidation Plan and the Schedules hereto:

(a) all references to currency are to Canadian Dollars, except as otherwise expressly indicated;

(b) the division of this Liquidation Plan into articles, sections, subsections and clauses and the insertion of headings and a table of contents are for convenience of reference only and shall not affect the construction or interpretation of this Liquidation Plan. The terms "this Liquidation Plan", "hereof", "hereunder", "herein" and similar expressions refer to this Liquidation Plan and not to any particular article, section, subsection or clause and include any plan supplemental hereto. Unless otherwise indicated, any reference in this Liquidation Plan to an article, section, subsection, clause or schedule refers to the specified article, section, subsection, clause or schedule of or to this Liquidation Plan;

(c) the use of words in the singular or plural, or with a particular gender, shall not limit the scope or exclude the application of any provision of this Liquidation Plan or a schedule hereto to such Person (or Persons) or circumstances as the context otherwise permits;

(d) the words "includes" and "including" and similar terms of inclusion shall not, unless expressly modified by the words "only" or "solely", be construed as terms of limitation, but rather shall mean "includes without limitation" and "including without limitation", so that references to included matters shall be regarded as illustrative without being either characterizing or exhaustive;

(e) unless otherwise specified, all references to time herein and in any document issued pursuant hereto mean local time in Toronto, Ontario and any reference to an event occurring on a Business Day shall mean prior to 5:00 p.m., on such Business Day. Unless otherwise specified, the time period within or following which any payment is to be made or act is to be done shall be calculated by excluding the day on which the period commences and including the day on which the period ends and by extending the period to the next succeeding Business Day if the last day of the period is not a Business Day. Whenever any payment to be made or action to be taken under this Liquidation Plan is required

to be made or to be taken on a day other than a Business Day, such payment shall be made or action taken on the next succeeding Business Day;

(f) unless otherwise specified, where any reference to an event occurring within any number of "days" appears in this Liquidation Plan, such reference means Calendar Days and not Business Days; and

(g) unless otherwise provided, any reference to a statute, or other enactment of parliament or a legislature includes all regulations made thereunder, all enactments to or re-enactments of such statute or regulations in force from time to time, and, if applicable, any statute or regulation that supplements or supersedes such statute or regulation.

## ARTICLE 2
## PURPOSE OF THE PLAN

### 2.1 Purpose

The purpose of this Liquidation Plan is to provide for a plan of liquidation and distribution of the Assets, payment or settlement of all Claims and dissolution of the Company.

### 2.2 Commencement of Winding Up

The voluntary winding up of the Company shall commence on and as of the Effective Date.

### 2.3 Affected Persons

This Liquidation Plan will be implemented under the OBCA and, as of the Effective Date will be binding on the Company, the Directors, the Inspectors, the Liquidator and the Shareholders in accordance with its terms. On the Liquidation Date, each Shareholder shall be deemed to have consented and agreed to all of the provisions of this Liquidation Plan in their entirety.

## ARTICLE 3
## EFFECT OF PLAN

### 3.1 Share Transfers

On and as of the Effective Date, to the extent permitted by the NEX and the Liquidator, the Common Shares will continue to trade on the NEX until such time as the Liquidator determines in accordance with Section 4.2(e).

**3.2 Company to Cease Business**

On and as of the Effective Date, the Company shall cease to carry on its undertaking, except in so far as may be required as beneficial for the winding up thereof in the discretion of the Liquidator, but its corporate existence and all its corporate powers, even if it is otherwise provided by its articles or by-laws, shall continue until its affairs are wound up.

**3.3 Resignation of Directors**

On and as of the Effective Date, all the powers of the Directors shall cease and the Directors shall be deemed to have resigned.

## ARTICLE 4
## THE LIQUIDATOR

**4.1 Appointment of Liquidator**

On and as of the Effective Date, Duff & Phelps Canada Restructuring Inc. is hereby appointed as the liquidator of the estate and effects of the Company (the "**Liquidator**") for the purpose of winding up its business and affairs and distributing its Assets, after satisfying all Claims, all in accordance with the terms of this Liquidation Plan, and who shall serve until removal and replacement in accordance with this Liquidation Plan. The Liquidator shall be the agent and attorney-in-fact of the Company and shall act for and on behalf of the Company with the authority to enter into agreements and execute documents for and on behalf of the Company in such capacity pursuant to the powers and obligations of the Liquidator as contained in this Liquidation Plan or otherwise under the OBCA.

**4.2 Mandatory Obligations of the Liquidator**

The Liquidator is expressly directed, empowered and authorized to, and shall:

(a) deposit all money that the Liquidator has belonging to the Company and amounting to $100 or more in any bank of Canada listed in Schedule I or II to the *Bank Act* (Canada) or in any trust corporation or loan corporation that is registered under the *Loan and Trust Corporations Act* or in any other depository approved by the Court, and as approved by the Inspectors, which deposit shall not be made in the name of the Liquidator individually, but shall be a separate deposit account in the Liquidator's name as Liquidator of the Company, and such money shall be withdrawn only by order for payment signed in accordance with such signing authorities as may be determined by the Liquidator in consultation with the Inspectors;

(b) at every meeting of the Shareholders, produce a pass-book, or statement of account showing the amount of the deposits, the dates at which they were made, the amounts withdrawn and the dates of withdrawal, and mention of such production shall be made in the minutes of the meeting, and the absence of such

mention shall be admissible in evidence as proof, in the absence of evidence to the contrary, that the pass-book or statement of account was not produced at the meeting;

(c) forthwith after the Effective Date, maintain the listing of the Common Shares on the NEX (and the Liquidator hereby consents to the continued trading of the Common Shares on the NEX until the completion of the Claims Process, subject to compliance with the listing requirements of the NEX);

(d) establish and implement a Claims Process;

(e) following the completion of the Claims Process, implement the de-listing of the Common Shares from trading on the NEX and provide at least two weeks advance notice to the Shareholders by press release, filed at www.sedar.com and generally disseminated within Canada, of the date on which the Common Shares shall cease trading and whereupon, pursuant to Section 198 of the OBCA, all transfers of Common Shares thereafter shall be void unless made with the explicit sanction of the Liquidator;

(f) with the approval of the Inspectors, pay or otherwise satisfy all Claims from the Assets;

(g) after satisfying all Claims, distribute the remaining Assets rateably among the registered Shareholders according to their rights and interests in the Company, provided that no distribution or disposition of any or all of the Xceed Shares may be effected by the Liquidator without the prior approval of the Inspectors;

(h) cause to be filed with the appropriate Governmental Authority all Tax Returns required to be filed by Coventree, its subsidiaries and, if necessary, any trusts or special purpose entities for which Coventree continues to have responsibility under applicable Legal Requirements;

(i) remit all taxes required to be remitted by Coventree in accordance with all applicable statutes, all outstanding CPP contributions and EIA premiums, including any associated interest and penalties and obtain the Clearance Certificates;

(j) cause to be filed with the appropriate Governmental Authority all financial statements and reports required to be filed by Coventree;

(k) maintain the continuous disclosure requirements applicable to the Company under all applicable securities laws;

(l) meet with the Inspectors regularly and shall call such meetings by providing at least two days written notice to the Inspectors which notice period may be waived by such Inspectors in their discretion;

(m) subject to the approval of the Inspectors, maintain appropriate director and officer type insurance in place for the Liquidator and the Inspectors; and

(n) make up an account showing the manner in which the winding up has been conducted and the Assets disposed of, and thereupon shall call a meeting of the Shareholders for the purpose of having the account laid before them and hearing any explanation that may be given by the Liquidator, and the meeting shall be called in the manner prescribed by the articles or by-laws of the Company or, in default thereof, in the manner prescribed by the OBCA for the calling of meetings of shareholders, and within ten days after the meeting is held file a notice in the prescribed form under the OBCA with the OBCA Director stating that the meeting was held and the date thereof and shall forthwith publish the notice in *The Ontario Gazette*.

**4.3 Discretionary Powers of the Liquidator**

The Liquidator is expressly empowered and authorized, but not obligated, to do any of the following:

(a) with the prior approval of the Inspectors, bring or defend any action, suit or prosecution, or other legal proceedings, civil or criminal, in the name and on behalf of the Company, provided that the Inspectors, in their sole discretion, may determine to oversee and manage the administration of any such proceedings and, if the Inspectors so determine, the Inspectors (and not the Liquidator) shall have full carriage of the administration and management of such proceedings (which may include any proceedings with respect to any Claim) including the ability to settle or otherwise compromise any or all of the matters subject to such proceedings;

(b) carry on the business of the Company so far as may be required as beneficial for the winding up of the Company;

(c) sell any of the Assets by public auction or private sale or, where applicable, through a stock exchange, and receive payment of the purchase price either in cash or otherwise;

(d) engage the services of a broker to effect the sale of the Xceed Shares if the prior approval of the Inspectors to dispose of the Xceed Shares has been obtained;

(e) do all acts and execute, in the name and on behalf of the Company, all documents, and for that purpose use the seal of the Company, if any;

(f) draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the Company;

(g) raise upon the security of the Assets any requisite money;

(h) call meetings of the Shareholders for any purpose the Liquidator thinks fit;

(i) with the approval of the Shareholders or the Inspectors, make such compromise or other arrangement as the Liquidator thinks expedient with any creditor or person claiming to be a creditor or having or alleging that he, she or it has a Claim whereby the Company may be rendered liable;

(j) with the approval of the Shareholders or the Inspectors, compromise all debts and liabilities capable of resulting in debts, and all claims, whether present or future, certain or contingent, liquidated or unliquidated, subsisting or supposed to subsist between the Company and any contributory, alleged contributory or other debtor or person who may be liable to the Company and all questions in any way relating to or affecting the Assets, or the winding up of the Company, upon the receipt of such sums payable at such times and generally upon such terms as are agreed, and the Liquidator may take any security for the discharge of such debts or liabilities and give a complete discharge in respect thereof;

(k) at any time, make an application to the Court under Section 207 of the OBCA to have the liquidation of the Company supervised by the Court if the Liquidator considers such an application advisable under the circumstances then existing;

(l) at any time after the affairs of the Company have been fully wound up, make an application to the Court for an order dissolving the Company;

(m) make or cause to be made, from time to time, any interim distributions or distributions in kind of portions of the Assets to the registered Shareholders rateably among the registered Shareholders according to their rights and interests in the Company, as considered appropriate and approved by the Inspectors, and while maintaining such reserves as are reasonably necessary to provide for all Claims, provided that no distribution or disposition of any or all of the Xceed Shares may be effected by the Liquidator without the prior approval of the Inspectors;

(n) at any time after the Effective Date, request the Transfer Agent to refrain from making any changes to the registers maintained by the Transfer Agent in respect of the Common Shares, except to the extent necessary as a result of the continued trading of the Common Shares on the NEX;

(o) wind up or dissolve all wholly-owned subsidiaries of the Company; and

(p) do and execute all such other things as are necessary for winding up the business and affairs of the Company and distributing the Assets.

**4.4 Reporting Obligations**

The Liquidator shall report to the Shareholders at such times and intervals as the Liquidator may deem appropriate with respect to matters relating to the Assets, Coventree and such other matters as may be relevant to this Liquidation Plan.

**4.5 Removal of the Liquidator**

The Liquidator may be removed by:

(a) order of the Court;

(b) resolution of the majority of the Inspectors; or

(c) ordinary resolution of the Shareholders at a meeting called for the purpose of removing the Liquidator,

but only if such order of the Court or resolution of Shareholders or Inspectors appoints another liquidator in the Liquidator's stead which successor liquidator shall become the Liquidator under this Liquidation Plan.

**4.6 Resignation of the Liquidator and Filling Vacancy**

If the Liquidator resigns, then a successor liquidator shall be appointed by resolution of the majority of Inspectors, by ordinary resolution of the Shareholders at a meeting called for the purpose of appointing a successor liquidator, or by order of the Court, and such successor liquidator shall become the Liquidator under this Liquidation Plan.

**4.7 Fees of the Liquidator**

The Liquidator shall be paid its reasonable fees and disbursements, in each case at its standard rates and charges, from the Assets as and when the Liquidator renders an account to the Company and such account is approved by the Inspectors, all as more particularly described in the Liquidator's retainer letter attached as Schedule "A" hereto. With the agreement of the Liquidator, amendments to the Liquidator's retainer letter may be made if the Inspectors approve of such amendments. Pursuant to Section 222 of the OBCA, the costs, charges and expenses of the winding up, including the remuneration of the Liquidator, are payable out of the Assets in priority to all other Claims.

**4.8 Indemnity**

The Company hereby releases, holds harmless, and indemnifies the Liquidator from and against all liabilities, claims and costs of any nature arising from the Liquidator's execution of this Liquidation Plan, save and except any such liabilities, claims or costs arising as a result of the Liquidator's fraud, gross negligence or wilful misconduct.

## ARTICLE 5
## TERMINATION OF EMPLOYEES

### 5.1 Termination of Employment

All Employees shall be terminated on the Effective Date, other than those Employees who are requested by the Liquidator to remain in service and assist in the implementation of this Liquidation Plan and agree to do so which Employees shall remain Employees of the Company.

### 5.2 Employment Agreements

In connection with the termination of all Employees, Coventree shall honour and fully comply with all existing agreements with such Employees.

## ARTICLE 6
## INSPECTORS

### 6.1 Appointment of Inspectors

On and as of the Effective Date, Brendan Calder, Geoffrey Cornish and G. Wesley Voorheis are hereby appointed as inspectors of the Company's liquidation pursuant to Section 194 of the OBCA (the "**Inspectors**").

### 6.2 Approval of Inspectors

For any action or inaction which requires the approval of the Inspectors under this Liquidation Plan or the OBCA, such approval shall exist if a majority of the Inspectors approve of the action or inaction by vote at a meeting of Inspectors or otherwise by written resolution signed by a majority of the Inspectors.

### 6.3 Meetings of Inspectors

The Liquidator or any one of the Inspectors may call a meeting of Inspectors by providing all of the Inspectors with two days written notice of such meeting, which notice may be waived by the Inspectors in their discretion. Such meetings may be held by teleconference. Quorum for any meeting of Inspectors shall be a majority of the Inspectors. Each of the Inspectors shall have one vote at any such meetings. The Liquidator shall have no vote at such meetings but may chair such meetings with the approval of a majority of the Inspectors. Where the Liquidator is not in attendance at such meetings, the Inspectors may decide among themselves which one shall act as chair of the meeting.

### 6.4 Removal of Inspectors

An Inspector may be removed by:

(a) order of the Court; or

(b) ordinary resolution of the Shareholders at a meeting called for the purpose of removing an Inspector.

**6.5 Filing Vacancies of Inspectors**

There shall always be at least one Inspector and not more than three Inspectors at any time. Any vacancy in the number of permissible Inspectors may be filled by election by the majority of remaining Inspectors.

**6.6 Remuneration of Inspectors**

The compensation paid to Inspectors other than employees of the Company shall be $25,000 per Inspector per year, plus $1,500 per Inspector per day on which meetings of Inspectors are held for attendance at such meetings in person or, if attended by conference call, $1,000 per Inspector per day. In addition, Inspectors other than employees of the Company may charge supplementary fees in the form of hourly rates, per diem fees or other formats, as determined by the Inspectors, acting reasonably, in consultation with the Liquidator. Inspectors shall also be reimbursed for their reasonable expenses and shall participate in the insurance arrangement, if any, described in Section 4.2(m).

**6.7 Indemnity**

The Company hereby releases, holds harmless, and indemnifies the Inspectors from and against all liabilities, claims and costs of any nature arising from the Inspector's actions as an Inspector under the Liquidation Plan and pursuant to the OBCA, save and except any such liabilities, claims or costs arising as a result of the Inspector's fraud, gross negligence or wilful misconduct.

## ARTICLE 7
## DISTRIBUTIONS

**7.1 Delivery of Distribution to Shareholders**

Unless otherwise directed, distributions to registered Shareholders shall be made by the Liquidator at the addresses set forth in the registers maintained by the Transfer Agent in respect of the Common Shares as at the date of any such distribution, or if applicable, and to the extent differing from the foregoing, at the address of such registered Shareholder's respective legal representatives, in trust for such registered Shareholder. Beneficial holders of Common Shares shall be entitled to receive distributions only through the applicable registered Shareholder on the registers maintained by the Transfer Agent in respect of the Common Shares.

**7.2 Undeliverable Distributions to Shareholders**

Where the Liquidator is unable to distribute rateably the Assets among the registered Shareholders because a registered Shareholder is unknown or a registered Shareholder's whereabouts is unknown, the share of the Assets of such registered Shareholder may, by agreement with the Public Trustee, be delivered or conveyed by the Liquidator to the Public Trustee to be held in trust for the registered Shareholder, and such delivery or conveyance shall be deemed to be a distribution to that registered Shareholder of his, her or its rateable share for the purpose of this Liquidation Plan.

**7.3 Interim Distributions**

Any distributions to registered Shareholders (other than any final distribution on the cancellation of the Common Shares) shall be either as a reduction of stated capital, subject to satisfying the applicable solvency tests in the OBCA, or as a dividend. The determination as to whether or not to make any such interim distribution and whether or not any such interim distribution is made as a reduction of stated capital or as a dividend shall be made by the Inspectors.

## ARTICLE 8
## COMPLETION OF THE LIQUIDATION PLAN

**8.1 Discharge of Liquidator and Inspectors**

At the Dissolution Date, the Liquidator and Inspectors shall be discharged and shall have no further obligations or responsibilities, except only with respect to any remaining duties or power required to implement and give effect to the terms of this Liquidation Plan.

## ARTICLE 9
## GENERAL PROVISIONS

**9.1 Liquidation Plan Amendment**

(a) The Liquidator and Inspectors may, at any time prior to the Dissolution Date, agree to amend, modify and/or supplement this Liquidation Plan without the approval of the Shareholders, (i) in order to correct any clerical or typographical error, (ii) as required to maintain the validity or effectiveness of this Liquidation Plan as a result of any change in any Legal Requirement, or (iii) in order to make any change that in the opinion of the Inspectors is administrative in nature and does not materially change the terms of this Liquidation Plan.

(b) Subject to the ability of the Liquidator and Inspectors to agree to amend, modify and/or supplement or amend this Liquidation Plan without the approval of the Shareholders as provided in Section 9.1(a), the Liquidator and Inspectors reserve the right, at any time prior to the Dissolution Date, to amend, modify and/or supplement this Liquidation Plan, provided that any such amendment,

modification or supplement shall not be effective until approved by a special resolution of the Shareholders at a meeting of Shareholders called for the purposes of approving such amendment, modification or supplement.

**9.2 Severability**

In the event that any provision in this Liquidation Plan is held by the Court to be invalid, void or unenforceable, the Court shall have the power to alter and interpret such term or provision to make it valid and enforceable to the maximum extent practicable, consistent with the original purpose of the term or provision held to be invalid, void or unenforceable, and such term or provision shall then be applicable as altered and interpreted. Notwithstanding any such holding, alteration or interpretation, the remainder of the terms and provisions of this Liquidation Plan shall remain in full force and effect and shall in no way be affected, impaired or invalidated by such holding, alteration or interpretation.

**9.3 Paramountcy**

From and after the Liquidation Date, any conflict between: (A) this Liquidation Plan; and (B) any information summary in respect of this Liquidation Plan, or the covenants, warranties, representations, terms, conditions, provisions or obligations, express or implied, of any contract, document or agreement, written or oral, and any and all amendments and supplements thereto existing between Coventree and any of the Shareholders, Directors, Liquidator, and Inspectors as at the Liquidation Date, will be deemed to be governed by the terms, conditions and provisions of this Liquidation Plan, which shall take precedence and priority.

**9.4 Responsibilities of the Liquidator**

The Liquidator will have only those powers granted to it by this Liquidation Plan, by the OBCA and by any order of the Court.

**9.5 Notices**

Any notice or communication to be delivered hereunder shall be in writing and shall reference this Liquidation Plan and may, subject as hereinafter provided, be made or given by personal delivery, by fax, courier or e-mail addressed to the respective parties as follows:

(i) if to a Shareholder:

at the addresses set forth in the securities register kept at the Transfer Agent;

(ii) if to a Creditor:

at the addresses set forth in the books and records of the Company or the proofs of claim filed by such Creditor in accordance with the Claims Process

(iii) if to the Liquidator:

Duff & Phelps Canada Restructuring Inc.
200 King St. W., Suite 1002
P.O. Box 48
Toronto, ON M5H 3T4

Attention: Peter P. Farkas or Robert Harlang
Fax: 647.497.9478 or 647.497.9480
E-mail: Peter.Farkas@duffandphelps.com
Robert.Harlang@duffandphelps.com

with a copy to (which shall not constitute notice):

Davies Ward Phillips & Vineberg LLP
1 First Canadian Place, Suite 4400
Toronto, ON M5X 1B1

Attention: Robin B. Schwill
Fax: (416) 863-0871
E-mail: rschwill@dwpv.com

(iv) if to the Inspectors:

Wes Voorheis
Voorheis & Co.
Bay Adelaide Centre
333 Bay Street, Suite 910
Toronto, ON M5H 2R2

Brendan Calder
121 Walker Avenue
Toronto, ON M4V 1G5

Geoffrey Cornish
Coventree Inc.
TD Canada Trust Tower
161 Bay Street, 27th Floor
Toronto, ON M5J 2S1

or to such other address as any party may from time to time notify the others in accordance with this Section 9.5. All such notices and communications which are delivered shall be deemed to have been received on the date of delivery. Any such notices and communications which are faxed shall be deemed to be received on the date faxed if sent before 5:00 p.m. Eastern Standard Time on a Business Day and otherwise shall be deemed to be received on the Business Day next following the day upon which such fax was sent. Any notice or other communication sent by mail shall be deemed to have been received on the fifth Business Day after the date of mailing. The unintentional failure by the Liquidator to give a notice contemplated hereunder shall not invalidate any action taken by any Person pursuant to this Liquidation Plan.

**9.6 Governing Law**

This Liquidation Plan shall be governed by and construed in accordance with the laws of the Province of Ontario and the federal laws of Canada applicable therein without regard to conflict of laws. All questions as to the interpretation or application of this Liquidation Plan and all proceedings taken in connection with this Liquidation Plan and its provisions shall be subject to the exclusive jurisdiction of the Court.

The foregoing Liquidation Plan being adopted by the Board as of this 23rd day of January, 2012.

**BY ORDER OF THE BOARD**

by _____

Name:

Title: Secretary

# SCHEDULE A

DUFF & PHELPS

Coventree Inc.
161 Bay Street
27th Floor
Toronto, ON M5J 2S1

February 7, 2012

**Attention: Mr. Geoffrey P. Cornish**

Dear Mr. Cornish:

**Re: Coventree Inc. (the "Company" or "Coventree")**

On June 30, 2010, the shareholders of Coventree approved a plan of liquidation and distribution ("Plan of Liquidation") to wind up the Company under the *Business Corporations Act (Ontario)* ("BCAO"). On January 23, 2012, the directors of Coventree determined the effective date for the Plan of Liquidation would be February 15, 2012. A copy of the Plan of Liquidation is attached hereto. In accordance with the Plan of Liquidation, Duff & Phelps Canada Restructuring Inc. ("D&P"), as successor of RSM Richter Inc., will be the liquidator ("Liquidator") effective February 15, 2012.

This letter sets out the scope and terms of the engagement of D&P as Liquidator.

D&P shall carry out the duties as set out in the Plan of Liquidation and the Winding-up Order of the Superior Court of Justice – Commercial List ("Court") to be made on February 15, 2012 and any other order made by the Court with respect to Coventree.

In performing the engagement, the following provisions would apply:

- We will require full access to the Company, its personnel, books and records, its legal counsel and other advisors.
- We will be using and relying upon financial and other information provided by the Company.

Our fees for this engagement will be based on our prevailing standard hourly rates for the individuals involved, plus actual out-of-pocket disbursements. Fees and disbursements are subject to HST, to the extent applicable.

A summary of our present hourly rates is as follows:

| | |
|---|---|
| Managing Directors/Directors | $500 to $650 |
| Senior Associates | $300 to $475 |
| Assistants | $125 to $275 |

Duff & Phelps Canada Restructuring Inc
200 King Street West, Suite 1002
P.O. Box 77
Toronto, Ontario, M5H 3T4

T +1 416 932 6225
F +1 647 497 9480

robert.harlang@duffandphelps.com
www.duffandphelps.com

* * *

If the foregoing terms are acceptable, please acknowledge by signing below and returning this letter to the attention of the undersigned by facsimile at 647-497-9480, or by scanning an executed copy via email to robert.harlang@duffandphelps.com.

We wish to thank you for considering our firm for this engagement. We very much look forward to working with the Company to assist it in implementing an efficient and orderly winding up of its affairs.

Should you have any questions or concerns, please do not hesitate to contact the undersigned.

Yours truly,

DUFF & PHELPS CANADA RESTRUCTURING INC.

Per: Robert Harlang

Confirmed and agreed to:

COVENTREE INC.

by: Geoffrey P. Cornish

Feb 7, 2012

Authorized Signature Date

APPLICATION UNDER SECTION 207 OF THE *BUSINESS CORPORATIONS ACT*, R.S.C. 1990, c. B.16, AS AMENDED
IN THE MATTER OF THE WINDING-UP OF COVENTREE INC.

Court File No: CV-12-9594-00CL

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**
**COMMERCIAL LIST**

Proceeding Commenced at Toronto

**WINDING-UP ORDER**

DAVIES WARD PHILLIPS & VINEBERG LLP
1 First Canadian Place
Suite 4400
Toronto, ON M5X 1B1

Robin B. Schwill (LSUC#: 38452I)

Tel: 416.863.5502
Fax: 416 863 0871

Lawyers for the Applicant

APPLICATION UNDER SECTION 207 OF THE *BUSINESS CORPORATIONS ACT*, R.S.C. 1990, c. B.16, AS AMENDED

IN THE MATTER OF THE WINDING-UP OF COVENTREE INC.

Court File No: CV-12-9594-00CL

Feb 15/12

R. B. Schwill + S. Frankel for Applicant. Feb 15, 2012
J. Braden for M. D. Jai.

The Application was not opposed.
The Applicant has filed a comprehensive factum which provides a factual summary and statutory & applicable law.
Having reviewed the Record and hearing submissions, I am satisfied that circumstances are such that it is appropriate for the voluntary winding-up of the Applicant to be continued as a court-supervised winding-up under s 207(1) of the OBCA and that the proposed Winding-Up Order and Claims Procedure Order should be granted in the form presented.

**ONTARIO**
**SUPERIOR COURT OF JUSTICE-COMMERCIAL LIST**

Proceeding Commenced at Toronto

**APPLICATION RECORD OF THE APPLICANT**
(Returnable February 15, 2012)


DAVIES WARD PHILLIPS & VINEBERG LLP
1 First Canadian Place
Suite 4400
Toronto, ON M5X 1B1

Robin B. Schwill (LSUC#: 38452I)

Tel: 416.863.5502
Fax: 416.863.0871

Lawyers for the Applicant

Counsel advised that arrangements are being made with counsel to Mr. Tait and related entities to ensure that the "Tax Litigation" can proceed in an organized manner.

On the issue of claims, there is a theoretical concern of conflict as between any Inspector/Shareholder and the claimant. In such circumstances any inspector who has an equity position in the Applicants should recuse himself/herself from any discussions relating to the claims. Further, the Liquidator is to ensure that it has retained independent counsel - Mr. Heath - who separate from Applicants counsel to deal with any contested claim issues.

Orders have been signed as the form presented.

J.

# Tab 3

**SUPERIOR COURT**
*(Commercial Division)*

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTRÉAL

No: 500-11-044039-135

DATE: FEBRUARY 1, 2013

---

**PRESENT: THE HONOURABLE MR. JUSTICE LOUIS J. GOUIN, S.C.J.**

---

**IN THE MATTER OF THE LIQUIDATION OF:**

**PENSON FINANCIAL SERVICES CANADA INC.**

Petitioner

and

**ERNST & YOUNG INC.**

Proposed Liquidator

and

**THE DIRECTOR UNDER THE CBCA**

Impleaded Party

---

**ORDER**

*(Continuing the Liquidation of Penson Financial Services Canada Inc. Under the Supervision of the Court and Appointing a Liquidator)*

---

**GIVEN** Penson Financial Services Canada Inc. ("**PFSC**" or the "**Petitioner**")'s *Petition for the Issuance of an Order that the Liquidation of Penson Financial Services Canada Inc. be Continued Under the Supervision of the Court, Appointing a Liquidator and for an Order Approving a Claims Process* (the "**Petition**") pursuant to sections 211(8), 215 and 217 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 (as amended, the "**CBCA**"), the exhibits and the affidavit filed in support thereof;

**GIVEN** the consent of Ernst & Young Inc. ("**E&Y**" or the "**Liquidator**") to act as liquidator;

**GIVEN** the representations of counsels for the Petitioner and for E&Y;

**GIVEN** the provisions of the CBCA;

**FOR THESE REASONS, THE COURT:**

[1] **GRANTS** the present Petition.

[2] **ORDERS** that the time for service of this Petition is hereby validated so that this Petition is properly returnable today and hereby dispenses with further service thereof.

[3] **ORDERS** that the liquidation of the Petitioner shall continue under the supervision of the Court pursuant to section 211(8) of the CBCA.

**APPOINTMENT AND POWERS OF THE LIQUIDATOR**

[4] **APPOINTS** Ernst & Young Inc. as liquidator of all of the Petitioner's present and future property, assets, rights and undertakings, of whatsoever nature and kind and wherever situated, whether held directly or indirectly by the Petitioner, in any capacity whatsoever, or held by others for the Petitioner (collectively, the "**Property**"), without security.

[5] **ORDERS** that the powers of the Petitioner's sole shareholder and as well as those of its directors, in such capacity, are hereby vested in the Liquidator, provided, however, that the Liquidator may in its discretion temporarily or permanently delegate back to the Petitioner's sole shareholder or its directors, in writing, some or all of their powers which they had prior to the date of this order (the "**Order**").

[6] **ORDERS** that the Liquidator is hereby empowered, authorized and directed to take into custody and control the Property, to proceed with the liquidation of the Property (the "**Liquidation**"), to carry out one or more distributions (the "**Liquidation Distributions**"), including a final distribution after the Liquidator shall have rendered a final account to the Court, of the Petitioner's remaining assets to its shareholder after providing for outstanding liabilities, contingencies and costs of the Liquidation, the Liquidation Distributions and the Dissolution (as defined below) and to effect the dissolution of the Petitioner (the "**Dissolution**") after the Liquidator shall have rendered such final account to the Court.

[7] **ORDERS** that the Liquidator may take such steps as, in its discretion, it deems are necessary or desirable to receive, preserve, protect, maintain control over, liquidate and realize upon the Property or any part or parts thereof.

[8] **ORDERS** that subject to the content of this Order, the Liquidator has full authority to settle or compromise any claims and/or pay all liabilities and expenses that arise out of or in connection with the Property and in respect of its performance of its duties as Liquidator including, without limitation, legal fees and disbursements of counsel to the Liquidator and counsel to the Petitioner, in each case at their standard rates and charges, whether incurred before or after making this Order, and to establish reserves for contingent liabilities and costs associated with the Liquidation, the Liquidation Distributions, and the Dissolution.

[9] **ORDERS** that the Liquidator be at liberty and is hereby authorized and empowered to employ or retain on behalf of the Petitioner such employees or former employees of the Petitioner, agents, experts, auditors, consultants, legal counsels and other professional advisors, and enter into such other contracts, as in its discretion it deems necessary or desirable for the purposes of receiving, preserving, protecting and realizing upon the Property or any part or parts thereof, or generally in respect of exercising its powers and performing its duties hereunder on behalf of the Petitioner and not in its capacity as Liquidator, and that the Liquidator shall not be the employer or successor employer of any such person employed or retained at the employ of the Petitioner.

[10] **ORDERS** that, notwithstanding any other provision of this Order inconsistent therewith, as the case may be, the Liquidator is authorized at all times, for and on behalf of the Petitioner to:

(a) maintain customers' securities accounts and meet margin calls;

(b) distribute cash and securities to customers;

(c) transfer securities accounts to another securities firm, and;

(d) deliver registered securities to persons in whose name such securities are registered.

[11] **ORDERS** that the Liquidator be at liberty and is hereby authorized and empowered to report and consult with former directors and officers of the Petitioner and to receive and consider the opinions and advice of such former directors and officers as in its discretion it deems necessary or desirable in

relation to carrying out the Liquidation, the Liquidation Distributions and the Dissolution.

[12] **ORDERS** that in addition to the Liquidator's counsel, the Liquidator may, in its discretion, as necessary or desirable, continue to engage the Petitioner's counsel to assist it in carrying out the Claims Process (as defined in the Petition), the Liquidation, the Liquidation Distributions and the Dissolution.

[13] **ORDERS** that without in any way limiting the generality of the foregoing, and in furtherance thereof, the Liquidator is expressly empowered and authorized to do any of the following where the Liquidator, in its discretion, deems it necessary or desirable:

(a) to hold and invest Property that is money in bank accounts, term deposits, or cashable guaranteed investment certificates of a Canadian chartered bank or in treasury bills issued by the Government of Canada;

(b) to take such steps as, in the discretion of the Liquidator, are necessary or desirable to maintain control over all receipts and disbursements including, without limitation, taking such steps as are necessary or desirable to control access to and use of all bank accounts, investment or brokerage accounts of the Petitioner or open new bank, investment or brokerage accounts, approve all cheques or other instruments drawn on such accounts, and permit payment of those expenses that, in the discretion of the Liquidator, are necessary or desirable to carry out the Liquidation, the Liquidation Distributions and the Dissolution;

(c) to take such steps as, in the discretion of the Liquidator, are necessary or desirable to verify the existence and location of all of the Property, the terms of all agreements or other arrangements relating thereto, whether written or oral, the existence or assertion of any lien, charge, encumbrance or security interest thereon, and any other matters that, in the opinion of the Liquidator, may affect the extent, value, existence, preservation and liquidation of such Property;

(d) to negotiate, enter into, amend, terminate or settle any agreements in respect of the Property or to which the Petitioner is a party, including, without limitation, residual supplier contracts and real estate leases and the memberships, registrations, accounts and arrangements of the Petitioner with the Investment Industry Regulatory Organization of Canada ("**IIROC**") and the Petitioner's other regulators, and with the relevant exchanges and other marketplaces;

(e) to incur any obligations in the ordinary course of business and of a liquidation;

(f) to liquidate, or cause to be liquidated, any and all of the Petitioner's residual client investment positions including, without limitation, by means of a distribution of securities in kind, and including positions of non-trading client accounts for which the Petitioner or the Liquidator have been unable to secure the transfer to a new receiving broker, subject to compliance with the requirements of any applicable laws governing the treatment of unclaimed property;

(g) to pay all liabilities and on-going expenses on or after the date of this Order which may arise out of or in connection with the operation of the Property and/or premises of the Petitioner, including, without limitation, taxes, rent, utilities, heating, maintenance, insurance, supplies and other expenses, and to establish reserves for contingent liabilities and the costs associated with the Liquidation, the Liquidation Distributions and the Dissolution;

(h) to receive and collect all monies and accounts now owed or hereafter owing to the Petitioner in respect of the Property, including, without limitation, residual accounts receivable owing from client brokers, and to exercise all rights and remedies of the Petitioner in collecting all such monies;

(i) to remit comfort deposits to client brokers to the extent that the amounts receivable are collected;

(j) to cause:

(i) the preparation and the filing of the financial statements, tax return(s), forms, notices, and other documents of the Petitioner, and such tax elections as the Liquidator, in its discretion, deems necessary or desirable (including, without limitation, in connection with distributions referred to in paragraph (p));

(ii) the Petitioner to pay any associated tax liability pursuant to any applicable taxation legislation or regulations that may trigger directors' liability; and

(iii) the Petitioner to obtain any certificates, clearance certificates and other authorizations under applicable taxation legislation and regulations which have not already been obtained in connection

with any matter affecting or contemplated by the Liquidation, the Liquidation Distributions and the Dissolution;

(k) to cause the preparation and delivery to the shareholder of the Petitioner and other recipients of payments from the Liquidator of all tax information and slips relating to such payments that are required to be delivered under applicable taxation legislation and regulations;

(l) to prepare and deliver to any current and former employees, officers, directors, and independent contractors of the Petitioner records of employment, T4 slips, or other prescribed forms as may be applicable to such persons under applicable legislation and regulations;

(m) to report information and prepare and deliver such documentation, forms or tax slips in respect of the Petitioner's clients (including, without limitation, clients of brokerage firms and portfolio managers which were the Petitioner's clients at any relevant time) and/or parties on behalf of which the Petitioner provided services or held assets, as the Liquidator, in its discretion, deems necessary or desirable, including, without limitation, any and all information and documentation that may be necessary or useful for the preparation of tax returns by such clients and other parties for the 2012 and 2013 fiscal years and for any prior years as the case may be;

(n) to cause the preparation, delivery and filing of all documents including, without limitation, all applicable registration filings, the preparation and delivery of monthly and annual reports to IIROC, the issuance of monthly and quarterly investment statements, and take all actions and measures, on behalf of and in the name of the Petitioner, as the Liquidator, in its discretion, deems necessary or desirable, in order to comply with any statutory, regulatory, and other similar requirements applicable to the Petitioner;

(o) to provide for the preservation or destruction of records as is necessary for the Liquidation and in order to comply with any statutory, regulatory, and other similar requirements applicable to the Petitioner, in the discretion of the Liquidator, provided, however that the Liquidator shall not destroy any records within seven (7) years of the date hereof without first obtaining the approval of this Court on notice of at least ten (10) days to the service list;

(p) to declare and, subject to further order of this Court approving same, to pay distributions and other amounts to the shareholder of the Petitioner,

including all distributions permitted by the CBCA, as contemplated by this Order;

(q) to otherwise carry out the Liquidation and Liquidation Distributions, as contemplated in this Order and in keeping with the provisions of the CBCA applicable to the Dissolution, including, without limitation, delivering notices to the shareholder and the creditors of the Petitioner, filing of articles of dissolution with the Director appointed under the CBCA, and completing all other filings and obtaining all consents under the CBCA and any other legislation applicable to the Dissolution; and

(r) to apply to the Court for additional authority, power or directions.

[14] **ORDERS** that the Liquidator be and is fully and exclusively authorized and empowered to institute, prosecute and to continue the prosecution of all actions, applications or proceedings in and before both courts and administrative bodies as may in its discretion be necessary or desirable to properly receive, protect, preserve and realize upon the Property or any part or parts thereof and, subject to the Claims Process Order dated February 1, 2013, as may be amended and/or restated from time to time thereafter, to defend all actions, applications or proceedings now pending or hereafter instituted against the Petitioner or the Liquidator in respect of the Property or the Petitioner's liabilities, and to appear in and conduct the prosecution or defence of any such actions, applications or proceedings now pending or hereafter instituted in any court or administrative body by or against the Petitioner or the Liquidator, the prosecution or defence of which will in the discretion of the Liquidator be necessary or desirable to properly receive, protect, preserve and realize upon the Property, and to settle or compromise any such actions, applications or proceedings which in the discretion of the Liquidator should be settled or compromised, and the authority hereby conferred shall extend to such appeals as the Liquidator shall, in its discretion, deem necessary or desirable in respect of any order or judgment.

[15] **ORDERS** that when all or part of the Property is sold or otherwise dealt with, the Petitioner shall join in and execute all necessary powers of attorney, conveyances, deeds and documents of whatsoever nature or form. For such purpose, the Liquidator shall be authorized and empowered to execute such powers of attorney, conveyances, deeds or other documents in the name of and on behalf of the Petitioner. Any such powers of attorney, conveyances, deeds or documents so executed by the Liquidator shall have the same force and effect as if executed by the Petitioner.

[16] **ORDERS** that the Liquidator be and is hereby empowered to take any steps reasonably incidental to the exercise of its powers or the performance of any statutory obligations, and in each case where the Liquidator takes any such

actions or steps, it shall do so to the exclusion of all other persons, and without interference from any other persons.

[17] **ORDERS** that subject to section 223 of the CBCA, the Liquidator shall be at liberty from time to time to pay its reasonable fees and disbursements, in respect of the performance of its duties as Liquidator, whether incurred before or after the making this Order, out of the monies in its hands at its standard rates and charges.

[18] **ORDERS** that the Liquidator, the Liquidator's counsel and the Petitioner's counsel shall be entitled to the benefit of and are hereby granted a charge (the "**Liquidator's Charge**") on the Property, which charge shall not exceed an aggregate amount of $1 million, as security for the payment of their professional fees, disbursements and other expenditures incurred at the standard rates and charges of the Liquidator and such counsel, both before and after the making of this Order in respect of these proceedings. The Liquidator's Charge shall constitute a first ranking charge on the Property and shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise in favour of any individual, partnership, firm, joint venture, trust, entity, corporation, limited or unlimited liability company, body corporate, unincorporated association or organization, governmental body or agency, or similar entity, howsoever designated or constituted and any individual or other entity owned or controlled by or which is the agent of any of the foregoing (all of the foregoing, collectively being "**Persons**" and each being a "**Person**").

[19] **DECLARES** that the Liquidator's Charge shall be valid and enforceable as against all Property and against all Persons, including, without limitation, any trustee in bankruptcy, receiver, receiver and manager or interim receiver of the Petitioner, for all purposes.

## DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE LIQUIDATOR

[20] **ORDERS** that, upon the written request of the Liquidator, all Persons shall forthwith advise the Liquidator of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Liquidator and shall deliver all such Property to the Liquidator.

[21] **ORDERS** that, upon the written request of the Liquidator, all Persons shall forthwith advise the Liquidator of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Petitioner, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (collectively, the "**Records**") in that Person's possession or control, and shall provide to the

Liquidator or permit the Liquidator to make, retain and take away copies thereof and grant to the Liquidator unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Liquidator due to the privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure.

[22] **ORDERS** that if any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall, upon the written request of the Liquidator, provide the Liquidator with all such assistance in gaining immediate access to the information in the Records as the Liquidator may in its discretion require, including providing the Liquidator with instructions on the use of any computer or other system and providing the Liquidator with any and all access codes, account names and account numbers that may be required to gain access to the information, and shall not alter, erase or destroy any Records without the prior written consent of the Liquidator.

LIQUIDATION DISTRIBUTIONS

[23] **ORDERS** that, subject to any order or direction of this Court to the contrary, the Net Realized Value of the Property (as hereinafter defined) shall be held by the Liquidator to be disposed of pursuant to the terms of this Order, the CBCA and, if applicable, further orders of this Court. The "**Net Realized Value of the Property**" means, at any time and from time to time, cash held by the Petitioner and cash proceeds actually received by the Liquidator from the disposition of the Property less the aggregate of: (i) all amounts previously distributed by the Liquidator to the Petitioner's sole shareholder; and (ii) amounts paid to satisfy or settle, or set aside for payment of the liabilities (including contingent liabilities) of the Petitioner and the costs associated with the Liquidation, the Liquidation Distributions and the Dissolution and the Liquidator and all applicable taxes, the remuneration and expenses of the Liquidator's and the Petitioner's counsel.

[24] **ORDERS** that the Liquidator shall proceed with the Liquidation Distributions by way of one or more distributions to the Petitioner's shareholder from the Net Realized Value of the Property and any balance from any claims reserve pursuant to the Claims Process (as defined in the Petition).

REPORTING TO COURT

[25] **ORDERS** that the Liquidator shall report to the Court, as may be necessary or required, as to the status of the Claims Process (as defined in the Petition), which

shall be instituted by subsequent order, the Liquidation, the Liquidation Distributions and the Dissolution.

RELEASES, INSURANCES AND INDEMNIFICATION

[26] **ORDERS** that, if not already obtained by the Petitioner, the Liquidator shall use reasonable efforts to obtain and maintain for the benefit of the Petitioner's former directors and officers liability insurance, including a tail policy with respect thereto, and such persons shall be named as insured on such policies and the Liquidator is further authorized to obtain policies of insurance covering its acts and omissions.

[27] **ORDERS** that the Liquidator is a representative of the Petitioner and shall not incur any liability except in its capacity as Liquidator of the Petitioner.

[28] **ORDERS** that the Liquidator shall incur no liability or obligation as a result of its appointment or the fulfillment of its duties in carrying out the provisions of this Order or any subsequent order, save and except for any liability or obligation arising from its duty to act with care, diligence and skill pursuant to section 222(2) of the CBCA. Nothing in this Order shall derogate from the protections afforded to the Liquidator under the CBCA or any other applicable legislation.

[29] **ORDERS** that no proceeding or enforcement process in any court or tribunal shall be commenced or continued against the Liquidator except with leave of this Court.

[30] **ORDERS** that any and all obligation of the Petitioner to indemnify its former directors and officers pursuant to the Petitioner's by-laws, or any other indemnification agreements in place, shall continue in full force and effect, and shall be fully enforceable against the Petitioner, in accordance with the respective terms thereof until completion of the final Liquidation Distribution.

[31] **ORDERS** that the Liquidator shall establish a reasonable reserve to cover any potential claims by the directors and officers of the Petitioner pursuant to the Petitioner's obligation to indemnify its directors and officers, contractual or otherwise, including under the by-laws of the Petitioner, and that such reserve shall be maintained until immediately before the final Liquidation Distribution.

LIMITATION OF ACTIONS

[32] **ORDERS** that until further order of this Court (the "**Stay Period**"), no proceeding or enforcement process in any court or tribunal, including any administrative or

arbitral tribunal, whether domestic or foreign (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Petitioner and the Liquidator, or affecting the Petitioner's operations and activities or the Property, including as provided in paragraph [33] herein below except with leave of this Court. Any and all Proceedings currently under way against or in respect of the Petitioner or the Property are hereby stayed and suspended pending further order of this Court.

[33] **ORDERS** that during the Stay Period, no Proceeding may be commenced, or continued against any former, present or future director or officer of the Petitioner nor against any person deemed to be a director or an officer of the Petitioner (each, a "**Director**", and collectively the "**Directors**") in respect of any claim against such Director which arose prior to, or relate to acts or events which occurred prior to, the Effective Time (as defined below) and which relates to any obligation of the Petitioner where it is alleged that any of the Directors is under any law liable in such capacity for the payment of such obligation.

[34] **ORDERS** that the Liquidator shall not be liable and shall not incur any sanction or any penalty that may be imposed for any act or omission of the Petitioner prior to the granting of this Order that constitutes or constituted a breach under any statutory or regulatory provision governing securities or derivatives or any rules of any self-regulatory organizations, including, *inter alia*, any rules of IIROC, on the part of the Liquidator, its directors, officers and agents or on the part of the employees and agents of the Petitioner.

[35] **ORDERS** that no action taken by the Liquidator in compliance with this Order and in the performance of its duties as Liquidator in accordance therewith constitutes a breach of any statutory or regulatory provision governing securities or derivatives or any rules of any self-regulatory organizations, including, *inter alia*, any rules of IIROC, on the part of the Liquidator, its directors, officers and agents or on the part of the employees and agents of the Petitioner.

[36] **ORDERS** that during the Stay Period, all rights and remedies of any Person against the Petitioner or its Property are hereby stayed and suspended, except with the consent of the Liquidator or leave of this Court;

[37] **ORDERS** that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit, in each case, in favour of or held by the Petitioner, except with the consent of the Liquidator or leave of this Court;

[38] **ORDERS** that no insurance policy, insurance coverage, bond or any other type of financial guarantees provided to or in favor of the Petitioner shall be terminated or cancelled as a result of the Liquidation, the issuance of this order or the appointment of the Liquidator except with the consent of the Liquidator or of the Court,

[39] **DECLARES** that nothing in this order shall prevent or interfere with the application of section 8 of the Payment Clearing and Settlement Act, S.C. 1996, c. 6, as amended.

[40] **ORDERS** that nothing in this Order shall affect such investigations, actions, suits or proceedings by CDS Clearing Depositary Services Inc., the Canadian Derivatives Clearing Corporation, or a regulatory body (as defined in Section 11.1(1) of the *Companies' Creditors Arrangement Act* (the "**CCAA**") and/or prescribed by regulation under the CCAA and which, for greater certainty, includes IIROC) as are permitted by Section 11.1 of the CCAA, *mutatis mutandis*.

**NOTICES AND COMMUNICATIONS**

[41] **ORDERS** that any notice or other communication to be given under this Order by a creditor to the Liquidator shall be in writing and will be sufficiently given only if given by e-mail, ordinary mail, registered mail, courier, personal delivery or facsimile transmission except where otherwise specifically provided for in the CBCA. Any document sent pursuant to this Order shall be deemed to have been received three (3) Business Days after the document is sent by mail, and one (1) Business Day after the document is sent by courier, e-mail or facsimile transmission. E-mail correspondence shall be directed to the following addresses:

| | |
|---|---|
| Liquidator: | Ernst & Young Inc.<br>Attention : Martin P. Rosenthal & Martin Daigneault<br>Email: martin.rosenthal@ca.ey.com & martin.daigneault@ca.ey.com |
| Liquidator's Counsel | Fasken Martineau Dumoulin LLP<br>Attention: Alain Riendeau<br>Email : ariendeau@fasken.com |
| Petitioner's Counsel | Stikeman Elliott LLP<br>Attention: Guy P. Martel & Danny D. Vu<br>Email: gmartel@stikeman.com & ddvu@stikeman.com |

[42] **ORDERS** that any document sent by the Liquidator pursuant to this Order or the CBCA may be sent by e-mail, ordinary mail, registered mail, courier, personal delivery or facsimile transmission except where otherwise specifically provided for in the CBCA. Notice of such document shall be deemed to have been received for any document sent pursuant to this Order three (3) Business Days after the

document is sent by mail and one (1) Business Day after the document is sent by courier, e-mail or facsimile transmission.

[43] **ORDERS** that the Liquidator and any Person may serve any court materials in these proceedings by e-mailing a PDF or other electronic copy of such materials to counsel to the Petitioner and counsel to the Liquidator.

[44] **ORDERS** that the Liquidator shall post any and all court materials in these proceedings on its website.

**MISCELLANEOUS**

[45] **ORDERS** that the Liquidator be at liberty and is hereby authorized and empowered from time to time to apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

[46] **ORDERS** that in the event where the Liquidator reaches the conclusion that the Petitioner has become insolvent, the Liquidator may apply to this Court for an Order terminating its appointment as Liquidator in these proceedings or converting these proceedings into proceedings under the CCAA or the *Bankruptcy and Insolvency Act* (the "**BIA**").

[47] **ORDERS** that the appointment of E&Y as Liquidator in the within proceedings shall not preclude it to act as monitor or trustee, as applicable, in the event where the within proceedings are converted into proceedings under the CCAA, the BIA or any other legislation.

[48] **REQUESTS** the aid and recognition of any Court or administrative body in any Province of Canada and any Canadian federal court or administrative body and any federal or state court or administrative body in the United States of America and any court or administrative body elsewhere, to act in aid of and to be complementary to this Court in carrying out the terms of this Order.

[49] **DECLARES** that any interested Person may apply to this Court to vary or rescind the Order or seek other relief upon five (5) days notice to the Liquidator and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order, such application or motion shall be filed during the Stay Period ordered by this Order, unless otherwise ordered by this Court;

[50] **DECLARES** that this Order and all of its provisions are effective as of 12:01 a.m. Eastern Standard / Daylight Time on the date of this Order (the "**Effective Time**").

**WITHOUT COSTS.**

S.C.J.

COPIE CONFORME

*Case Name:*

**Penson Financial Services Canada Inc. (Syndic de)**

**Between**
**PENSON FINANCIAL SERVICES CANADA INC., Debtor, and ERNST & YOUNG INC., Liquidator / Petitioner, and THE DIRECTOR UNDER THE CBCA and THE BC UNCLAIMED PROPERTY SOCIETY and REVENU QUÉBEC, DIRECTION PRINCIPALE DES BIENS NON RÉCLAMÉS and TAX AND REVENUE ADMINISTRATION ALBERTA TREASURY BOARD AND FINANCE and CDS CLEARING AND DEPOSITORY SERVICES INC. and THE DEPOSITORY TRUST AND CLEARING CORPORATION and THE ATTORNEY GENERAL OF CANADA FOR THE RECEIVER GENERAL FOR CANADA and INVESTMENT INDUSTRY REGULATORY ORGANIZATION OF CANADA ("IIROC"), Impleaded parties, and DELOITTE & TOUCHE SRL and BDO DUNWOODY SRL and SCHWARTZ LEVITSKY FELDMAN SRL, Intervening Creditors**

[2014] Q.J. No. 8948

**2014 QCCS 4078**

2014EXP-2821

J.E. 2014-1603

No.: 500-11-044039-135

Quebec Superior Court (Commercial Division)
District of Montreal

**The Honourable Robert Mongeon J.S.C.**

Heard: February 10, 2014.
Judgment: August 13, 2014.

(90 paras.)

*Bankruptcy and insolvency law -- Administration of estate -- Sale of property -- Administrative officials and appointees -- Liquidators -- Duties and powers -- Sale of assets -- Discretion -- Remuneration -- Expenses -- A judgment call made by the Liquidator to limit the off-set of certain conservatory measures against the property of others and not literally destroy such assets by applying a pro-rated overhead charge upon that same property, appears to be not only within reason but within the Liquidator's duty towards absent beneficiaries of these unclaimed assets -- A fair and equitable balance of the rights of all creditors into the Estate of PFSC would be achieved by allowing the Liquidator to deduct against the net proceeds of the liquidation of the Unclaimed Assets, all of his direct costs, inclusive of legal fees directly incurred in the process -- Motion for the sale of unclaimed client accounts granted -- Canada Business Corporations Act, s. 217.*

The liquidator of Penson Financial Services Canada Inc. (PFSC), who is undergoing a process of liquidation under the supervision of the Court, seeks an order authorizing the liquidation of the unclaimed client accounts, directing it to distribute the proceeds of the sale and allowing it to take certain other actions in respect of PFSC's unclaimed client assets. The only opposed conclusion provides that the Liquidator will proceed to distribute the cash received from the sales along with the residual cash positions, net of the direct costs incurred by the Liquidator in dealing with residual unclaimed assets of $270,000 resulting from the management and disposal of the unclaimed assets, to the appropriate Canadian unclaimed property authorities, net of their proportionate share of brokerage fees and costs. Certain creditors are of the view that the Liquidator's costs incurred in the process of "cleaning up" the unclaimed client accounts should not be limited to the amount of $270,000 above noted. Rather, all of the costs of the Liquidator should be recuperated against the assets of such unclaimed accounts even if this means that all or substantially all of said assets will be "eaten up" in the process. The Liquidator alleges that the Court should not interfere with what appears to be a management question. The Court should therefore show deference towards the approach advanced by the Liquidator.

HELD: Motion granted. The Liquidator should exercise a balanced judgment between his power to charge all possible direct and/or indirect costs against specific assets under his administration and control and, ultimately, the decision should be his to be reviewed by the Court only if it appears that his decisions are unreasonable. A judgment call made by the Liquidator to limit the off-set of certain conservatory measures against the property of others and not literally destroy such assets by applying a pro-rated overhead charge upon that same property, appears to be not only within reason but within the Liquidator's duty towards absent beneficiaries of these unclaimed assets. A fair and equitable balance of the rights of all creditors into the Estate of PFSC would be achieved by allowing the Liquidator to deduct against the net proceeds of the liquidation of the Unclaimed

Assets, all of his direct costs, inclusive of legal fees directly incurred in the process.

**Statutes, Regulations and Rules Cited:**

Civil code of Quebec, art. 1299 et seq., art. 1301

Canada Business Corporations Act, s. 217

**Counsel:**

Alain Riendeau, *Fasken Martineau DuMoulin.*

Douglas Mitchell, *Irving Mitchell Kalichman.*

Avram Fishman, *Fishman Flanz Meland Paquin.*

Jean-François Gauvin, *Miller Thomson.*

Jonathan Warin, Me Jean-Yves Simard, *Lavery De Billy.*

Alain Tardif, *McCarthy Tétrault.*

---

**JUDGMENT ON LIQUIDATOR'S MOTION FOR AN ORDER AUTHORIZING THE LIQUIDATION OF THE UNCLAIMED CLIENT ACCOUNTS, DIRECTING THE LIQUIDATOR TO DISTRIBUTE THE PROCEEDS OF THE SALE AND ALLOWING THE LIQUIDATOR TO TAKE CERTAIN OTHER ACTIONS IN RESPECT OF PFSC'S UNCLAIMED CLIENT ASSETS**

**1** Penson Financial Services Canada Inc. (PFSC) is undergoing a process of liquidation under the supervision of this Court, pursuant to an Order of Liquidation issued on February 1, 2013 by my colleague Justice Louis J. Gouin.

**2** PFSC now seeks to obtain the following Order:

> **FIND TO BE SATISFACTORY AND SUFFICIENT the Liquidator's efforts to find, notify and contact the current and former clients of Penson Financial Services Canada Inc. ("PFSC") with residual investment assets appearing on PFSC's records and remaining under the management of PFSC (the "Unclaimed Assets"), as is more fully set out in the Second**

**Report of the Liquidator (P-3) dated November 10, 2013;**

**DECLARE that the Liquidator has complied with all applicable legislation dealing with unclaimed property, namely the Québec *Unclaimed Property Act,* c. B-5.1, the Alberta *Unclaimed Personal Property and Vested Property Act*, c. U-1.5 and *Regulation*, Alberta *Regulation* 104/2008 and the British Columbia *Unclaimed Property Act*, [SBC 1999] c. 48 and *Regulation*, B.C. Reg. 463/99 (collectively the "Unclaimed Property Legislation") and that nothing in the present Order is contrary to the Unclaimed Property Legislation;**

**AUTHORIZE AND DIRECT the Liquidator to transfer the marketable Unclaimed Assets to omnibus accounts opened with an appropriate market participant;**

**AUTHORIZE AND DIRECT the Liquidator to sell the marketable Unclaimed Assets including the PFSC and Northern Securities Inc. ("NSI") unclaimed assets through an appropriate market participant and to remit the sale proceeds along with the cash positions to the applicable Canadian provincial bodies dealing with unclaimed assets, and to the Receiver General for Canada with respect to amounts attributable to account owners whose last known address is in the province of Ontario or other provinces who do not have a specified body dealing with unclaimed assets, net of the securities brokerage costs and the liquidator's direct fees in dealing with these residual Unclaimed Assets of $270,000 with respect to the management and disposal of the Unclaimed Assets;**

**AUTHORIZE AND DIRECT the Liquidator to obtain receipts ("Receipts") from the Clearing and Depository Service ("CDS") and/or the Depository Trust and Clearing Corporation ("DTCC") for any non-marketable and/or non-transferrable Unclaimed Assets which cannot be transferred or sold and to hold the Receipts in trust for a period of three years from the date of issuance of the present Order or until such time as they are claimed by the client;**

**AUTHORIZE AND DIRECT the Liquidator to destroy the Receipts if they remain unclaimed after a period of three years following the date of the**

**issuance of the present Order;**

**AUTHORIZE CDS and DTCC to write-off any non-marketable Unclaimed Assets for which the Liquidator cannot obtain Receipts;**

**AUTHORIZE the Liquidator to take any and all other reasonable measures to sell, transfer and dispose of the Unclaimed Assets and to comply with the present Order;**

**THE WHOLE without costs, except in the case of contestation.**

**(Emphasis added)**

**3** All of the foregoing conclusions, but one, which is underlined, are not opposed by any of the parties or stakeholders having an interest into the assets of PFSC.

**4** Certain creditors are, however, of the view that the Liquidator's costs incurred in the process of "cleaning up" these unclaimed client accounts should not be limited to the amount of $270,000 above noted. Rather, all of the costs of the Liquidator should be recuperated against the assets of such unclaimed accounts even if this means that all or substantially all of said assets will be "eaten up" in the process.

## FACTUAL BACKGROUD

**5** As alleged in paragraphs 12 and following of his Motion, the Liquidator represents that PFSC offered outsourced back-office support and acted as carrying broker for 32 brokerage firms as well as a direct investment dealer custodian services for the clients of 53 portfolio managers as at August 31, 2012, at which time it held $9,827,068,068 in assets on behalf of approximately 125,000 individual investors representing 171,074 individual investment accounts.

**6** As of February 1st, 2013, PFSC still had 7,945 open client investment accounts holding in excess of $20.9 million of assets under management ("AUM"). A majority of these accounts consisted of client accounts for which no transfer instructions had been received from said clients.

**7** In addition, in January 2013, PFSC was assigned the residual client accounts of Northern Securities Inc. ("NSI") a Canadian introducing broker that had its license suspended and had not been able to secure an arrangement with an alternate carrying broker to accept a transfer of its client accounts.

**8** As a result, the responsibility for a significant volume of client accounts was transferred from NSI to PFSC, including 6 individual accounts which had been used by NSI as omnibus accounts (an

account used to house the assets of multiple investors simultaneously) to house a substantial amount of unclaimed cash and securities (the "NSI Unclaimed Assets").

**9** The Liquidator made inquiries with NSI and its representatives to obtain information on these accounts and was provided with individual names and account numbers for 4 out of 6 of the accounts containing in excess of 12,400 individual client accounts valued at more than $1,200,000, including in excess of 3,900 different securities. See the correspondence exchanged with NSI filed as Exhibit P-2.

**10** The Liquidator was able to substantially reconcile the securities in PFSC's records with these 4 accounts with the NSI unclaimed listing provided to establish that such listings were accurate.

**11** For the 2 remaining accounts, the account numbers provided were from PFSC's old technology platform and therefore required former PFSC employees to manually retrieve the clients' contact information from its former information technology platform.

**12** As of November 5, 2013 the total client AUM has declined to $1,882,000. See paragraph 21 of the Second Report of the Liquidator, Exhibit P-3.

**13** The number of asset transfers has considerably declined recently as the bulk of the residual client AUM consists of the (i) PFSC and NSI Unclaimed Assets, and (ii) a limited number of securities subject to certain transfer restrictions. The current profile of residual AUM is more fully detailed in the Second Report of the Liquidator (P-3).

**14** The Liquidator's Motion deals with those Unclaimed Assets which consist almost entirely of PFSC and NSI Unclaimed Assets, save and except for NSI's comfort deposit of $155,000, which is currently under review by the Liquidator.

**15** Between April 3, 2013 and April 30, 2013, the Liquidator made 352 phone calls to individual clients who had not yet provided any transfer instructions, as it is more fully detailed in the Second Report of the Liquidator (P-3).

**16** On April 26, 2013, the Liquidator sent an additional 199 letters to clients that could not be reached by telephone. See Exhibit P-5.

**17** The Liquidator continued in his efforts to communicate with holders of accounts who had failed to provide transfer instructions and on May 21, 2013, 105 additional letters were sent by the Liquidator to certain PFSC clients. See Exhibit P-6.

**18** On or about May 30, 2013, the Liquidator made an additional 58 phone calls to remaining clients. See the Second Report of the Liquidator (P-3).

**19** With respect to specific clients contained in the NSI Unclaimed Assets' accounts, the Liquidator compiled a listing of last known addresses for a substantial portion of the documented

owners of these unclaimed assets.

**20** A similar process to identify the last known addresses was initiated by the Liquidator with respect o the PFSC Unclaimed Assets.

**21** Accordingly, these amounts were never allocated to any client and as such, there are no identified parties to whom the Liquidator can mail notices to claim this unclaimed cash and securities. Consequently, it is impossible for the Liquidator to allocate more of the PFSC Unclaimed Assets to any client or mailing address. See the Second Report of the Liquidator (P-3).

**22** In the week ended June 28, the Liquidator mailed in excess of 4,400 letters to investment holders identified in the NSI listing of Unclaimed Cash and Securities, at their lasts known address, dating back to the 2008 records. See Exhibit P-7.

**23** On Thursday July 25, the Liquidator placed an ad in the Globe & Mail's national edition to advise the public of the Unclaimed Assets that could be claimed from the Liquidator, in an attempt to reach the PFSC and NSI (and its predecessors) clients. See Exhibit P-8.

**24** The Liquidator submits that the foregoing actions have been extensive and that it has taken any and all reasonable measures to locate the owners of the PFSC and NSI Unclaimed Assets.

**25** Following IIROC's decision to suspend PFSC's membership, PFSC can no longer execute trades. See Exhibit P-9.

**26** As a result of PFSC's and the Liquidator's inability to execute trades, the Liquidator has sought out an Omnibus agreement with market participants in order to sell the marketable Unclaimed Assets.

**27** On September 30, 2013, in view of the present petition, the Liquidator entered into an Omnibus agreement (the "Omnibus Agreement") with Desjardins Securities Inc. ("VMD") which will allow the Liquidator to transfer all residual marketable securities into omnibus accounts at VMD so that it may proceed to liquidate all of the marketable Unclaimed Assets. See Exhibit P-10.

**28** The proceeds of the sale of the Unclaimed Assets pursuant to the Omnibus Agreement will be remitted to the Liquidator's trading account at VMD, net of brokerage fees, to be subsequently transferred to the Liquidator's operating bank account. The Liquidator will then proceed to distribute the cash received from the sales along with the residual cash positions, net of the direct costs incurred by the Liquidator in dealing with residual Unclaimed Assets of $270,000 resulting from the management and disposal of the Unclaimed Assets, to the appropriate Canadian unclaimed property authorities, net of their proportionate share of brokerage fees and costs.

**29** As it is more fully detailed in the Second Report of the Liquidator (P-3), the residual client positions can be allocated as follows to four different provinces: Québec, British Colombia, Alberta

and Ontario, excluding their proportionate share of brokerage fees and Liquidation costs noted above:

| Province | Marketable | Cash | Total - Cash equivalents | Non-Marketable | Total - AUM |
|---|---|---|---|---|---|
| Alberta | 8,675 | 1,298 | 9,973 | 5 | 9,978 |
| British Columbia | 379,816 | 72,707 | 452,522 | 271 | 52,793 |
| Ontario | 23,943 | 13,769 | 37,713 | 43 | 37,756 |
| Québec | 707,143 | 449,994 | 1,157,138 | 3,615 | 1,160,753 |
| **Total** | **1,119,577** | **537,769** | **1,657,346** | **3,935** | **1,661,280** |

**30** In accordance with the applicable legislation, the cash and securities that could not be allocated to a specific province as a result of the absence of account information (i.e. origins of the account or client addresses) have been allocated to the province of Québec being the location of PFSC's head office and principal place of business.

**31** Québec, British Columbia and Alberta have unclaimed property legislation that provides a mechanism for the transfer of unclaimed property. The Liquidator has contacted the relevant authorities in each of these provinces and will distribute the proceeds of the sale and the residual cash positions to each of these provinces in accordance with the above stated allocation and as more fully detailed in the Second Report of the Liquidator (P-3).

**32** Ontario does not currently have unclaimed property legislation in force and there does not exist any mechanism to transfer the unclaimed assets to the province of Ontario. The Liquidator submits that the Ontario unclaimed assets should therefore be remitted to the Receiver General for Canada along with any information that could later be used to corroborate an investor's claim with the Receiver General for Canada.

**33** The Liquidator also holds approximately 3,400 separate securities in the Unclaimed Assets that are non-transferrable and/or non-marketable. The Liquidator obtained this information pursuant to a request made to CDS to identify the residual investments that are non-marketable and/or non-transferrable as per the attached correspondence, Exhibit P-11.

**34** As described above, the Liquidator plans to transfer all marketable securities to the corresponding omnibus accounts pursuant to the Omnibus Agreement (P-9). However, given that certain Unclaimed Assets are either non-marketable, non-transferrable or both, the Liquidator cannot liquidate these securities pursuant to the Omnibus Agreement.

**35** To solve this issue, the Liquidator is working with CDS and DTCC to obtain Receipts for the securities which are non-transferrable and/or non marketable. See Receipt filed as Exhibit P-12.

**36** The Receipts will allow CDS and DTCC to write off these securities from PFSC's accounts with CDS and DTCC, thus reducing administrative and custody fees owing to these entities, while allowing the Liquidator to conserve the ability to request the delivery of a share certificate in the event that a former client comes forward seeking such securities and that the securities become marketable. This will further allow PFSC to claim its residual cash deposit with CDS and DTCC for the benefit of its creditors.

**37** The Liquidator will conserve the corresponding client account information available on an Excel spreadsheet which, if necessary, will allow the Liquidator to match the identity of the clients to the appropriate Receipts. The Liquidator will keep these Receipts in trust for a period of three years in order to safeguard the rights of clients who may have a claim to these securities. Following the period of three years, the Liquidator will be authorized to destroy the Receipts.

## THE POSITION OF THE INTERVENING CREDITORS

**38** Deloitte & Touche SRL, BDO Dunwoody SRL and Schwartz Levitsky Feldman SRL are creditors to the Estate of PFSC (the "Invervening Creditors").

**39** They strongly oppose the submission of the Liquidator that only a portion of the costs incurred in the process of locating the beneficial owners of the Unclaimed Assets be deducted from the said assets. Their position is that all of the said costs, even if it means that all or substantially all of the liquidated proceeds resulting therefrom, would literally disappear.

**40** The position of the Intervening Creditors is understandable: all of the residual costs of the Liquidator not specifically charged against the Unclaimed Assets will have to be paid out of the mass of the assets of PFSC, thus proportionately reducing the liquidation dividends to be eventually disbursed to them.

**41** They submit that the Liquidator should deduct from the sale proceeds all of, the costs associated with attempting to locate the owners of all assets under management ("AUM") from the time of the commencement of the Liquidation, including the costs relating to those assets the beneficial ownership of which was located and then delivered owing to the protracted work and efforts expended by the Liquidator.

**42** The Intervening creditors allege that the total amount spent by the Liquidator in locating and returning the Unclaimed Assets to their rightful owners resulted in an expenditure in costs far greater than $270,000.

**43** They submit that from the date of the Liquidation Order on February 1, 2013 to this date, the direct and indirect costs incurred by the Liquidator in connection with the management of the process of unclaimed assets have been in an amount well in excess of the sum of $1,882,000.

**44** More particularly, a detailed table prepared by the Liquidator shows that the estimated costs

incurred or to be incurred from September 1, 2013 to administer and deliver the residual Unclaimed Assets to governmental authorities, amount to $268,176. However, the date of September 1, 2013 was chosen by the Liquidator as this is the point in time where the residual Unclaimed Assets could be remitted to the governmental authorities.

**45** In addition, costs were incurred by the Liquidator to administer unclaimed client assets under management since its appointment on February 1, 2013. As appears from a detailed analysis which was prepared by the Liquidator in connection with the present Motion, and which includes all work done by the Liquidator specifically to administer unclaimed client assets, the estimated costs to administer unclaimed client assets amounted to $244,694 between February 2013 (appointment of the Liquidator) and August 31, 2013 (cut-off date to claim client cash and securities in the hands of the Liquidator).

**46** According to the Intervening Creditors, there is agreement on the part of the Liquidator that the amount to be deducted from the sale proceeds of the Unclaimed Assets should be increased to $512,870, being the aggregate, direct costs of dealing with the Unclaimed Assets as described hereinabove.

**47** In addition to the foregoing, professional fees have been incurred in the management of the Unclaimed Assets process including the preparation of the Liquidator's report and Motion to Court relating to Unclaimed Assets (the "Unclaimed Assets Motion"). As of November 29, 2-13, these professional fees were in the amount of $115,774.08, the whole as appears from the calculation prepared by the Liquidator in connection with the present request.

**48** Lastly, the Intervening Creditors submit that a further deduction must be made corresponding to an allocation of all general and overhead expenses incurred by the Liquidator which were not specifically incurred for purposes other than assets under management (AUM) from February 1, 2013 to this date, to unclaimed client assets, based upon the percentage which unclaimed client assets bear to AUM. As appears from a detailed analysis which was prepared by the Liquidator in connection with the present request, the amount of such allocation of liquidation costs to the management of Unclaimed AUM amounts to $6,231,567.

**49** The Intervening Creditors therefore submit that all of the aforementioned Liquidator's costs associated with attempting to locate the owners of all the unclaimed assets, ought to be deducted from the sale proceeds of the Unclaimed Assets as a whole, prior to any remittance of such proceeds to the appropriate provincial and federal bodies dealing with unclaimed property.

**50** Considering that these costs have been incurred for the exclusive benefits of the beneficiaries of unclaimed assets, and are of no benefit to the corporation or its creditors, the Intervening Creditors argue that it is only fair that the beneficiaries of such assets incur the costs relating to their return and it would not be fair for such costs to be borne by the corporation and paid from the latter's proprietary assets at the expense of PFSC's creditors.

## DISCUSSION

**51** The above noted facts are not seriously contested by the parties. The main question is relatively simple: should the Liquidator be able to limit the off-set of his costs and expenses against the Unclaimed Assets to those direct costs which he has identified or should he be directed to allow against his better judgment, that all or substantially all of such proceeds to be off set not only by what he identifies as his direct costs but also by the amounts suggested by the Intervening Creditors.

**52** Based upon the foregoing, however, if I were to retain the position of the Intervening Creditors, there would be no proceeds left in the Unclaimed Assets and their beneficial owners (whoever they may be) would have no possibility of recovery whatsoever.

**53** There is very little legislation doctrine or jurisprudence to guide and instruct the Court in formulating an answer to this question. In point of fact, there is no specific provision of the CBCA dealing with this issue, nor is there a specific jurisprudential example directly on point.

**54** The Liquidator alleges that the Court should not interfere with what appears to be a management question. The Court should therefore show deference towards the approach advanced by the Liquidator.

**55** The Intervening Creditors say that they should not have to (indirectly) pay for those exorbitant costs if they were incurred for the sole benefit of the beneficial owners of the Unclaimed Assets.

**56** Obviously, this seems to be a question where:

- equity;
- judicial discretion; and
- common sense

should prevail.

**57** In addition, those beneficial owners are obviously not present before the Court. This is certainly not a reason to take advantage of their absence and wipe out their assets.

**58** PFSC has assets of its own as well as assets under management which do not belong to it. I am currently unaware of the details of each category of assets nor do I know the amount of the total liquidated assets. The liquidation process is not yet terminated.

**59** The Liquidator, under *Quebec Law* has a duty towards those beneficial owners as an Administrator of the Property of Others, under articles 1299 and following, C.c.Q.

**60** As such, he is obliged to ..."perform all acts necessary for the preservation of the property or useful for the maintenance of the use for which the property is ordinarily destined..."[1]

**61** Section 217 of the CBCA provides as follows:

> **217. [Powers of court] In connection with the dissolution or the liquidation and dissolution of a corporation, the court may, if it is satisfied that the corporation is able to pay or adequately provide for the discharge of all its obligations, make any order it thinks fit including, without limiting the generality of the foregoing,**
>
> **(a) an order to liquidate;**
>
> **(b) an order appointing a liquidator, with or without security, fixing his remuneration and replacing a liquidator;**
>
> ...
>
> **(e) an order determining the validity of any claims made against the corporation;**
>
> ...
>
> **(h) an order approving the payment, satisfaction or compromise of claims against the corporation and the retention of assets for such purpose, and determining the adequacy of provisions for the payment or discharge of obligations of the corporation, whether liquidated, unliquidated, future or contingent;**
>
> **(i) an order disposing of or destroying the documents and records of the corporation;**
>
> **(j) on the application of a creditor, the inspectors or the liquidator, an order giving directions on any matter arising in the liquidation;**
>
> ...
>
> **(m) an order disposing of any property belonging to creditors or shareholders who cannot be found;**

**62** There is no specific provision in the CBCA dealing with the question raised by the present proceedings.

**63** It has been suggested by the Intervening Creditors that the Court should not be seriously concerned with the fact that the Liquidator is dealing with assets that are not the property of PFSC. They submitted a number of decisions which support the proposition that a Receiver under the BIA, a Monitor under the CCAA or a liquidator under the CBCA are entitled to incur an expense chargeable to assets held in trust for third parties, provided that such expense is necessary, given the scope of their administrative powers and duties.

**64** I agree.

**65** See: *Ontario (Securities Commission) v. Consortium Construction Inc.*, 9 C.B.R. (3d) 278 (Ont. C. J. Gen. Div.) affirmed in appeal: [1992] O.J. No. 1584 (C.A.).

**66** However, the cases cited by the Intervening Creditors do confirm that this power should be sparingly used and with a certain degree of deference towards the decision of (in this case) the Liquidator.

**67** See *Eron Mortgage Corp. (trustee of) v. Eron Mortgage Corp.* [1998] B.C.J. No. 282; 53 B.C.L.R. (3d) 24 (BCSC per Tysoe J., as he then was).

**68** I consider that this Court has jurisdiction to allow the Liquidator to off-set his costs of managing the Unclaimed Assets. However, the Liquidator should exercise a balanced judgment between his power to charge all possible direct and/or indirect costs against specific assets under his administration and control and, ultimately, the decision should be his to be reviewed by the Court only if it appears that his decisions are unreasonable.

**69** In other words, a judgment call made by the Liquidator to limit the off-set of certain conservatory measures against the property of others and not literally destroy such assets by applying a pro-rated overhead charge upon that same property, appears to be not only within reason but within the Liquidator's duty towards absent beneficiaries of these Unclaimed Assets.

**70** Tysoe J. in *Eron* (supra) wrote at paragraph 36:

> **"The general principle which I extract from these authorities is that the Court does have the jurisdiction to order that trust assets be charged with the remuneration and expenses of a third party if the work done by the third party is of benefit to the trust property or is necessary for the management and preservation of the trust assets. Implicit in the statement that the work be necessary for the management and preservation of the trust assets is that another person would have been required to perform the work if the party claiming compensation had not done it. Two of the cases say that the Court**

> **should exercise its discretion sparingly, which I interpret to mean that the Court should proceed cautiously to ensure that it is just and equitable for the owners of the trust property to bear the expense of a third party who has not been engaged by them."**

**71** Madam Justice Topolniski of the Court of Queen's Bench of Alberta in Re: *Residential Warranty Company of Canada Inc.*, 2006 ABQB 236 speaks of "fairness, practicality and neutrality" in considering the appropriateness of approving expenses of a trustee under the BIA.

**72** In dismissing the appeal from Topolniski J.'s judgment, the Alberta Court of Appeal (per Paperny J.) 2006 ABCA 293 wrote at paragraph 32:

> **"There is precedent for allowing a trustee to be remunerated from trust property for efforts in sorting out trust claims and distributing the trust *res* to beneficiaries: see for example, *Re Nakashidze* (1948), 29 C.B.R. 35 (Ont. S.C.); *Re Rideout Real Estate Ltd.* (1957), 36 C.B.R. 111 (Ont. S.C.); *Re Kern Agencies, Ltd.* (No. 3) (1932), 13 C.B.R. 333 (Sask. K.B.); *Re NRS Rosewood Real Estate Ltd.* (1992), 9 C.B.R. (3d) 163 (Ont. S.C.). In NRS Rosewood, for example, Austin J. faced the same argument made by Kingsway in this case that the trustee had no entitlement to share in assets which were not the property of the bankrupt. Austin J. concluded that "[a]s the question had to be settled one way or another, and as the Trustee took the initiative, it is only reasonable that some part of the Trustee's fees be paid out of the property in issue".**

**73** It appears that the Liquidator in the present instance has done that. The end result may not satisfy some creditors but, in the end result their counter-proposal appears to be grossly unfair upon a class of (unknown and for absent) creditors who would lose all of their assets.

**74** After considering the facts of the present instance and above case law, I am of the opinion that a fair and equitable balance of the rights of all creditors into the Estate of PFSC would be achieved by allowing the Liquidator to deduct against the net proceeds of the liquidation of the Unclaimed Assets, all of his direct costs, inclusive of legal fees directly incurred in the process. In the course of argument, counsel for the Liquidator has acknowledged that an additional amount of $54,000 to cover legal fees incurred in the process, should be added.

**75** I therefore propose to retain the amount of $270,000 suggested by the Intervening Creditors, to which should be added the amount of $54,000 to cover legal fees, for a total amount of $324,000 as the overall charge to be applied against the Unclaimed Assets.

**76** As for the amount of $244,000 referred to in paragraph [46] above, the Liquidator has decided not to consider it. It has not been shown to me that his decision is inappropriate and I consider that this decision should not be set aside lightly.

**77** It would not be appropriate, in my view, to add a charge in excess of $6 million representing a so-called pro-rated charge of the Liquidator's total liquidation costs. To do so would cause a specific class of creditors to be totally wiped out. This would neither be fair or equitable.

**78** This finding is consistent with the Liquidation Order of February 1, 2013 (by Gouin J.) which reads in part as follows:

> **ORDERS that without in any limiting the generality of the foregoing, and in furtherance thereof, the Liquidator is expressly empowered to do any of the following where the Liquidator, in its discretion, deems it necessary or desirable:**
>
> **[...]**
>
> **(f) to liquidate, or cause to be liquidated, any and all of the Petitioner's residual client investment positions including, without limitation, by means of a distribution of securities in kind, and including position of non-trading client accounts for which the Petitioner or the Liquidator have been unable to secure the transfer to a new receiving broker, subject to compliance with the requirements of any applicable laws governing the treatment of unclaimed property;**

**79** The Liquidator has made a judgment call with respect to what should or should not be charged as "reasonable" expenses against the Unclaimed Assets. The Intervening Creditors may have a different view on the question but their position does not make it a better decision which should necessarily be retained. In the end result, I am of the view that the Intervening Creditors have failed to demonstrate that this Liquidator's judgement call is either unfair or unreasonable to a point where it should be set aside.

**80 FOR THESE REASONS, The Court;**

**81 GRANTS the Liquidator's Motion;**

**82 FINDS TO BE SATISFACTORY AND SUFFICIENT** the Liquidator's efforts to find, notify and contact the current and former clients of Penson Financial Services Canada Inc. ("PFSC") with residual investment assets appearing on PFSC's records and remaining under the management of PFSC (the "Unclaimed Assets"), as is more fully set out in the Second Report of the Liquidator (P-3) dated November 10, 2013;

**83 DECLARES** that the Liquidator has complied with all applicable legislation dealing with unclaimed property, namely the Québec *Unclaimed Property Act,* c. B-5.1, the Alberta *Unclaimed Personal Property and Vested Property Act*, c. U-1.5 and *Regulation*, Alberta *Regulation* 104/2008 and the British Columbia *Unclaimed Property Act*, [SBC 1999] c. 48 and *Regulation*, B.C. Reg.

463/99 (collectively the "Unclaimed Property Legislation") and that nothing in the present Order is contrary to the Unclaimed Property Legislation;

**84 AUTHORIZES AND DIRECTS** the Liquidator to transfer the marketable Unclaimed Assets to omnibus accounts opened with an appropriate market participant;

**85 AUTHORIZES AND DIRECTS** the Liquidator to sell the marketable Unclaimed Assets including the PFSC and Northern Securities Inc. ("NSI") unclaimed assets through an appropriate market participant and to remit the sale proceeds along with the cash positions to the applicable Canadian provincial bodies dealing with unclaimed assets, and to the Receiver General for Canada with respect to amounts attributable to account owners whose last known address is in the province of Ontario or other provinces who do not have a specified body dealing with unclaimed assets, net of the securities brokerage costs and the liquidator's direct fees in dealing with these residual Unclaimed Assets of $324,000 with respect to the management and disposal of the Unclaimed Assets;

**86 AUTHORIZES AND DIRECTS** the Liquidator to obtain receipts ("Receipts") from the Clearing and Depository Service ("CDS") and/or the Depository Trust and Clearing Corporation ("DTCC") for any non-marketable and/or non-transferrable Unclaimed Assets which cannot be transferred or sold and to hold the Receipts in trust for a period of three years from the date of issuance of the present Order or until such time as they are claimed by the client;

**87 AUTHORIZES AND DIRECTS** the Liquidator to destroy the Receipts if they remain unclaimed after a period of three years following the date of the issuance of the present Order;

**88 AUTHORIZES** CDS and DTCC to write-off any non-marketable Unclaimed Assets for which the Liquidator cannot obtain Receipts;

**89 AUTHORIZES** the Liquidator to take any and all other reasonable measures to sell, transfer and dispose of the Unclaimed Assets and to comply with the present Order;

**90 THE WHOLE** with costs, against the Intervening Creditors.

THE HONOURABLE ROBERT MONGEON J.S.C.

1 Article 1301 C.c.Q.

# Tab 4

# COUR SUPÉRIEURE

*(Chambre commerciale)*

**CANADA**
**PROVINCE DE QUÉBEC**
**DISTRICT DE MONTRÉAL**

**No: 500-11-047375-148**

**DATE: 18 SEPTEMBRE 2014**

---

**SOUS LA PRÉSIDENCE DE: L'HONORABLE MARTIN CASTONGUAY, J.C.S.**

---

**DANS L'AFFAIRE DE LA LIQUIDATION DE:**

**CONSTRUCTION FRANK CATANIA ET ASSOCIÉS INC.**
et
**LES DÉVELOPPEMENTS IMMOBILIERS F. CATANIA ET ASSOCIÉS INC.**
et
**DÉVELOPPEMENT LACHINE EST INC.**
et
**GROUPE FRANK CATANIA & ASSOCIÉS INC.**
et
**7593724 CANADA INC.**

Requérantes

et

**PRICEWATERHOUSECOOPERS INC.**

Liquidateur proposé

et

**LE DIRECTEUR NOMMÉ EN VERTU DE LA LCSA**

Mis-en-cause

---

**ORDONNANCE RECTIFIÉE DE LIQUIDATION**

---

Dans la désignation du Liquidateur contenue à l'ordonnance du 15 septembre 2014, une erreur s'est glissée et on devrait lire PricewaterhouseCoopers Inc. au lieu de PricewaterhouseCoopers LLP. Il y a donc lieu de rectifier l'ordonnance de liquidation en conséquence.

L'HONORABLE MARTIN CASTONGUAY, J.C.S.

**ORDONNANCE RECTIFIÉE**

**LE TRIBUNAL**, après avoir pris connaissance de la *Requête pour (i) l'émission d'une ordonnance de liquidation; (ii) la nomination d'un liquidateur; et (iii) l'approbation d'une procédure de traitement des réclamations* (la « **Requête** ») aux termes des articles 211(8), 215 et 217 de la *Loi canadienne sur les sociétés par actions*, L.R.C. 1985, c. C-44 (telle qu'amendée, la « **LCSA** ») présentée par Construction Frank Catania et Associés Inc., Les Développements Immobiliers F. Catania et Associés Inc., Développement Lachine Est Inc., Groupe Frank Catania & Associés Inc. et 7593724 Canada Inc. (les « **Requérantes** »), de l'affidavit et des pièces déposées à son soutien;

**CONSIDÉRANT** la signification de la Requête;

**CONSIDÉRANT** le consentement de PricewaterhouseCoopers Inc. (« **PWC** » ou le « **Liquidateur** ») à agir à titre de liquidateur;

**CONSIDÉRANT** les représentations des procureurs respectifs des Requérantes et du Liquidateur;

**CONSIDÉRANT** les dispositions de la LCSA;

**EN CONSÉQUENCE, LE TRIBUNAL:**

[1] **ACCUEILLE** la Requête.

[2] **ABRÈGE**, le cas échéant, tout délai de présentation relatif à la présentation de la Requête.

[3] **ORDONNE** que la liquidation de la Requérante se poursuive sous la surveillance du tribunal au terme de l'article 211(8) de la LCSA.

**NOMINATION ET POUVOIRS DU LIQUIDATEUR**

[4] **NOMME** PWC pour agir à titre de liquidateur à l'égard de l'ensemble des biens et propriétés, éléments d'actifs, droits et obligations des Requérantes, présents et futurs, de quelque nature que ce soit, et en quelque lieu où ils se trouvent, qu'ils

soient détenus directement ou indirectement par les Requérantes, à quelque titre que ce soit, ou qu'ils soient détenus par d'autres pour les Requérantes (collectivement, les « **Biens** »).

[5] **ORDONNE** que les pouvoirs des actionnaires des Requérantes ainsi que ceux de leurs administrateurs, en cette qualité, soient dévolus au Liquidateur.

[6] **AUTORISE** le Liquidateur à prendre possession et contrôle des Biens, à procéder à leur liquidation (la « **Liquidation** »), à effectuer une ou plusieurs distributions (les « **Distributions de liquidités** »), y compris une distribution finale après que le Liquidateur ait pourvu au passif en cours, aux éventualités et aux coûts de la Liquidation, des Distributions de liquidités et de la Dissolution (ci-après définie), à procéder à la dissolution des Requérantes (la « **Dissolution** ») et à rendre au tribunal un compte rendu définitif à cet effet, incluant le détail de tout partage du reliquat de l'actif entre les actionnaires, le cas échéant.

[7] **ORDONNE** que les pouvoirs conférés au Liquidateur par la LCSA et par la présente ordonnance (l'« **Ordonnance** ») pourront être exercés par le Liquidateur à sa discrétion, et dans la mesure il l'estime nécessaires ou souhaitable.

[8] **DÉCLARE** que sous réserve des dispositions prévues à l'article 223 de la LCSA, le Liquidateur a pleine autorité pour régler ou transiger toute réclamation à même les liquidités en sa possession et pour s'acquitter de toute obligation et de tous frais provoqués par ou en relation avec l'exécution de ses fonctions de liquidateur, notamment, tous frais juridiques et débours des procureurs du Liquidateur et des Requérantes, dans chaque cas, selon leurs tarifs et frais standards, qu'ils soient encourus avant ou après la présente Ordonnance, et pour constituer des réserves quant au passif éventuel et aux coûts associés à la Liquidation, aux Distributions de liquidités et à la Dissolution.

[9] **ORDONNE** qu'en aucun temps avant la fin de la Liquidation, le Liquidateur ne sera tenu d'acquitter toute somme due découlant des réclamations acceptées, tranchées ou autrement réglées, et ce, malgré la solvabilité des Requérantes, étant cependant entendu que le Liquidateur pourra, s'il l'estime opportun, nécessaire et dans l'intérêt de la Liquidation, effectuer un paiement immédiat à un créancier qui a une réclamation valide, sous réserve cependant, dans le cas d'un paiement supérieur à 200 000 $ (excluant une Avance intersociété) à une partie liée, y compris un actionnaire, administrateur ou dirigeant, pour une réclamation basée sur des faits antérieurs à l'émission de la présente Ordonnance, qu'un tel paiement ne pourra être effectué par le Liquidateur qu'après l'émission d'un préavis de 15 jours aux créanciers sur la liste de distribution. Toutefois, lorsque le Liquidateur décidera de ne pas acquitter une somme due découlant d'une réclamation acceptée, tranchée ou autrement réglée, un créancier ayant une réclamation valide pourra s'adresser au Tribunal afin d'en obtenir le paiement.

[10] **AUTORISE** le Liquidateur, sans limiter la généralité de ce qui précède, à exercer les pouvoirs suivants :

(a) recevoir, conserver, protéger, liquider, maintenir le contrôle et réaliser sur les Biens, ou sur toute partie ou parties de ceux-ci;

(b) détenir et à investir les Biens détenus sous forme d'argent dans des comptes bancaires, des dépôts à terme ou des certificats de placement garantis encaissables d'une banque à charte canadienne ou dans des bons du Trésor émis par le gouvernement du Canada;

(c) prendre les mesures qui sont nécessaires ou souhaitables pour maintenir le contrôle sur tous les encaissements et les déboursés, notamment, pour contrôler l'accès à et l'utilisation de tout compte bancaire, de placement ou de courtage des Requérantes, ou pour procéder à l'ouverture d'un nouveau compte bancaire, de placement ou de courtage, pour approuver tous les chèques ou autres instruments de paiement tirés sur un de ces comptes et permettre le paiement des dépenses qui, à la discrétion du Liquidateur, sont nécessaires ou souhaitables pour réaliser la Liquidation, les Distributions de liquidités et la Dissolution;

(d) prendre les mesures qui sont nécessaires ou souhaitables pour vérifier l'existence et l'emplacement de tous les Biens, pour vérifier les conditions de toute convention ou autre entente afférente à ceux-ci, qu'elle soit écrite ou orale, pour vérifier l'existence ou l'assertion de toute hypothèque, sûreté, charge ou tout autre intérêt rattaché aux Biens, et pour vérifier toute autre question qui est susceptible d'affecter la mesure, la valeur, l'existence, la préservation et la liquidation des Biens;

(e) négocier, conclure, modifier, résilier ou régler toute convention ou entente à l'égard des Biens;

(f) effectuer des évaluations environnementales des propriétés et des opérations des Requérantes et entamer des discussions et des négociations avec les autorités environnementales compétentes quant à la réhabilitation ou la décontamination environnementale des Biens;

(g) contracter toute obligation dans le cours normal des entreprises;

(h) payer toutes dettes et frais encourus avant ou après l'émission de la présente Ordonnance provoqués par ou en relation avec les opérations des Requérantes, notamment, les salaires, les impôts, le loyer, les services publics, le chauffage, l'entretien, les assurances, les fournitures et autres frais, et à mettre en place des réserves pour les dettes éventuelles et coûts associés à la Liquidation, aux Distributions de liquidités et à la Dissolution;

(i) recueillir et percevoir toutes les sommes et comptes qui sont ou seront dus aux Requérantes et exercer tous les droits ou recours des Requérantes dans la collecte de telles sommes;

(j) consulter les anciens administrateurs et dirigeants des Requérantes et recevoir et considérer les opinions et conseils de ceux-ci;

(k) employer ou à conserver au service des Requérantes tout employé ou ancien employé des Requérantes, mandataire, expert, vérificateur, consultant, conseiller juridique et autre conseiller professionnel, et à contracter à de telles fins s'il le juge nécessaire ou souhaitable afin de recevoir, conserver, protéger et réaliser sur les Biens ou sur toute partie ou parties de ceux-ci, ou plus généralement à l'égard de l'exercice de ses pouvoirs et de l'exécution de ses fonctions en vertu des présentes, au nom des Requérantes et non en sa qualité de Liquidateur;

(l) en plus de retenir les services de son propre procureur, retenir les services des procureurs des Requérantes afin de l'assister avec le Processus de réclamation (tel que défini dans la Requête), la Liquidation, les Distributions de liquidités et la Dissolution;

(m) procéder à:

(i) la préparation et le dépôt des états financiers, des déclarations de revenus, des formulaires, des avis et autres documents des Requérantes, et aux choix fiscaux de celles-ci;

(ii) régler, par l'entremise des Requérantes, toute dette fiscale en vertu de la législation ou réglementation fiscale applicable qui peut engager la responsabilité des administrateurs; et

(iii) obtenir, par l'entremise des Requérantes, tout certificat, certificat d'autorisation et autres autorisations qui n'ont pas déjà été obtenues en vertu de la législation et règlementation fiscale applicable.

(n) assurer la préparation et la livraison, aux actionnaires des Requérantes et à tout autre récipiendaire de paiements en provenance du Liquidateur, des renseignements fiscaux et relevés d'impôts qui doivent être livrés en vertu de la législation et de la réglementation fiscale applicable;

(o) assurer la préparation et la livraison à tout employé, dirigeant, administrateur et entrepreneur indépendant des Requérantes, passés ou actuels, des relevés d'emploi, des relevés T4 ou de tout autre formulaire prescrit applicable à de telles personnes en vertu de la législation et de la réglementation applicable;

(p) communiquer l'information et préparer et livrer la documentation, les formulaires ou relevés fiscaux relatifs aux clients des Requérantes ou à l'égard de parties au nom desquelles les Requérantes ont fourni des services ou détenu des actifs, notamment, toute information et documentation nécessaire ou utile pour la préparation des déclarations de revenus par de tels clients et autres parties pour l'année fiscale de 2014 et pour toute année précédente, le cas échéant;

(q) assurer la conservation ou la destruction de documents si cela est nécessaire pour la Liquidation et afin de se conformer à toute exigence légale, réglementaire ou autre, applicable aux Requérantes, à condition toutefois que le Liquidateur ne détruise pas de documents dans les sept (7) années suivant la date de la présente Ordonnance sans obtenir préalablement l'approbation du tribunal sur préavis à la liste de distribution d'au moins dix (10) jours;

(r) réaliser la Liquidation et les Distributions de liquidités, en conformité avec la présente Ordonnance et dans le respect des dispositions de la LCSA applicables à la Dissolution, notamment, l'envoi d'avis aux actionnaires et aux créanciers des Requérantes, le dépôt des statuts de dissolution avec le Directeur nommé en vertu de la LCSA, et compléter tout autre dépôt et à obtenir tout consentement requis en vertu de la LCSA et toute autre législation applicable à la Dissolution; et

(s) présenter une demande au tribunal afin d'obtenir des directives supplémentaires concernant l'exercice de ses pouvoirs, obligations et droits respectifs en vertu des présentes ou pour obtenir toute autorité ou tout pouvoir supplémentaire.

[11] **AUTORISE** le Liquidateur, sur une base exclusive et sous réserve des dispositions l'Ordonnance relative au traitement des réclamations émise dans le présent dossier, à sa discrétion et s'il l'estime nécessaire ou souhaitable pour convenablement recevoir, protéger, préserver ou réaliser sur les Biens, à:

(a) introduire, poursuivre et continuer la poursuite de toute action ou procédure judiciaire engagées par les Requérantes devant tout tribunal ou entité administrative;

(b) comparaître et mener la défense toute action ou procédure judiciaire actuellement en cours ou ultérieurement introduite à l'encontre des Requérantes ou du Liquidateur à l'égard des Biens ou des obligations des Requérantes;

(c) régler ou transiger de telles actions ou procédures judiciaires qui, de l'avis du Liquidateur et à son entière discrétion, devraient être réglées ou transigées;

l'autorité conférée par les présentes s'étendant aux appels qui, de l'avis du Liquidateur et à sa discrétion, sont nécessaires ou souhaitables à l'égard de toute ordonnance ou de tout jugement.

[12] **ORDONNE** aux Requérantes, dans le cadre de la vente et de la disposition des Biens, d'exécuter les procurations, actes et instruments, de quelque nature ou sorte que ce soit, qui pourraient être requis. À cette fin, le Liquidateur est autorisé et habilité à exécuter les procurations, actes et instruments au nom de et pour le compte des Requérantes. Ces procurations, actes et instruments exécutés par le Liquidateur ont la même force et le même effet que s'ils étaient exécutés par les Requérantes.

[13] **AUTORISE** le Liquidateur à prendre les mesures raisonnablement accessoires à l'exercice de ses pouvoirs ou à l'exécution de toute obligation légale, et **DÉCLARE** que, dans chaque cas où le Liquidateur prend une telle action ou mesure, l'exercice des pouvoirs du Liquidateur se fera l'exclusion de toute autre personne, et sans ingérence de toute autre personne.

## CHARGES ET AVANCES INTERSOCIÉTÉS

[14] **ORDONNE** que le Liquidateur, le procureur du Liquidateur et le procureur des Requérantes bénéficient et se voient par les présentes octroyer une charge sur les Biens, laquelle ne pourra excéder un montant total de **350 000,00 $**, en garantie du paiement de leurs frais et déboursés professionnels et autres dépenses engagées selon les tarifs et les frais standards du Liquidateur et desdits procureurs, tant avant qu'après l'émission de la présente Ordonnance, à l'égard de la présente instance (la « **Charge du Liquidateur** »).

[15] **AUTORISE** le Liquidateur agissant au nom de l'une des Requérantes à emprunter, rembourser et réemprunter sur une base renouvelable (telle Requérante étant un « **Emprunteur intersociété** »), toute somme d'une autre Requérante (telle Requérante étant un « **Prêteur intersociété** »), de temps en temps, si elle l'estime nécessaire ou souhaitable (les « **Avances intersociété** ») conformément à un billet promissoire émis en faveur du Prêteur intersociété, à titre de preuve, afin que l'Emprunteur intersociété puisse financer ses dépenses courantes et payer toute autre somme autorisée par les dispositions de la présente Ordonnance.

[16] **ORDONNE** qu'une charge, hypothèque et sûreté soit, par les présentes, constituée sur la totalité des Biens de l'Emprunteur intersociété, laquelle ne pourra excéder un montant total de **2 000 000,00 $** par Emprunteur intersociété, en faveur du Prêteur intersociété (une telle charge étant une « **Charges intersociété** » et collectivement avec la Charge du Liquidateur, les « **Charges** ») en garantie des obligations de l'Emprunteur intersociété liées aux avances faites

au Prêteur intersociété.

[17] **DÉCLARE** que les Charges constituent des charges de rang supérieur sur les Biens et ont priorité sur toutes autres hypothèques, charges, sûretés, fiducie ou autre intérêt, de quelque nature que ce soit, constitué légalement ou autrement en faveur de tout autre individu, personne, firme, coentreprise, société par actions, société de personnes, société à responsabilité limitée ou illimitée, fiducie, entreprise, société en participation, association, organisation, organisme gouvernemental ou agence, personne morale ou organisation non constituée en personne morale ou tout autre entité similaire, quelle qu'en soit sa désignation ou sa constitution, et tout individu ou autre entité détenue ou contrôlée par ou qui est le mandataire de l'une des personnes mentionnées ci-dessus (collectivement, des « **Personnes** » et individuellement, une « **Personne** ») à l'exception toutefois, des Personnes n'ayant pas reçu signification de la Requête préalablement à son audition (les « **Personnes non-signifiées** »). Le Liquidateur ainsi que tout autre bénéficiaire des Charges auront toutefois l'opportunité, s'ils le jugent nécessaire, de déposer, à une date ultérieure, une requête visant à ce que les Charges ait une priorité sur les droits des Personnes non-signifiées, ou toutes autres Personnes pouvant être affectées par les Charges.

[18] **ORDONNE** que toute Charge intersociété, le cas échéant, prendra rang sur les Biens de la Requérante visée après la Charge du Liquidateur.

[19] **DÉCLARE** que les Charges sont valides et opposables à tout syndic de faillite, séquestre, administrateur séquestre ou séquestre intérimaire des Requérantes, et ce, à toutes fins.

## OBLIGATION D'ACCÈS ET DE COOPÉRATION

[20] **ORDONNE** que, sur demande écrite du Liquidateur, toute Personne doit immédiatement aviser le Liquidateur de l'existence de tous Biens en sa possession ou sous son contrôle, doit accorder sans délai un accès immédiat et continu au Liquidateur à ces Biens et doit remettre ceux-ci au Liquidateur.

[21] **ORDONNE** que sur demande écrite du Liquidateur, toute Personne doit immédiatement aviser le Liquidateur de l'existence de tout livre, document, titre, contrat, commande, livre et registre comptable et tout autre document, registre et donnée de toute sorte reliée à l'entreprise ou aux affaires des Requérantes. Une telle Personne doit également, sur demande écrite du Liquidateur, l'aviser immédiatement de tout programme informatique, bande informatique, disquette ou autre support de stockage de données contenant de telles informations (collectivement, les « **Registres** ») en sa possession ou sous son contrôle et doit également, sur demande écrite du Liquidateur, fournir ou permettre à celui-ci de faire, conserver ou prendre des copies et accorder au Liquidateur un libre accès afin d'utiliser tout système de comptabilité, ordinateur, programme informatique et toute installation physique rattachée à de telles informations. Rien dans la

présente Ordonnance ne permet d'exiger la livraison des Registres ou l'octroi d'un accès à ces Registres qui ne peuvent être divulgués ou fournis au Liquidateur en raison d'un privilège rattaché aux communications avocat-client ou en raison de dispositions légales prohibant une telle divulgation.

[22] **ORDONNE** que si un quelconque Registre est enregistré sur un ordinateur ou tout autre système électronique de stockage de l'information, que ce soit par un fournisseur de service indépendant ou autrement, toute Personne en possession ou ayant contrôle d'un Registre doit, sur demande écrite du Liquidateur, fournir au Liquidateur toute l'assistance nécessaire afin qu'il obtienne un accès immédiat à l'information contenue dans le Registre, y compris toute instruction quant à l'utilisation de tout ordinateur ou autre système et tout code d'accès, nom et numéro de compte requis afin d'obtenir un accès à l'information, et cette Personne ne peut altérer, effacer ou détruire tout Registre sans le consentement préalable écrit du Liquidateur.

## DISTRIBUTIONS DE LIQUIDITÉS

[23] **ORDONNE**, sous réserve de toute autre ordonnance ou directive du Tribunal à l'effet contraire, que la Valeur nette de réalisation des Biens (telle que définie ci-après) doit être détenue par le Liquidateur afin d'être disposée conformément aux dispositions de la présente Ordonnance, de la LCSA et, le cas échéant, de toute autre ordonnance émise par le tribunal. La « **Valeur nette de réalisation** » désigne, en tous temps, les espèces détenues par les Requérantes et les fonds reçus par le Liquidateur suite à la disposition des Biens, moins la somme de (i) tout fond de réserve établi par ordonnance subséquente de ce tribunal afin de satisfaire le paiement de toute réclamation éventuelle; (ii) toute somme payée afin de satisfaire ou régler le paiement des dettes des Requérantes; et (iii) les coûts liés à la Liquidation, aux Distributions de liquidités et à la Dissolution, y compris les coûts liés au Liquidateur et toute taxe applicable, rémunération et dépenses du procureur du Liquidateur et du procureur des Requérantes.

[24] **ORDONNE** au Liquidateur de procéder aux Distributions de liquidités par voie d'une ou de plusieurs distributions aux actionnaires des Requérantes à même la Valeur nette de réalisation et le solde restant de tout fond de réserve crée, le cas échéant, pour le paiement des réclamations éventuelles.

## RAPPORT AU TRIBUNAL

[25] **ORDONNE** au Liquidateur de faire rapport au tribunal, lorsqu'il l'estimera nécessaire ou souhaitable, sur l'état de progression du Processus de réclamation, de la Liquidation, des Distributions de liquidités et de la Dissolution.

**LIMITE DE RESPONSABILITÉ DU LIQUIDATEUR**

[26] **ORDONNE** qu'à moins d'une permission préalable octroyée par ce tribunal, aucune procédure ou mesure d'exécution ne peut être introduite ou continuée à l'encontre du Liquidateur devant tout tribunal ou toute autre instance judiciaire.

[27] **DÉCLARE** que PWC n'engage sa responsabilité qu'à titre de liquidateur des Requérantes, qu'elle n'engage pas sa responsabilité personnelle et qu'elle ne souscrit à aucune obligation en raison de sa nomination à titre de liquidateur, à l'exception de toute responsabilité éventuelle découlant de son devoir d'agir avec soin, diligence et compétence conformément à l'article 222(2) de la LCSA. Rien dans la présente Ordonnance ne déroge aux protections accordées au Liquidateur en vertu de la LCSA ou de toute autre législation applicable.

[28] **DÉCLARE** que le Liquidateur ne pourra en aucun cas être considéré comme employeur successeur, employeur lié ou répondant eu égard aux anciens et actuels employés des Requérantes en vertu de toute législation ou règlementation provinciale, fédérale ou municipale applicable en matière de norme d'emploi et de travail ou de toute autre loi, toute convention collective et toute autre entente conclue entre les Requérantes et leurs anciens et actuels employés.

[29] **DÉCLARE** que, nonobstant les dispositions de toute loi fédérale ou provinciale, le Liquidateur est dégagé de toute responsabilité personnelle pour tout fait ou dommage lié aux Biens, y compris tout Bien qui pourrait être contaminé ou qui pourrait lui-même être un contaminant ou un polluant ou qui pourrait causer ou contribuer à un déversement, une décharge, un rejet, ou un dépôt d'une substance, en contravention à toute loi fédérale, provinciale ou autre qui vise la protection, conservation, amélioration, décontamination ou réhabilitation de l'environnement ou qui est relative à l'élimination de déchets ou de tout autre contaminant (la « **Législation environnementale** »), survenu avant ou après sa nomination comme Liquidateur, sauf pour toute responsabilité engendrée par sa faute lourde ou intentionnelle.

[30] **DÉCLARE** que l'exercice des pouvoirs conférés en vertu de la présente Ordonnance n'a pas pour effet de confier au Liquidateur le soin, la propriété, le contrôle, la charge, l'occupation, la possession ou la gestion, ou d'exiger ou de requérir du Liquidateur d'occuper, d'assurer le contrôle, le soin, la charge, la possession ou la gestion de tout Bien qui pourrait être contaminé, ou qui pourrait lui-même être un contaminant ou un polluant, ou qui pourrait causer ou contribuer à un déversement, une décharge, un rejet, ou un dépôt d'une substance en contravention à la Législation environnementale. Le Liquidateur ne doit pas être considéré, en raison la présente Ordonnance, comme détenant le contrôle, la charge, la possession ou la gestion de quelconque Bien au sens de la Législation environnementale.

[31] **DÉCLARE** qu'advenant qu'une ordonnance de réparation de tout fait ou dommage lié à l'environnement et touchant les Biens émanant d'une autorité compétente soit reçue par ou portée à la connaissance du Liquidateur et qu'aucune entente ne soit conclue avec l'autorité compétente, le Liquidateur devra, dans le délai fixé par l'ordonnance, ou dans les dix (10) jours suivant la date à laquelle l'ordonnance est reçue ou portée à la connaissance du Liquidateur, présenter au tribunal une requête pour directives.

**ADMINISTRATEURS ET DIRIGEANTS**

[32] **ORDONNE** que toute obligation d'indemnisation due par les Requérantes à leurs anciens administrateurs et dirigeants en vertu des règlements administratifs des Requérantes ou de toute autre convention d'indemnisation demeurent en vigueur, continuent à recevoir plein effet et sont opposables aux Requérantes jusqu'à l'accomplissement de la dernière Distribution de liquidité.

[33] **ORDONNE** au Liquidateur d'établir une réserve raisonnable afin de couvrir toute réclamation potentielle des administrateurs et dirigeants à l'encontre des Requérantes en vertu d'une quelconque obligation d'indemnisation, et ordonne au Liquidateur de maintenir une telle réserve jusqu'au dernier moment avant la Distribution de liquidités finale.

**SUSPENSION DES PROCÉDURES**

[34] **ORDONNE** que jusqu'à nouvel ordre du tribunal (la « **Période de suspension** »), aucune procédure ni aucune mesure d'exécution devant tout tribunal ou instance judiciaire, y compris tout tribunal administratif ou arbitral, qu'il soit national ou étranger (chacune une « **Procédure** »), ne sera introduite ou continuée à l'encontre de ou à l'égard des Requérantes et du Liquidateur ou qui affecte les affaires et activités des Requérantes ou des Biens. Toute Procédure déjà introduite à l'encontre de ou à l'égard des Requérantes ou des Biens est, par les présentes, mise en sursis et suspendue, et ce, jusqu'à ce que le tribunal en autorise la continuation. Toutefois, dans le cas d'un processus d'adjudication devant une instance judiciaire spécialisée, tel un tribunal ayant compétence en matière fiscale, pénale ou criminelle, le processus d'adjudication en cours pourra être continué et ce, aux seules fins de quantifier le montant d'une réclamation, étant toutefois entendue que toute mesure de recouvrement ou d'exécution sera suspendue par la présente Ordonnance.

[35] **ORDONNE** qu'au cours de la Période de suspension, aucune Procédure ne peut être introduite ou continuée à l'encontre de tout administrateur ou dirigeant des Requérantes, ancien, actuel ou futur, ni à l'encontre de toute personne réputée être un administrateur ou un dirigeant des Requérantes (individuellement, un « **Administrateur** » et collectivement les « **Administrateurs** ») concernant toute réclamation à l'encontre d'un Administrateur, intentée avant ou se rapportant à

des actes ou évènements qui se sont produits avant l'Heure de prise d'effet (telle que définie ci-après) et portant sur toute obligation des Requérantes lorsqu'il est allégué que tout Administrateur est, en vertu de toute loi, tenu, en cette qualité, au paiement de cette obligation.

[36] **ORDONNE** qu'au cours de la Période de suspension, tout droit et action en justice de toute Personne à l'encontre des Requérantes ou des Biens soit, par les présentes, mis en sursis et suspendu, à moins du consentement du Liquidateur ou à moins d'une permission octroyée par le tribunal.

[37] **ORDONNE** qu'au cours de la Période de suspension, aucune Personne n'interrompe, ne fasse défaut d'honorer, ne change, n'interfère avec, ne répudie, ne résilie, ne mette fin à ou ne cesse d'exercer tout droit, droit de renouvellement, contrat, entente, licence ou permis qui, dans chaque cas, est en faveur de ou détenu par les Requérantes, à moins du consentement du Liquidateur ou d'une permission octroyée par le tribunal.

[38] **ORDONNE** qu'au cours de la Période de suspension, tout fournisseur de biens ou de services aux Requérantes soit enjoint, jusqu'à l'émission de toute autre ordonnance du Tribunal, de ne pas résilier, modifier ou cesser d'exécuter toute entente de fourniture de biens ou de services, telle qu'elle peut être requise par le Liquidateur, et que le Liquidateur soit autorisé à continuer à utiliser le numéro de téléphone, de télécopieur, les adresses internet et autres services, y inclus l'internet et les sites web des Requérantes, en autant que les prix normaux et autres frais habituels pour tels biens et services fournis ou rendus après la date de cette Ordonnance soient acquittés par le Liquidateur selon les pratiques normales de paiement des Requérantes, ou selon toute autre pratique pouvant être convenue entre le fournisseur de biens ou de services et le Liquidateur, ou selon toute ordonnance du Tribunal.

[39] **ORDONNE** qu'aucune police d'assurance, couverture d'assurance, obligation ou tout autre type de garantie financière fournie à ou en faveur des Requérantes n'est résilié ou annulé en raison de la Liquidation, de l'émission de cette Ordonnance ou de la nomination du Liquidateur, à moins du consentement du Liquidateur ou d'une permission octroyée par le tribunal.

**AVIS ET COMMUNICATIONS**

[40] **ORDONNE** que tout avis ou autre communication à être donné aux termes de cette Ordonnance par un créancier au Liquidateur doit être donné par écrit. Cet avis peut être transmis par courrier ordinaire ou recommandé, par courriel, par messager, livré en mains propres ou transmis par télécopieur, sauf stipulation contraire spécifique dans la LCSA. Tout document envoyé aux termes de la présente Ordonnance est réputé avoir été reçu trois (3) jours ouvrables après la date de livraison s'il s'agit d'un document envoyé par courrier et un (1) jour ouvrable s'il s'agit d'un document envoyé par messager, par courriel ou transmis par télécopieur. Tout document envoyé par courriel doit être envoyé aux

adresses électroniques suivantes :

| | |
|---|---|
| Liquidateur: | PricewaterhouseCoopers Inc.<br>À l'attention de: Christian Bourque<br>Adresse: christian.bourque@ca.pwc.com |
| Procureurs du Liquidateur: | Fasken Martineau Dumoulin LLP<br>À l'attention de: Luc Béliveau<br>Adresse : lbeliveau@fasken.com |
| Procureurs des Requérantes: | Stikeman Elliott LLP<br>À l'attention de: Guy P. Martel, Joseph Reynaud, Danny Duy Vu<br>Adresses: gmartel@stikeman.com; jreynaud@stikeman.com; ddvu@stikeman.com |

[41] **ORDONNE** que tout document envoyé par le Liquidateur conformément à la présente Ordonnance ou conformément à la LCSA peut être envoyé par courrier ordinaire ou recommandé, par courriel, par messager, livré en mains propres ou transmis par télécopieur, sauf stipulation contraire spécifique dans la LCSA. Avis d'un tel document envoyé conformément à la présente Ordonnance est réputé avoir été reçu trois (3) jours ouvrables après la date de livraison s'il s'agit d'un document envoyé par courrier et un (1) jour ouvrable s'il s'agit d'un document envoyé par messager, courriel ou transmis par télécopieur.

[42] **ORDONNE** que le Liquidateur et toute personne peut signifier les documents relatifs à la présente instance à toutes les parties représentées par procureur en envoyant par courrier électronique un document PDF ou une autre forme de copie électronique de ces documents, aux adresses électroniques au procureur des Requérantes et au procureur du Liquidateur, à condition que si une partie en fait la demande, une copie sur support papier de ces documents lui soit livrée dans les meilleurs délais.

[43] **ORDONNE** que le Liquidateur publie tout document relatif à la présente instance sur son site internet.

## DISPOSITIONS DIVERSES

[44] **ORDONNE** la mise sous scellé au dossier de la Cour des Annexes au Rapport du liquidateur, Pièce R-4, ainsi que des Pièces R-5, R-6, R-11 et R-12 au soutien de la Requête, et **ORDONNE** que les créanciers actuels et potentiels des Requérantes pourront exiger la communication des Pièces produites sous scellé en vertu de la présente Ordonnance, sous réserve toutefois d'en faire la demande par écrit aux procureurs du Liquidateur et de signer une entente de confidentialité standard à cet égard.

[45] **DÉCLARE** que le Liquidateur peut, de temps à autre, présenter une demande au tribunal afin d'obtenir des directives concernant l'exercice de ses pouvoirs, obligations et droits en vertu des présentes ou concernant l'exécution appropriée de la présente Ordonnance.

[46] **ORDONNE** que dans l'éventualité où le Liquidateur conclu que les Requérantes sont – ou l'une d'entre elles est - insolvable, il peut s'adresser au tribunal afin d'obtenir une ordonnance mettant fin à sa nomination à titre de liquidateur dans la présente instance ou permettant la conversion de la présente instance en une instance sous la *Loi sur les arrangements avec les créanciers des compagnies, L.R.C. (1985), ch. C-36* (la « **LACC** ») ou de la *Loi sur la faillite et l'insolvabilité, L.R.C. (1985), ch. B-3* (la « **LFI** »).

[47] **ORDONNE** que la nomination de PWC pour agir à titre de liquidateur dans la présente instance ne l'empêche pas d'agir à titre de syndic ou de contrôleur, le cas échéant, dans le cas où la présente instance est continuée sous la LACC, la LFI ou toute autre législation.

[48] **DEMANDE** l'aide et la reconnaissance de tout tribunal ou organisme administratif de toute province du Canada, de tout tribunal fédéral ou organisme administratif du Canada, ainsi que de tout tribunal ou organisme administratif fédéral ou étatique des États-Unis d'Amérique et de tout tribunal ou organisme administratif étranger, afin que ceux-ci apportent leur aide au Tribunal et se fassent son auxiliaire aux fins de l'exécution des conditions de la présente Ordonnance.

[49] **DÉCLARE** que toute Personne intéressée peut présenter une demande au tribunal afin de faire modifier ou d'annuler la présente Ordonnance ou afin d'obtenir un autre redressement, moyennant un préavis de cinq (5) jours au Liquidateur et à toute autre partie susceptible d'être affectée par l'ordonnance demandée ou moyennant tout autre préavis, s'il en est, que le tribunal pourra ordonner.

[50] **DÉCLARE** que la présente Ordonnance et toutes ses dispositions prennent effet à compter de 0h01 heure de l'Est, à la date de la présente Ordonnance (« **Heure de prise d'effet** »).

**LE TOUT SANS FRAIS.**

L'HONORABLE MARTIN CASTONGUAY, J.C.S.

*Intitulé de la cause :*

**Construction Frank Catania et Associés inc. (Syndic de)**

**DANS L'AFFAIRE DE LA LIQUIDATION DE :**
**CONSTRUCTION FRANK CATANIA ET ASSOCIÉS INC. et LES DÉVELOPPEMENTS IMMOBILIERS F. CATANIA ET ASSOCIÉS INC. et DÉVELOPPEMENT LACHINE EST INC. et GROUPE FRANK CATANIA & ASSOCIÉS INC. et 7593724 CANADA INC., Requérantes, et Pricewaterhousecoopers INC., Liquidateur proposé, et LE DIRECTEUR NOMMÉ EN VERTU DE LA LCSA, Mis-en-cause**

[2014] J.Q. no 9847

**2014 QCCS 4359**

No : 500-11-047375-148

Cour supérieure du Québec
District de Montréal

**L'honorable Martin Castonguay J.C.S.**

le 18 septembre 2014.

(50 paragr.)

*Droit corporatif -- Société par actions -- Dissolution et liquidation -- Liquidateur -- Nomination -- Pouvoirs et devoirs -- Vente de l'actif -- Il y a lieu de nommer PWC pour agir à titre de liquidateur -- Les pouvoirs des actionnaires des requérantes ainsi que ceux de leurs administrateurs, en cette qualité, sont dévolus à PWC*

Requête pour l'émission d'une ordonnance de liquidation de Construction Frank Catania et Associés inc. (Catania), pour la nomination d'un liquidateur et pour l'approbation d'une procédure de traitement des réclamations.

DISPOSITIF : Requête accueillie. Il y a lieu de nommer PWC pour agir à titre de liquidateur. Les

pouvoirs des actionnaires des requérantes ainsi que ceux de leurs administrateurs, en cette qualité, sont dévolus à PWC. PWC pourra prendre possession et contrôle des biens de Catania et procéder à leur liquidation. PWC devra faire rapport au Tribunal, lorsqu'il l'estimera nécessaire ou souhaitable, sur l'état de progression du processus de réclamation.

**Législation citée :**

Loi canadienne sur les sociétés par actions, L.R.C. 1985, c. C-44, art. 211(8), art. 215, art. 217

**Avocats :**

Aucun avocat n'est mentionné.

---

**ORDONNANCE RECTIFIÉE DE LIQUIDATION** Dans la désignation du Liquidateur contenue à l'ordonnance du 15 septembre 2014, une erreur s'est glissée et on devrait lire PricewaterhouseCoopers Inc. au lieu de PricewaterhouseCoopers LLP. Il y a donc lieu de rectifier l'ordonnance liquidation en conséquence.

**ORDONNANCE RECTIFIÉE**

**LE TRIBUNAL**, après avoir pris connaissance de la Requête pour (i) l'émission d'une ordonnance de liquidation; (ii) la nomination d'un liquidateur; et (iii) l'approbation d'une procédure de traitement des réclamations (la "**Requête**") aux termes des articles 211(8), 215 et 217 de la Loi canadienne sur les sociétés par actions, L.R.C. 1985, c. C-44 (telle qu'amendée, la "**LCSA**") présentée par Construction Frank Catania et Associés Inc., Les Développements Immobiliers F. Catania et Associés Inc., Développement Lachine Est Inc., Groupe Frank Catania & Associés Inc. et 7593724 Canada Inc. (les "**Requérantes**"), de l'affidavit et des pièces déposées à son soutien;

**CONSIDÉRANT** la signification de la Requête;

**CONSIDÉRANT** le consentement de PricewaterhouseCoopers Inc. ("**PWC**" ou le "**Liquidateur**") à agir à titre de liquidateur;

**CONSIDÉRANT** les représentations des procureurs respectifs des Requérantes et du Liquidateur;

**CONSIDÉRANT** les dispositions de la LCSA;

**EN CONSÉQUENCE, LE TRIBUNAL :**

1 **ACCUEILLE** la Requête.

2 **ABRÈGE**, le cas échéant, tout délai de présentation relatif à la présentation de la Requête.

3 **ORDONNE** que la liquidation de la Requérante se poursuive sous la surveillance du tribunal au terme de l'article 211(8) de la LCSA.

**NOMINATION ET POUVOIRS DU LIQUIDATEUR**

4 **NOMME** PWC pour agir à titre de liquidateur à l'égard de l'ensemble des biens et propriétés, éléments d'actifs, droits et obligations des Requérantes, présents et futurs, de quelque nature que ce soit, et en quelque lieu où ils se trouvent, qu'ils soient détenus directement ou indirectement par les Requérantes, à quelque titre que ce soit, ou qu'ils soient détenus par d'autres pour les Requérantes (collectivement, les "**Biens**").

5 **ORDONNE** que les pouvoirs des actionnaires des Requérantes ainsi que ceux de leurs administrateurs, en cette qualité, soient dévolus au Liquidateur.

6 **AUTORISE** le Liquidateur à prendre possession et contrôle des Biens, à procéder à leur liquidation (la "**Liquidation**"), à effectuer une ou plusieurs distributions (les "**Distributions de liquidités**"), y compris une distribution finale après que le Liquidateur ait pourvu au passif en cours, aux éventualités et aux coûts de la Liquidation, des Distributions de liquidités et de la Dissolution (ci-après définie), à procéder à la dissolution des Requérantes (la "**Dissolution**") et à rendre au tribunal un compte rendu définitif à cet effet, incluant le détail de tout partage du reliquat de l'actif entre les actionnaires, le cas échéant.

7 **ORDONNE** que les pouvoirs conférés au Liquidateur par la LCSA et par la présente ordonnance (l'"**Ordonnance**") pourront être exercés par le Liquidateur à sa discrétion, et dans la mesure il l'estime nécessaires ou souhaitable.

8 **DÉCLARE** que sous réserve des dispositions prévues à l'article 223 de la LCSA, le Liquidateur a pleine autorité pour régler ou transiger toute réclamation à même les liquidités en sa possession et pour s'acquitter de toute obligation et de tous frais provoqués par ou en relation avec l'exécution de ses fonctions de liquidateur, notamment, tous frais juridiques et débours des procureurs du Liquidateur et des Requérantes, dans chaque cas, selon leurs tarifs et frais standards, qu'ils soient encourus avant ou après la présente Ordonnance, et pour constituer des réserves quant au passif éventuel et aux coûts associés à la Liquidation, aux Distributions de liquidités et à la Dissolution.

9 **ORDONNE** qu'en aucun temps avant la fin de la Liquidation, le Liquidateur ne sera tenu d'acquitter toute somme due découlant des réclamations acceptées, tranchées ou autrement réglées, et ce, malgré la solvabilité des Requérantes, étant cependant entendu que le Liquidateur pourra, s'il l'estime opportun, nécessaire et dans l'intérêt de la Liquidation, effectuer un paiement immédiat à un

créancier qui a une réclamation valide, sous réserve cependant, dans le cas d'un paiement supérieur à 200 000 $ (excluant une Avance intersociété) à une partie liée, y compris un actionnaire, administrateur ou dirigeant, pour une réclamation basée sur des faits antérieurs à l'émission de la présente Ordonnance, qu'un tel paiement ne pourra être effectué par le Liquidateur qu'après l'émission d'un préavis de 15 jours aux créanciers sur la liste de distribution. Toutefois, lorsque le Liquidateur décidera de ne pas acquitter une somme due découlant d'une réclamation acceptée, tranchée ou autrement réglée, un créancier ayant une réclamation valide pourra s'adresser au Tribunal afin d'en obtenir le paiement.

**10 AUTORISE** le Liquidateur, sans limiter la généralité de ce qui précède, à exercer les pouvoirs suivants :

(a) recevoir, conserver, protéger, liquider, maintenir le contrôle et réaliser sur les Biens, ou sur toute partie ou parties de ceux-ci;

(b) détenir et à investir les Biens détenus sous forme d'argent dans des comptes bancaires, des dépôts à terme ou des certificats de placement garantis encaissables d'une banque à charte canadienne ou dans des bons du Trésor émis par le gouvernement du Canada;

(c) prendre les mesures qui sont nécessaires ou souhaitables pour maintenir le contrôle sur tous les encaissements et les déboursés, notamment, pour contrôler l'accès à et l'utilisation de tout compte bancaire, de placement ou de courtage des Requérantes, ou pour procéder à l'ouverture d'un nouveau compte bancaire, de placement ou de courtage, pour approuver tous les chèques ou autres instruments de paiement tirés sur un de ces comptes et permettre le paiement des dépenses qui, à la discrétion du Liquidateur, sont nécessaires ou souhaitables pour réaliser la Liquidation, les Distributions de liquidités et la Dissolution;

(d) prendre les mesures qui sont nécessaires ou souhaitables pour vérifier l'existence et l'emplacement de tous les Biens, pour vérifier les conditions de toute convention ou autre entente afférente à ceux-ci, qu'elle soit écrite ou orale, pour vérifier l'existence ou l'assertion de toute hypothèque, sûreté, charge ou tout autre intérêt rattaché aux Biens, et pour vérifier toute autre question qui est susceptible d'affecter la mesure, la valeur, l'existence, la préservation et la liquidation des Biens;

(e) négocier, conclure, modifier, résilier ou régler toute convention ou entente

à l'égard des Biens;

(f) effectuer des évaluations environnementales des propriétés et des opérations des Requérantes et entamer des discussions et des négociations avec les autorités environnementales compétentes quant à la réhabilitation ou la décontamination environnementale des Biens;

(g) contracter toute obligation dans le cours normal des entreprises;

(h) payer toutes dettes et frais encourus avant ou après l'émission de la présente Ordonnance provoqués par ou en relation avec les opérations des Requérantes, notamment, les salaires, les impôts, le loyer, les services publics, le chauffage, l'entretien, les assurances, les fournitures et autres frais, et à mettre en place des réserves pour les dettes éventuelles et coûts associés à la Liquidation, aux Distributions de liquidités et à la Dissolution;

(i) recueillir et percevoir toutes les sommes et comptes qui sont ou seront dus aux Requérantes et exercer tous les droits ou recours des Requérantes dans la collecte de telles sommes;

(j) consulter les anciens administrateurs et dirigeants des Requérantes et recevoir et considérer les opinions et conseils de ceux-ci;

(k) employer ou à conserver au service des Requérantes tout employé ou ancien employé des Requérantes, mandataire, expert, vérificateur, consultant, conseiller juridique et autre conseiller professionnel, et à contracter à de telles fins s'il le juge nécessaire ou souhaitable afin de recevoir, conserver, protéger et réaliser sur les Biens ou sur toute partie ou parties de ceux-ci, ou plus généralement à l'égard de l'exercice de ses pouvoirs et de l'exécution de ses fonctions en vertu des présentes, au nom des Requérantes et non en sa qualité de Liquidateur;

(l) en plus de retenir les services de son propre procureur, retenir les services des procureurs des Requérantes afin de l'assister avec le Processus de réclamation (tel que défini dans la Requête), la Liquidation, les

Distributions de liquidités et la Dissolution;

(m) procéder à :

(i) la préparation et le dépôt des états financiers, des déclarations de revenus, des formulaires, des avis et autres documents des Requérantes, et aux choix fiscaux de celles-ci;

(ii) régler, par l'entremise des Requérantes, toute dette fiscale en vertu de la législation ou réglementation fiscale applicable qui peut engager la responsabilité des administrateurs; et

(iii) obtenir, par l'entremise des Requérantes, tout certificat, certificat d'autorisation et autres autorisations qui n'ont pas déjà été obtenues en vertu de la législation et règlementation fiscale applicable.

(n) assurer la préparation et la livraison, aux actionnaires des Requérantes et à tout autre récipiendaire de paiements en provenance du Liquidateur, des renseignements fiscaux et relevés d'impôts qui doivent être livrés en vertu de la législation et de la réglementation fiscale applicable;

(o) assurer la préparation et la livraison à tout employé, dirigeant, administrateur et entrepreneur indépendant des Requérantes, passés ou actuels, des relevés d'emploi, des relevés T4 ou de tout autre formulaire prescrit applicable à de telles personnes en vertu de la législation et de la réglementation applicable;

(p) communiquer l'information et préparer et livrer la documentation, les formulaires ou relevés fiscaux relatifs aux clients des Requérantes ou à l'égard de parties au nom desquelles les Requérantes ont fourni des services ou détenu des actifs, notamment, toute information et documentation nécessaire ou utile pour la préparation des déclarations de revenus par de tels clients et autres parties pour l'année fiscale de 2014 et pour toute année précédente, le cas échéant;

(q) assurer la conservation ou la destruction de documents si cela est nécessaire pour la Liquidation et afin de se conformer à toute exigence légale, réglementaire ou autre, applicable aux Requérantes, à condition toutefois que le Liquidateur ne détruise pas de documents dans les sept (7) années suivant la date de la présente Ordonnance sans obtenir préalablement l'approbation du tribunal sur préavis à la liste de distribution d'au moins dix (10) jours;

(r) réaliser la Liquidation et les Distributions de liquidités, en conformité avec la présente Ordonnance et dans le respect des dispositions de la LCSA applicables à la Dissolution, notamment, l'envoi d'avis aux actionnaires et aux créanciers des Requérantes, le dépôt des statuts de dissolution avec le Directeur nommé en vertu de la LCSA, et compléter tout autre dépôt et à obtenir tout consentement requis en vertu de la LCSA et toute autre législation applicable à la Dissolution; et

(s) présenter une demande au tribunal afin d'obtenir des directives supplémentaires concernant l'exercice de ses pouvoirs, obligations et droits respectifs en vertu des présentes ou pour obtenir toute autorité ou tout pouvoir supplémentaire.

**11 AUTORISE** le Liquidateur, sur une base exclusive et sous réserve des dispositions l'Ordonnance relative au traitement des réclamations émise dans le présent dossier, à sa discrétion et s'il l'estime nécessaire ou souhaitable pour convenablement recevoir, protéger, préserver ou réaliser sur les Biens, à :

(a) introduire, poursuivre et continuer la poursuite de toute action ou procédure judiciaire engagées par les Requérantes devant tout tribunal ou entité administrative;

(b) comparaître et mener la défense toute action ou procédure judiciaire actuellement en cours ou ultérieurement introduite à l'encontre des Requérantes ou du Liquidateur à l'égard des Biens ou des obligations des Requérantes;

(c) régler ou transiger de telles actions ou procédures judiciaires qui, de l'avis du Liquidateur et à son entière discrétion, devraient être réglées ou transigées;

l'autorité conférée par les présentes s'étendant aux appels qui, de l'avis du Liquidateur et à sa discrétion, sont nécessaires ou souhaitables à l'égard de toute ordonnance ou de tout jugement.

12 **ORDONNE** aux Requérantes, dans le cadre de la vente et de la disposition des Biens, d'exécuter les procurations, actes et instruments, de quelque nature ou sorte que ce soit, qui pourraient être requis. À cette fin, le Liquidateur est autorisé et habilité à exécuter les procurations, actes et instruments au nom de et pour le compte des Requérantes. Ces procurations, actes et instruments exécutés par le Liquidateur ont la même force et le même effet que s'ils étaient exécutés par les Requérantes.

13 **AUTORISE** le Liquidateur à prendre les mesures raisonnablement accessoires à l'exercice de ses pouvoirs ou à l'exécution de toute obligation légale, et **DÉCLARE** que, dans chaque cas où le Liquidateur prend une telle action ou mesure, l'exercice des pouvoirs du Liquidateur se fera l'exclusion de toute autre personne, et sans ingérence de toute autre personne.

## CHARGES ET AVANCES INTERSOCIÉTÉS

14 **ORDONNE** que le Liquidateur, le procureur du Liquidateur et le procureur des Requérantes bénéficient et se voient par les présentes octroyer une charge sur les Biens, laquelle ne pourra excéder un montant total de **350 000,00 $**, en garantie du paiement de leurs frais et déboursés professionnels et autres dépenses engagées selon les tarifs et les frais standards du Liquidateur et desdits procureurs, tant avant qu'après l'émission de la présente Ordonnance, à l'égard de la présente instance (la "**Charge du Liquidateur**").

15 **AUTORISE** le Liquidateur agissant au nom de l'une des Requérantes à emprunter, rembourser et réemprunter sur une base renouvelable (telle Requérante étant un "**Emprunteur intersociété**"), toute somme d'une autre Requérante (telle Requérante étant un "**Prêteur intersociété**"), de temps en temps, si elle l'estime nécessaire ou souhaitable (les "**Avances intersociété**") conformément à un billet promissoire émis en faveur du Prêteur intersociété, à titre de preuve, afin que l'Emprunteur intersociété puisse financer ses dépenses courantes et payer toute autre somme autorisée par les dispositions de la présente Ordonnance.

16 **ORDONNE** qu'une charge, hypothèque et sûreté soit, par les présentes, constituée sur la totalité des Biens de l'Emprunteur intersociété, laquelle ne pourra excéder un montant total de **2 000 000,00 $** par Emprunteur intersociété, en faveur du Prêteur intersociété (une telle charge étant une "**Charges intersociété**" et collectivement avec la Charge du Liquidateur, les "**Charges**") en garantie des obligations de l'Emprunteur intersociété liées aux avances faites au Prêteur intersociété.

17 **DÉCLARE** que les Charges constituent des charges de rang supérieur sur les Biens et ont priorité sur toutes autres hypothèques, charges, sûretés, fiducie ou autre intérêt, de quelque nature que ce soit, constitué légalement ou autrement en faveur de tout autre individu, personne, firme, coentreprise, société par actions, société de personnes, société à responsabilité limitée ou illimitée, fiducie, entreprise, société en participation, association, organisation, organisme gouvernemental ou

agence, personne morale ou organisation non constituée en personne morale ou tout autre entité similaire, quelle qu'en soit sa désignation ou sa constitution, et tout individu ou autre entité détenue ou contrôlée par ou qui est le mandataire de l'une des personnes mentionnées ci-dessus (collectivement, des "**Personnes**" et individuellement, une "**Personne**") à l'exception toutefois, des Personnes n'ayant pas reçu signification de la Requête préalablement à son audition (les "**Personnes non-signifiées**"). Le Liquidateur ainsi que tout autre bénéficiaire des Charges auront toutefois l'opportunité, s'ils le jugent nécessaire, de déposer, à une date ultérieure, une requête visant à ce que les Charges ait une priorité sur les droits des Personnes non-signifiées, ou toutes autres Personnes pouvant être affectées par les Charges.

**18 ORDONNE** que toute Charge intersociété, le cas échéant, prendra rang sur les Biens de la Requérante visée après la Charge du Liquidateur.

**19 DÉCLARE** que les Charges sont valides et opposables à tout syndic de faillite, séquestre, administrateur séquestre ou séquestre intérimaire des Requérantes, et ce, à toutes fins.

**OBLIGATION d'ACCÈS ET de coopération**

**20 ORDONNE** que, sur demande écrite du Liquidateur, toute Personne doit immédiatement aviser le Liquidateur de l'existence de tous Biens en sa possession ou sous son contrôle, doit accorder sans délai un accès immédiat et continu au Liquidateur à ces Biens et doit remettre ceux-ci au Liquidateur.

**21 ORDONNE** que sur demande écrite du Liquidateur, toute Personne doit immédiatement aviser le Liquidateur de l'existence de tout livre, document, titre, contrat, commande, livre et registre comptable et tout autre document, registre et donnée de toute sorte reliée à l'entreprise ou aux affaires des Requérantes. Une telle Personne doit également, sur demande écrite du Liquidateur, l'aviser immédiatement de tout programme informatique, bande informatique, disquette ou autre support de stockage de données contenant de telles informations (collectivement, les "**Registres**") en sa possession ou sous son contrôle et doit également, sur demande écrite du Liquidateur, fournir ou permettre à celui-ci de faire, conserver ou prendre des copies et accorder au Liquidateur un libre accès afin d'utiliser tout système de comptabilité, ordinateur, programme informatique et toute installation physique rattachée à de telles informations. Rien dans la présente Ordonnance ne permet d'exiger la livraison des Registres ou l'octroi d'un accès à ces Registres qui ne peuvent être divulgués ou fournis au Liquidateur en raison d'un privilège rattaché aux communications avocat-client ou en raison de dispositions légales prohibant une telle divulgation.

**22 ORDONNE** que si un quelconque Registre est enregistré sur un ordinateur ou tout autre système électronique de stockage de l'information, que ce soit par un fournisseur de service indépendant ou autrement, toute Personne en possession ou ayant contrôle d'un Registre doit, sur demande écrite du Liquidateur, fournir au Liquidateur toute l'assistance nécessaire afin qu'il obtienne un accès immédiat à l'information contenue dans le Registre, y compris toute instruction quant à l'utilisation de tout ordinateur ou autre système et tout code d'accès, nom et numéro de

compte requis afin d'obtenir un accès à l'information, et cette Personne ne peut altérer, effacer ou détruire tout Registre sans le consentement préalable écrit du Liquidateur.

## DISTRIBUTIONS DE LIQUIDITÉS

**23 ORDONNE**, sous réserve de toute autre ordonnance ou directive du Tribunal à l'effet contraire, que la Valeur nette de réalisation des Biens (telle que définie ci-après) doit être détenue par le Liquidateur afin d'être disposée conformément aux dispositions de la présente Ordonnance, de la LCSA et, le cas échéant, de toute autre ordonnance émise par le tribunal. La "**Valeur nette de réalisation**" désigne, en tous temps, les espèces détenues par les Requérantes et les fonds reçus par le Liquidateur suite à la disposition des Biens, moins la somme de (i) tout fond de réserve établi par ordonnance subséquente de ce tribunal afin de satisfaire le paiement de toute réclamation éventuelle; (ii) toute somme payée afin de satisfaire ou régler le paiement des dettes des Requérantes; et (iii) les coûts liés à la Liquidation, aux Distributions de liquidités et à la Dissolution, y compris les coûts liés au Liquidateur et toute taxe applicable, rémunération et dépenses du procureur du Liquidateur et du procureur des Requérantes.

**24 ORDONNE** au Liquidateur de procéder aux Distributions de liquidités par voie d'une ou de plusieurs distributions aux actionnaires des Requérantes à même la Valeur nette de réalisation et le solde restant de tout fond de réserve crée, le cas échéant, pour le paiement des réclamations éventuelles.

## RAPPORT AU TRIBUNAL

**25 ORDONNE** au Liquidateur de faire rapport au tribunal, lorsqu'il l'estimera nécessaire ou souhaitable, sur l'état de progression du Processus de réclamation, de la Liquidation, des Distributions de liquidités et de la Dissolution.

## LIMITE DE RESPONSABILITÉ DU LIQUIDATEUR

**26 ORDONNE** qu'à moins d'une permission préalable octroyée par ce tribunal, aucune procédure ou mesure d'exécution ne peut être introduite ou continuée à l'encontre du Liquidateur devant tout tribunal ou toute autre instance judiciaire.

**27 DÉCLARE** que PWC n'engage sa responsabilité qu'à titre de liquidateur des Requérantes, qu'elle n'engage pas sa responsabilité personnelle et qu'elle ne souscrit à aucune obligation en raison de sa nomination à titre de liquidateur, à l'exception de toute responsabilité éventuelle découlant de son devoir d'agir avec soin, diligence et compétence conformément à l'article 222(2) de la LCSA. Rien dans la présente Ordonnance ne déroge aux protections accordées au Liquidateur en vertu de la LCSA ou de toute autre législation applicable.

**28 DÉCLARE** que le Liquidateur ne pourra en aucun cas être considéré comme employeur successeur, employeur lié ou répondant eu égard aux anciens et actuels employés des Requérantes

en vertu de toute législation ou règlementation provinciale, fédérale ou municipale applicable en matière de norme d'emploi et de travail ou de toute autre loi, toute convention collective et toute autre entente conclue entre les Requérantes et leurs anciens et actuels employés.

**29 DÉCLARE** que, nonobstant les dispositions de toute loi fédérale ou provinciale, le Liquidateur est dégagé de toute responsabilité personnelle pour tout fait ou dommage lié aux Biens, y compris tout Bien qui pourrait être contaminé ou qui pourrait lui-même être un contaminant ou un polluant ou qui pourrait causer ou contribuer à un déversement, une décharge, un rejet, ou un dépôt d'une substance, en contravention à toute loi fédérale, provinciale ou autre qui vise la protection, conservation, amélioration, décontamination ou réhabilitation de l'environnement ou qui est relative à l'élimination de déchets ou de tout autre contaminant (la "**Législation environnementale**"), survenu avant ou après sa nomination comme Liquidateur, sauf pour toute responsabilité engendrée par sa faute lourde ou intentionnelle.

**30 DÉCLARE** que l'exercice des pouvoirs conférés en vertu de la présente Ordonnance n'a pas pour effet de confier au Liquidateur le soin, la propriété, le contrôle, la charge, l'occupation, la possession ou la gestion, ou d'exiger ou de requérir du Liquidateur d'occuper, d'assurer le contrôle, le soin, la charge, la possession ou la gestion de tout Bien qui pourrait être contaminé, ou qui pourrait lui-même être un contaminant ou un polluant, ou qui pourrait causer ou contribuer à un déversement, une décharge, un rejet, ou un dépôt d'une substance en contravention à la Législation environnementale. Le Liquidateur ne doit pas être considéré, en raison la présente Ordonnance, comme détenant le contrôle, la charge, la possession ou la gestion de quelconque Bien au sens de la Législation environnementale.

**31 DÉCLARE** qu'advenant qu'une ordonnance de réparation de tout fait ou dommage lié à l'environnement et touchant les Biens émanant d'une autorité compétente soit reçue par ou portée à la connaissance du Liquidateur et qu'aucune entente ne soit conclue avec l'autorité compétente, le Liquidateur devra, dans le délai fixé par l'ordonnance, ou dans les dix (10) jours suivant la date à laquelle l'ordonnance est reçue ou portée à la connaissance du Liquidateur, présenter au tribunal une requête pour directives.

## ADMINISTRATEURS ET DIRIGEANTS

**32 ORDONNE** que toute obligation d'indemnisation due par les Requérantes à leurs anciens administrateurs et dirigeants en vertu des règlements administratifs des Requérantes ou de toute autre convention d'indemnisation demeurent en vigueur, continuent à recevoir plein effet et sont opposables aux Requérantes jusqu'à l'accomplissement de la dernière Distribution de liquidité.

**33 ORDONNE** au Liquidateur d'établir une réserve raisonnable afin de couvrir toute réclamation potentielle des administrateurs et dirigeants à l'encontre des Requérantes en vertu d'une quelconque obligation d'indemnisation, et ordonne au Liquidateur de maintenir une telle réserve jusqu'au dernier moment avant la Distribution de liquidités finale.

## SUSPENSION DES PROCÉDURES

**34** **ORDONNE** que jusqu'à nouvel ordre du tribunal (la "**Période de suspension**"), aucune procédure ni aucune mesure d'exécution devant tout tribunal ou instance judiciaire, y compris tout tribunal administratif ou arbitral, qu'il soit national ou étranger (chacune une "**Procédure**"), ne sera introduite ou continuée à l'encontre de ou à l'égard des Requérantes et du Liquidateur ou qui affecte les affaires et activités des Requérantes ou des Biens. Toute Procédure déjà introduite à l'encontre de ou à l'égard des Requérantes ou des Biens est, par les présentes, mise en sursis et suspendue, et ce, jusqu'à ce que le tribunal en autorise la continuation. Toutefois, dans le cas d'un processus d'adjudication devant une instance judiciaire spécialisée, tel un tribunal ayant compétence en matière fiscale, pénale ou criminelle, le processus d'adjudication en cours pourra être continué et ce, aux seules fins de quantifier le montant d'une réclamation, étant toutefois entendue que toute mesure de recouvrement ou d'exécution sera suspendue par la présente Ordonnance.

**35** **ORDONNE** qu'au cours de la Période de suspension, aucune Procédure ne peut être introduite ou continuée à l'encontre de tout administrateur ou dirigeant des Requérantes, ancien, actuel ou futur, ni à l'encontre de toute personne réputée être un administrateur ou un dirigeant des Requérantes (individuellement, un "**Administrateur**" et collectivement les "**Administrateurs**") concernant toute réclamation à l'encontre d'un Administrateur, intentée avant ou se rapportant à des actes ou évènements qui se sont produits avant l'Heure de prise d'effet (telle que définie ci-après) et portant sur toute obligation des Requérantes lorsqu'il est allégué que tout Administrateur est, en vertu de toute loi, tenu, en cette qualité, au paiement de cette obligation.

**36** **ORDONNE** qu'au cours de la Période de suspension, tout droit et action en justice de toute Personne à l'encontre des Requérantes ou des Biens soit, par les présentes, mis en sursis et suspendu, à moins du consentement du Liquidateur ou à moins d'une permission octroyée par le tribunal.

**37** **ORDONNE** qu'au cours de la Période de suspension, aucune Personne n'interrompe, ne fasse défaut d'honorer, ne change, n'interfère avec, ne répudie, ne résilie, ne mette fin à ou ne cesse d'exercer tout droit, droit de renouvellement, contrat, entente, licence ou permis qui, dans chaque cas, est en faveur de ou détenu par les Requérantes, à moins du consentement du Liquidateur ou d'une permission octroyée par le tribunal.

**38** **ORDONNE** qu'au cours de la Période de suspension, tout fournisseur de biens ou de services aux Requérantes soit enjoint, jusqu'à l'émission de toute autre ordonnance du Tribunal, de ne pas résilier, modifier ou cesser d'exécuter toute entente de fourniture de biens ou de services, telle qu'elle peut être requise par le Liquidateur, et que le Liquidateur soit autorisé à continuer à utiliser le numéro de téléphone, de télécopieur, les adresses internet et autres services, y inclus l'internet et les sites web des Requérantes, en autant que les prix normaux et autres frais habituels pour tels biens et services fournis ou rendus après la date de cette Ordonnance soient acquittés par le Liquidateur selon les pratiques normales de paiement des Requérantes, ou selon toute autre pratique

pouvant être convenue entre le fournisseur de biens ou de services et le Liquidateur, ou selon toute ordonnance du Tribunal.

**39 ORDONNE** qu'aucune police d'assurance, couverture d'assurance, obligation ou tout autre type de garantie financière fournie à ou en faveur des Requérantes n'est résilié ou annulé en raison de la Liquidation, de l'émission de cette Ordonnance ou de la nomination du Liquidateur, à moins du consentement du Liquidateur ou d'une permission octroyée par le tribunal.

**AVIS ET COMMUNICATIONS**

**40 ORDONNE** que tout avis ou autre communication à être donné aux termes de cette Ordonnance par un créancier au Liquidateur doit être donné par écrit. Cet avis peut être transmis par courrier ordinaire ou recommandé, par courriel, par messager, livré en mains propres ou transmis par télécopieur, sauf stipulation contraire spécifique dans la LCSA. Tout document envoyé aux termes de la présente Ordonnance est réputé avoir été reçu trois (3) jours ouvrables après la date de livraison s'il s'agit d'un document envoyé par courrier et un (1) jour ouvrable s'il s'agit d'un document envoyé par messager, par courriel ou transmis par télécopieur. Tout document envoyé par courriel doit être envoyé aux adresses électroniques suivantes :

Liquidateur : PricewaterhouseCoopers Inc.

À l'attention de : Christian Bourque

Adresse : christian.bourque@ca.pwc.com

Procureurs du Liquidateur : Fasken Martineau Dumoulin LLP

À l'attention de : Luc Béliveau

Adresse : lbeliveau@fasken.com

Procureurs des Requérantes : Stikeman Elliott LLP

À l'attention de : Guy P. Martel, Joseph Reynaud, Danny Duy Vu

Adresses : gmartel@stikeman.com; jreynaud@stikeman.com; ddvu@stikeman.com

**41 ORDONNE** que tout document envoyé par le Liquidateur conformément à la présente Ordonnance ou conformément à la LCSA peut être envoyé par courrier ordinaire ou recommandé,

par courriel, par messager, livré en mains propres ou transmis par télécopieur, sauf stipulation contraire spécifique dans la LCSA. Avis d'un tel document envoyé conformément à la présente Ordonnance est réputé avoir été reçu trois (3) jours ouvrables après la date de livraison s'il s'agit d'un document envoyé par courrier et un (1) jour ouvrable s'il s'agit d'un document envoyé par messager, courriel ou transmis par télécopieur.

**42** **ORDONNE** que le Liquidateur et toute personne peut signifier les documents relatifs à la présente instance à toutes les parties représentées par procureur en envoyant par courrier électronique un document PDF ou une autre forme de copie électronique de ces documents, aux adresses électroniques au procureur des Requérantes et au procureur du Liquidateur, à condition que si une partie en fait la demande, une copie sur support papier de ces documents lui soit livrée dans les meilleurs délais.

**43** **ORDONNE** que le Liquidateur publie tout document relatif à la présente instance sur son site internet.

**DISPOSITIONS DIVERSES**

**44** **ORDONNE** la mise sous scellé au dossier de la Cour des Annexes au Rapport du liquidateur, Pièce R-4, ainsi que des Pièces R-5, R-6, R-11 et R-12 au soutien de la Requête, et **ORDONNE** que les créanciers actuels et potentiels des Requérantes pourront exiger la communication des Pièces produites sous scellé en vertu de la présente Ordonnance, sous réserve toutefois d'en faire la demande par écrit aux procureurs du Liquidateur et de signer une entente de confidentialité standard à cet égard.

**45** **DÉCLARE** que le Liquidateur peut, de temps à autre, présenter une demande au tribunal afin d'obtenir des directives concernant l'exercice de ses pouvoirs, obligations et droits en vertu des présentes ou concernant l'exécution appropriée de la présente Ordonnance.

**46** **ORDONNE** que dans l'éventualité où le Liquidateur conclu que les Requérantes sont -- ou l'une d'entre elles est - insolvable, il peut s'adresser au tribunal afin d'obtenir une ordonnance mettant fin à sa nomination à titre de liquidateur dans la présente instance ou permettant la conversion de la présente instance en une instance sous la *Loi sur les arrangements avec les créanciers des compagnies, L.R.C. (1985), ch. C-36* (la "**LACC**") ou de la *Loi sur la faillite et l'insolvabilité, L.R.C. (1985), ch. B-3* (la "**LFI**").

**47** **ORDONNE** que la nomination de PWC pour agir à titre de liquidateur dans la présente instance ne l'empêche pas d'agir à titre de syndic ou de contrôleur, le cas échéant, dans le cas où la présente instance est continuée sous la LACC, la LFI ou toute autre législation.

**48** **DEMANDE** l'aide et la reconnaissance de tout tribunal ou organisme administratif de toute province du Canada, de tout tribunal fédéral ou organisme administratif du Canada, ainsi que de tout tribunal ou organisme administratif fédéral ou étatique des États-Unis d'Amérique et de tout

tribunal ou organisme administratif étranger, afin que ceux-ci apportent leur aide au Tribunal et se fassent son auxiliaire aux fins de l'exécution des conditions de la présente Ordonnance.

**49 DÉCLARE** que toute Personne intéressée peut présenter une demande au tribunal afin de faire modifier ou d'annuler la présente Ordonnance ou afin d'obtenir un autre redressement, moyennant un préavis de cinq (5) jours au Liquidateur et à toute autre partie susceptible d'être affectée par l'ordonnance demandée ou moyennant tout autre préavis, s'il en est, que le tribunal pourra ordonner.

**50 DÉCLARE** que la présente Ordonnance et toutes ses dispositions prennent effet à compter de 0h01 heure de l'Est, à la date de la présente Ordonnance ("**Heure de prise d'effet**").

**LE TOUT SANS FRAIS.**

L'HONORABLE MARTIN CASTONGUAY J.C.S.

# Tab 5

**CANADA**

**SUPERIOR COURT**
**(Commercial Division)**
**The *Canada Business Corporations Act***

---

**PROVINCE OF QUÉBEC**
**DISTRICT OF MONTRÉAL**
**No.: 500-11-042912-127**

**MONTREAL, this 28th day of June, 2012**

**IN THE PRESENCE OF:**
**THE HONOURABLE MANON SAVARD, J.S.C.**

**IN THE MATTER OF THE LIQUIDATION OF:**

**ACE AVIATION HOLDINGS INC.**

**Applicant**

**-and-**

**ERNST & YOUNG INC.**

**Liquidator**

**-and-**

**THE DIRECTOR UNDER THE CBCA**

**Mis en cause**

---

# ORDER

**CONSIDERING** the Applicant's *"Application for an Order Appointing a Liquidator and for an Order that the Liquidation Be Continued Under the Supervision of the Court"* (the **"Motion"**) and its supporting exhibits;

DB

**CONSIDERING** that the Motion is consented to by the Proposed Liquidator, Ernst & Young Inc. (hereinafter the **"Liquidator"**);

**CONSIDERING** the submissions of counsel for the Applicant, ACE Aviation Holdings Inc. (**"ACE"**);

**GIVEN** the provisions of the *Canada Business Corporations Act*, (R.S.C., 1985, c. C-44) (the **"CBCA"**);

**WHEREFORE, THE COURT:**

[1] **GRANTS** the present Motion;

[2] **ORDERS** that the time for service of this Motion be and the same is hereby abridged;

[3] **ORDERS** that the liquidation of ACE shall continue under supervision of the Court, pursuant to Section 211(8) of the CBCA;

## I. APPOINTMENT & POWERS OF LIQUIDATOR

[4] **APPOINTS** Ernst & Young Inc. as Liquidator of all the present and future undertakings, property and assets of whatsoever nature and kind and wherever situate of ACE (the **"Property"**), without security;

[5] **ORDERS** that the powers of the directors and shareholders of ACE are hereby vested in the Liquidator;

[6] **ORDERS** that the Liquidator is hereby empowered, authorized and directed to take possession of and control the Property, to proceed with the liquidation of ACE's Property (the **"Liquidation"**), to carry out one or more distributions of ACE's remaining assets to its shareholders after providing for outstanding liabilities, contingencies and costs of the liquidation (the **"Liquidation**

DB

**Distribution**"), and to effect the dissolution of ACE (the "**Dissolution**");

[7] **ORDERS** that the Liquidator may take such steps as, in the opinion of the Liquidator, are necessary or appropriate to receive, preserve, protect, maintain control over, liquidate and realize upon the Property or any part or parts thereof;

[8] **ORDERS** that the Liquidator shall be at liberty from time to time to pay its reasonable fees and disbursements, in respect of the performance of its duties as Liquidator, whether incurred before or after making this Order, out of the monies in its hands at its standard rates and charges

[9] **ORDERS** that subject to the content of this Order, the Liquidator has full authority to settle and/or pay all liabilities and expenses that arise out of or in connection with the Property and in respect of its performance of the duties of the Liquidator including, without limitation, legal fees and disbursements of counsel to the Liquidator and counsel to ACE in each case at their standard rates and charges, whether incurred before or after making this Order, and to establish reserves for contingent liabilities and costs associated with the Liquidation, the Liquidation Distribution, and the Dissolution;

[10] **ORDERS** that the Liquidator be at liberty and is hereby authorized and empowered to employ or retain such agents, experts, auditors, advisors, consultants and legal counsel, as it may from time to time consider necessary or desirable for the purposes of receiving, preserving, protecting and realizing upon the Property or any part or parts thereof, or generally in respect of exercising its powers and performing its duties hereunder;

DB

[11] **ORDERS** that the Liquidator be at liberty and is hereby authorized and empowered to consult with former directors and officers of ACE and to receive and consider the opinions and advice of such former directors and officers as in its discretion it deems appropriate in relation to carrying out the Liquidation, the Liquidation Distribution and Dissolution;

[12] **ORDERS** that in addition to Liquidator's counsel, the Liquidator may, as necessary and appropriate, continue to engage ACE counsel to assist in carrying out the Liquidation, the Liquidation Distribution and Dissolution;

[13] Without in any way limiting the generality of the foregoing, and in furtherance thereof, the Liquidator is hereby expressly empowered, authorized and directed to take the following actions:

(a) to hold and invest Property that is money in bank accounts, term deposits, or cashable guaranteed investment certificates of a Canadian chartered bank or in treasury bills issued by the Government of Canada;

(b) to take such steps as, in the opinion of the Liquidator, are necessary or appropriate to maintain control over all receipts and disbursements including, without limiting the generality of the foregoing, taking such steps as are necessary or desirable to control access to and use of all bank accounts, investment or brokerage accounts of ACE or open new bank, investment or brokerage accounts, approve all cheques or other instruments drawn on such accounts, and permit payment of those expenses that, in the opinion of the Liquidator, are necessary to carry out the Liquidation, the Liquidation Distribution and the Dissolution;

DF

(c) to take such steps as in the opinion of the Liquidator are necessary and appropriate to verify the existence and location of all of the Property, the terms of all agreements or other arrangements relating thereto, whether written or oral, the existence or assertion of any lien, charge, encumbrance or security interest thereon, and any other matters that, in the opinion of the Liquidator, may affect the extent, value, existence, preservation and liquidation of such Property;

(d) to negotiate, enter into, terminate or settle any agreements in respect of the Property;

(e) to incur any obligations in the ordinary course of business and of the Liquidation;

(f) to receive and collect all monies and accounts now owed or hereafter owing to ACE in respect of the Property, and to exercise all rights and remedies of ACE in collecting all such monies;

(g) to declare and pay distributions and other amounts to the shareholders of ACE, including all distributions permitted by the CBCA, as contemplated by this order, including establishing record dates for distributions and other payments;

(h) to cause:

(i) the preparation and the filing of the tax return(s), forms, notices, and other documents of ACE, and such tax elections as the Liquidator deems advisable (including, without limitation, in connection with distributions referred to in paragraph (g);

DB

(ii) ACE to pay any associated tax liability pursuant to any applicable taxation legislation or regulations;

(iii) ACE to obtain any certificates, clearance certificates and other authorizations under applicable taxation legislation and regulations which have not already been obtained in connection with any matter affecting or contemplated by the Liquidation and Liquidation Distribution;

(i) to cause the preparation and delivery to shareholders and other recipients of payments from the Liquidator of all tax information and slips relating to such payments that is required to be delivered under applicable taxation legislation and regulations;

(j) to prepare and deliver to any current and former employees, officers, directors, and independent contractors of ACE records of employment, T4 slips, or other prescribed forms as may be applicable to such persons;

(k) to cause the sale or transfer of the shares of Air Canada and the warrants for the purchase of Air Canada shares at a time and for a price in the sole discretion of the Liquidator;

(l) to cause the preparation, delivery and filing of all documents and take all actions and measures, on behalf of and in the name of ACE, as are appropriate or necessary in order to comply with the securities laws and regulations applicable to ACE, and the rules of any stock exchange on which the shares of ACE are listed, including continuous disclosure obligations;

DB

(m) to provide for the preservation or destruction of documents as is necessary for the Liquidation, in the sole discretion of the Liquidator;

(n) to otherwise carry out the Liquidation and Liquidation Distribution, as contemplated in this Order and in keeping with the provisions of the CBCA applicable to the Dissolution including, without limitation, delivering notices to shareholders and creditors of ACE, filing of Articles of Dissolution with the Director appointed under the CBCA, and completing all other filings and obtaining all consents under the CBCA and any other legislation applicable to the Dissolution; and

[14] **ORDERS** that the Liquidator be and is hereby fully and exclusively authorized and empowered to institute and prosecute and to continue the prosecution of all actions, applications or proceedings in and before both courts and administrative bodies as may in its judgment be necessary or desirable to properly receive, protect, preserve and realize upon the Property or any part or parts thereof and also to defend all actions, applications or proceedings now pending or hereafter instituted against ACE or the Liquidator in respect of the Property or ACE's liabilities, and to appear in and conduct the prosecution or defence of any such actions, applications or proceedings now pending or hereafter instituted in any court or administrative body by or against ACE or the Liquidator, the prosecution or defence of which will in the judgment of the Liquidator be necessary or desirable to properly receive, protect, preserve and realize upon the Property, and to settle or compromise any such actions, applications or proceedings which in the judgment of the Liquidator should be settled, and the authority hereby conferred shall extend to such appeals as the Liquidator

DB

shall deem proper and advisable in respect of any order or judgment;

[15] **ORDERS** that when all or part of the Property is sold or otherwise dealt with, ACE shall join in and execute all necessary powers of attorney, conveyances, deeds and documents of whatsoever nature or form. For such purpose, the Liquidator is hereby authorized and empowered to execute such powers of attorney, conveyances, deeds or other documents in the name of and on behalf of ACE. Any such powers of attorney, conveyances, deeds or documents so executed by the Liquidator shall have the same force and effect as if executed by ACE;

[16] **ORDERS** that the Liquidator shall be empowered to take any steps reasonably incidental to the exercise of its powers or the performance of any statutory obligations and in each case where the Liquidator takes any such actions or steps, it shall do so to the exclusion of all other persons, and without interference from any other persons.

***NOTICES AND COMMUNICATIONS***

[17] **ORDERS** that any notice or other communication to be given under this Order by a Creditor to the Liquidator shall be in writing and will be sufficiently given only if given by e-mail, ordinary mail, registered mail, courier, personal delivery or facsimile transmission except where otherwise specifically provided for in the CBCA. Any document sent pursuant to this Order shall be deemed to have been received three (3) Business Days after the document is sent by mail and one (1) Business Day after the document is sent by courier, e-mail or facsimile transmission. E-mail correspondence shall be directed to the following addresses:

DB

| | |
|---|---|
| Liquidator: | Ernst & Young Inc. |
| | Attention: Sharon S. Hamilton |
| | E-mail: sharon.s.hamilton@ca.ey.com |
| Liquidator's Counsel | Lenczner Slaght Royce Smith Griffin LLP |
| | Attention: Monique Jilesen and Jon Laxer |
| | E-mail : mjilesen@litigate.com jlaxer@litigate.com |

| | |
|---|---|
| ACE Counsel | Stikeman Elliott LLP |
| | Attention: Jean Fontaine and Matthew Liben |
| | E-mail : jfontaine@stikeman.com mliben@stikeman.com |

[18] **ORDERS** that any document sent by the Liquidator pursuant to this Order or the CBCA may be sent by e-mail, ordinary mail, registered mail, courier, personal delivery or facsimile transmission except where otherwise specifically provided for in the CBCA. Any document sent pursuant to this Order shall be deemed to have been received three (3) Business Days after the document is sent by mail and one (1) Business Day after the document is sent by courier, e-mail or facsimile transmission;

[19] **ORDERS** that the Liquidator and any person may serve any court materials in these proceedings by e-mailing a PDF or other electronic copy of such materials to counsel to ACE and counsel to the Liquidator.

## IV. LIQUIDATION DISTRIBUTIONS

[20] **ORDERS** that, subject to any other court order or direction to the contrary, the Net Realized Value of the Property (as hereinafter defined) shall be held by the Liquidator to be disposed of pursuant

to the terms of this Order, the CBCA and, if applicable, further orders of this Court. The **"Net Realized Value of the Property"** means at any time and from time to time, cash held by ACE and cash proceeds actually received by the Liquidator from the disposition of the Property less any claims reserve established by subsequent order and any and all amounts paid to satisfy or settle, or set aside for payment of any excluded claims and the remuneration and expenses of the Liquidator, including, without limitation, the fees and disbursements of the Liquidator's counsel and ACE's counsel;

[21] **ORDERS** that, for the purposes of determining who is entitled to liquidation distributions and what amount should be paid, the Liquidator may rely on information concerning the identity, address, and number of shares held by registered shareholders that is provided by ACE's transfer agent, Canadian Stock Transfer Company Inc., as administrative agent for CIBC Mellon Trust Company (**"CST"**), or any other transfer agent appointed to replace CST (collectively the **"Transfer Agent Information"**) and the Liquidator is specifically authorized to determine entitlement to, and make payment of, liquidation distributions and other payments to shareholders in reliance on the Transfer Agent Information. The Liquidator shall not be liable for any errors in the Transfer Agent Information or for any over-payments, under-payments, or failure to make payments that result from the Liquidator's use of and reliance on the Transfer Agent Information;

[22] **ORDERS** that the Liquidator shall then proceed with the Liquidation Distribution by way of one or more distributions to ACE's shareholders from the Net Realized Value of the Property and any balance from any claims reserve pursuant to a Claims Process (as defined in the Motion) order;

[23] **ORDERS** that, as contemplated in the notice of annual and special meeting and management proxy circular dated March 9, 2012 that led to the approval of the Liquidation Resolution (as defined in the Motion), the final distribution and the cancellation of the shares of ACE will not occur before June 15, 2013;

## V. REPORTING TO COURT

[24] **ORDERS** that the Liquidator shall report periodically to the Court as to the status of the Claims Process (as defined in the Motion), which shall be instituted by subsequent order, the Liquidation, the Liquidation Distribution and the Dissolution;

## VI. RELEASES, INSURANCE AND INDEMNIFICATION

[25] **ORDERS** that, if not already obtained by ACE, the Liquidator shall obtain and maintain for the benefit of ACE's former officers and directors liability insurance, including a tail policy with respect thereto, and such persons shall be named as insured on such policies and the Liquidator is further authorized to obtain policies of insurance covering its acts and omissions;

[26] **ORDERS** that the Liquidator is a representative of ACE and does not incur any liability except in its capacity as Liquidator of ACE;

[27] **ORDERS** that the Liquidator shall incur no liability or obligation as a result of its appointment or the fulfillment of its duties in carrying out the provisions of this Order, save and except for any liability or obligation arising from its duty to act with care, diligence and skill pursuant to Section 222 (2) of the CBCA;

[28] **ORDERS** that no proceeding or enforcement process in any court or tribunal shall be commenced or continued against the Liquidator

DB

except with the written consent of the Liquidator or with leave of this Court;

[29] **ORDERS** that the indemnification agreements entered into with the current and former directors and officers of ACE listed in Annex A hereto (collectively the **"Indemnification Agreements"**) shall continue in full force and effect, and shall be fully enforceable against ACE, in accordance with the respective terms thereof until completion of the final Liquidation Distribution;

[30] **ORDER** that the Liquidator shall establish a reasonable reserve to cover any potential claims by directors and officers of ACE under the Indemnification Agreements or pursuant to a legal obligation of ACE to indemnify the directors and officers, including under the by-laws of ACE, and that such reserve shall be maintained until immediately before the final Liquidation Distribution;

**DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE LIQUIDATOR**

[31] **ORDERS** that, upon the written request of the Liquidator, all individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "Persons" and each being a "Person") shall forthwith advise the Liquidator of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Liquidator and shall deliver all such Property to the Liquidator;

[32] **ORDERS** that, upon the written request of the Liquidator, all Persons shall forthwith advise the Liquidator of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of ACE, and any

DB

computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "Records") in that Person's possession or control, and shall provide to the Liquidator or permit the Liquidator to make, retain and take away copies thereof and grant to the Liquidator unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Liquidator due to the privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure.

[33] **ORDERS** that if any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall, upon the written request of the Liquidator, provide the Liquidator with all such assistance in gaining immediate access to the information in the Records as the Liquidator may in its discretion require including providing the Liquidator with instructions on the use of any computer or other system and providing the Liquidator with any and all access codes, account names and account numbers that may be required to gain access to the information, and shall not alter, erase or destroy any Records without the prior written consent of the Liquidator.

**PIPEDA**

[34] **ORDERS** that, pursuant to clause 7(3)(c) of the Canada Personal Information Protection and Electronic Documents Act, the Liquidator may disclose personal information of identifiable

individuals to prospective purchasers or bidders for the Property and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more sales of the Property (each, a "**Sale**"), and provided that in each case the parties to whom such personal information is disclosed enter into a confidentiality agreement with the Liquidator which obliges them to preserve and protect the personal nature of the information, to make limited use thereof, and if they do not complete a Sale, to return all such information to the Liquidator, or in the alternative destroy all such information. The purchaser of any Property shall be entitled to continue to use the personal information provided to it, and related to the Property purchased, in a manner which is in all material respects identical to the prior use of such information by ACE, and shall return all other personal information to the Liquidator, or ensure that all other personal information is destroyed.

## VII. MISCELLANEOUS

[35] **ORDERS** that the Liquidator be at liberty and is hereby authorized and empowered from time to time to apply to this Court for directions in the discharge of its powers and duties hereunder;

[36] **REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Liquidator and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Liquidator, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Liquidator and its agents in carrying out the terms of this Order.

DB

[37] **ORDERS** that the Liquidator be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Liquidator is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

**THE WHOLE WITHOUT COSTS.**

**MONTREAL, this 28th day of June 2012**

J.S.C.

**THE HONOURABLE MANON SAVARD, J.S.C.**

COPIE CONFORME

OFFICIER AUTORISÉ

# ANNEX A
# INDEMNIFICATION AGREEMENTS

**Current Directors**

Gregory A. Boland

Pierre Marc Johnson

David J. Kassie

Robert F. Maclellan

Robert A. Milton

David I. Richardson

Marvin Yontef

**Former Directors**

Bernard Attali

Robert E. Brown

Michael M. Green

W. Brett Ingersoll

Richard H. McCoy

**Current Officers**

Brian Dunne

Carolyn M. Hadrovic

Sydney John Isaacs

Robert A. Milton

Jack McLean

**Former Officer**

Greg Cote

# Tab 6

**Most Negative Treatment:** Leave to appeal allowed
**Most Recent Leave to appeal allowed:** United Fuel Investments Ltd., Re | 1962 CarswellOnt 214, 33 D.L.R. (2d) 336 | (S.C.C., Mar 16, 1962)

1961 CarswellOnt 166
Ontario Court of Appeal

United Fuel Investments Ltd., Re

1961 CarswellOnt 166, [1962] O.R. 162, 31 D.L.R. (2d) 331

# Re United Fuel Investments Ltd.

Roach, Gibson and Schroeder, JJ.A.

Judgment: December 12, 1961

Proceedings: reversed *United Fuel Investments Ltd., Re* ,, 1961 CarswellOnt 53, 3 C.B.R. (N.S.) 84, [1961] O.R. 801, 29 D.L.R. (2d) 611 ((Ont. S.C.))

Counsel: *A. S. Pattillo, Q.C.*, and *D. J. Wright*, for the petitioning company, appellant.
*J. T. Weir, Q.C.*, and *B. Kellock*, for D M Deacon, a holder of Class B preferred shares and others, respondents.

Subject: Corporate and Commercial

**Related Abridgment Classifications**
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

**Headnote**

**Corporations --- Winding-up — Under Dominion Act — Winding-up order — Grounds — Resolution of shareholders**

**Corporations --- Winding-up — Under Dominion Act — Appeals — Right to appeal**

**The judgment of the Court was delivered by *Schroeder, J.A.*:**

1 The petitioner appeals from the order of Mr. Justice McLennan pronounced on July 31, 1961 whereby he dismissed a petition for winding-up presented by the appellant company, with costs. At a special general meeting of the company's shareholders held on November 8, 1960, holders of approximately 99% of the common shares voted in favour of a resolution that the company be wound up under the provisions of the *Winding-up Act*, R.S.C. 1952, c. 296, and that upon an order being made by the Supreme Court of Ontario for the winding-up of the company, the Court be requested to appoint the Clarkson Company Limited as provisional liquidator. The petition was sought under the provisions of s. 10(*b*) of the *Winding-up Act*, which provides as follows:

> 10. The court may make a winding-up order,
>
> (*b*) where the company at a special meeting of shareholders called for the purpose has passed a resolution requiring the company to be wound up.

McLennan, J., dismissed the petition solely upon the ground that the meeting at which the resolution was passed was not a "special meeting of shareholders called for the purpose" within the meaning of those words as appearing in said s. 10(*b*), since

 

it was a meeting only of the holders of common shares of the company and not of the holders of the issued and outstanding Class A and Class B preference shares as hereinafter mentioned. The learned Judge expressed his view in these words (p. 619 D.L.R., p. 809 O.R.):

> The procedure to wind up the company is undoubtedly of an unusual character and not the sort of business that is customarily transacted at either annual or special general meetings of the company, and the construction which I have placed on the two statutes and the supplementary letters patent is consistent with recognizing an interest which the Class B shareholders undoubtedly had in the proposed procedure to wind up.

2 On the hearing of the petition the respondent urged, in addition to the ground on which he was successful, two other grounds of opposition, namely, (first) that the learned Judge had a discretion to refuse the winding-up order if he was of the opinion that it was not just and equitable that the order should be made, and in the circumstances disclosed by the evidence the order should be refused on the ground that the winding-up was not in the interest of all the shareholders of the company but solely in the interest of the owners of common shares, and that in the proceedings tending to a dissolution of the company the majority of the holders of common shares who voted in favour of the resolution were either actuated by motives of self-interest, or sought the order as a means of evading questions raised by minority shareholders as to existing contracts for the purchase of natural gas and as to other matters of internal management. Secondly it was urged that during the last 10 years of the company's operations the holders of Class A preferred shares had been entitled by reason of certain events to vote for two of the directors composing the petitioning company's board, a right which had not been accorded to them. The learned Judge dismissed the petition upon the one ground stated earlier, but in discussing the latter two grounds he made it clear that he would not have given effect to them.

3 On this appeal counsel for the respondent seeks to maintain the order in appeal on the ground upon which he succeeded before McLennan, J., but also seeks to support it on the other two grounds of opposition which were advanced at the original hearing. Much the greater part of his argument was addressed to this Court upon the first of the two latter grounds.

4 Many grounds of argument urged on behalf of the respondents are said to arise out of relations and dealings with the company extending over a period of many years and in order properly to appreciate the force of those contentions it is necessary to trace the company's history in some detail. I shall endeavour to follow a chronological order as much as possible in setting out the material points of fact relating to the relevant issues.

5 United Fuel Investments Limited (hereinafter referred to as United Fuel) was incorporated in 1928 under the provisions of the *Companies Act*, R.S.C. 1927, c. 27, its objects being, *inter alia*, to acquire (as immediately following its incorporation it did acquire), all the outstanding shares of United Gas Limited (hereinafter referred to as United Gas) and of Hamilton By-Product Coke Ovens Limited (hereinafter referred to as the "Coke Company"). United Gas, which held the exclusive franchise to distribute natural gas to industrial and domestic consumers in parts of Hamilton and its environs, thus became a wholly owned subsidiary of United Fuel. The Coke Company manufactured gas which it sold to United Gas and which was distributed by that company under its franchise. The Coke Company also sold its by-product as fuel.

6 The authorized capital of United Fuel consisted of 250,000 6% cumulative redeemable preferred shares having a par value of $100 each, and 250,000 common shares without nominal or par value. Preferred shares were issued to the extent of 90,000 and common shares to the extent of 100,000. The preferred shareholders were entitled to a 6% cumulative preferred dividend and their shares were redeemable at the option of the company at $110, with a preference on winding-up of the company to the extent of $100 plus accrued dividends and, if the winding-up were voluntary, to an additional amount of $10 per share. The company was also given the right to purchase the preferred shares for redemption at a price not exceeding $110 per share. Its charter provided that when dividends on the preferred shares fell into arrears the holders were to be entitled in certain circumstances to notice of, and were to have the right to vote at all annual and special general meetings of the company. Apart from this provision the holders of preferred shares were not entitled to notice of or to vote at any such meetings.

7 In the year 1930 Union Gas Company of Canada Limited (hereinafter referred to as Union Gas) acquired over 99% of the outstanding common shares of the company and entered into an agreement with United Gas to supply it with natural gas. Union Gas is a company of very great substance which holds a franchise effective throughout southwestern Ontario. Between the

years 1930 and 1938 United Fuel, as the holder of United Gas shares and the Coke Company shares suffered a severe setback attributable to the effects of the competition from the Dominion Natural Gas Company Limited (hereinafter referred to as Dominion Gas) which distributed natural gas in another portion of the Hamilton area. Any deterioration in the financial position of United Fuel redounded to the disadvantage of Union Gas which held approximately 99% of the common shares of United Fuel. With a view to improving its position, Union Gas entered into an agreement with Dominion Gas bearing date November 10, 1937, which agreement was later amended by an agreement dated October 15, 1938. That agreement contemplated and was subject to an alteration in the capital structure of United Fuel. This was effected first by a compromise arrangement between United Fuel and the holders of its 6% cumulative preferred shares and the holders of its common shares, which arrangement was subsequently approved by an order of the Honourable Mr. Justice Middleton made on January 17, 1939, in accordance with the provisions of the Dominion *Companies Act;* and secondly, by the issuance of supplementary letters patent dated February 7, 1939, confirming the same. By its terms the 160,000 authorized and unissued preferred shares and the 150,000 authorized and unissued common shares were cancelled and the issued capital stock was reduced by $2,300,000. This reduction was brought about by cancelling $25 of the paid-up capital as represented by each of the 90,000 issued 6% cumulative preferred shares and $50,000 as represented by the 100,000 issued common shares. Each of the 90,000 issued preferred shares as so reduced was subdivided and changed into one 6% cumulative redeemable Class A preference share of the par value of $50 and one non-cumulative Class B preference share of the par value of $25. The 100,000 common shares were consolidated into 90,000 common shares without nominal or par value and this result was achieved by consolidating each holding of ten common shares into a holding of nine shares.

8 Under the terms of the supplementary letters patent the Class A preference shares, the Class B preference shares and the common shares carried and were subject to certain preferences, priorities, rights, limitations, conditions and restrictions as therein set out. Those provisions which are relevant to the issue now before the Court are as follows:

9 The holders of Class A preference shares were entitled to receive as and when declared by the Board of Directors out of the moneys of the company properly applicable to the payment of dividends fixed cumulative preferential cash dividends at the rate of 6% per annum payable quarterly on certain dates as therein set out on the amounts from time to time paid up thereon.

10 After payment of dividends on the Class A shares the moneys of the company declared payable as dividends were to be distributed *pro rata* among the holders of Class B preference shares and common shares; in the event of the winding-up of the company holders of Class A shares were to be entitled to a preference of $50 and holders of Class B shares to a preference of $25, and if the winding-up were voluntary they were to be entitled to an additional sum of $10 and $5 per share respectively, but to enjoy no further participation in the assets of the company; the Class A preference shares were to be redeemable by the company at any time at the price of $60 per share; the company was to have the right to purchase Class A and Class B preference shares in the market for redemption at prices not exceeding $60 and $30 per share respectively; if dividends on the Class A shares fell into arrears or in the event that either Dominion Gas or Union Gas purchased from the other certain voting trust certificates, the holders of Class A shares were to be entitled as a class to elect two of the directors of the company, otherwise the holders of Class A shares were not entitled to notice of or to vote at any annual or special general meetings of the company; the holders of Class B preferred shares were not to be entitled to received notice of or to vote at any annual or special general meetings of the company.

11 The contemplated changes in the capital structure of United Fuel having been implemented the agreement between Union Gas and Dominion Gas became operative. It provided that Union Gas was to transfer one-half of its holdings of the common stock of United Fuel to Dominion Gas; United Gas was to purchase the transmission and distribution system of Dominion in the Hamilton area; and Dominion and Union were to enter into an agreement to supply natural gas for distribution in that area.

12 Between 1942 and 1945 the company redeemed by purchase 20,311 Class B shares so that there are now outstanding 69,689 shares of that Class and 90,000 common shares.

13 It is disclosed in the affidavit of the comptroller, who was also secretary and treasurer of the company, that the arrangements made for the supply to United Gas of natural gas both by Dominion Gas and Union Gas in addition to the supply of manufactured gas by the Coke Company, did not result in the anticipated increase of earnings for reasons stated in a letter addressed to the

holders of Class A preference shares on June 13, 1947. At or about that time a meeting of the holders of these shares took place and new arrangements proposed in the letter were put into effect with the concurrence of these shareholders.

14 It should be mentioned that in the period extending from 1948 to 1956 United Fuel had three gas distributing subsidiaries namely United Gas, the United Suburban Gas Company Limited and the Wentworth Gas Company Limited, distribution being made by the two companies lastly named to areas beyond the boundaries of Hamilton. As these subsidiaries had been unable to obtain a sufficient supply of natural gas they fulfilled their franchise obligations by distributing manufactured gas. The situation changed in 1956, however, when an adequate supply of natural gas became available with the result that by the year 1958 all the areas served by the distributing subsidiaries had been converted for the consumption of natural gas.

15 The next step of importance is that in 1950 Union Gas obtained by transfer all the common shares of the company which had been acquired by Dominion Gas by the transfer made to it in 1938.

16 In April, 1956, the United Suburban Gas Company Limited and the Wentworth Gas Company Limited were amalgamated under the name of United Suburban Gas Company Limited. That company continued to distribute gas until 1959 when all its assets were acquired by United Gas and its charter is now in the process of being surrendered.

17 By December, 1959, United Gas was able to fulfil all its franchise obligations through the acquisition of an adequate supply of natural gas and it no longer had any need for manufactured gas. Accordingly it sold all the shares of the Coke Company. In the result, therefore, United Fuel is now a holding company owning all the outstanding shares of but one subsidiary, United Gas. It is urged on behalf of the appellant that United Fuel was originally incorporated as a holding company to hold the shares of two companies, United Gas and the Coke Company, and that its shares of the Coke Company having been disposed of, there is no reason for its further existence. It is also alleged that if the winding-up order is granted, the business now conducted by Union Gas can be carried on much more efficiently and its financing requirements for future operations and further expansion and development will be greatly facilitated.

18 In the company's annual report issued in June, 1960, the President declared that the main reason for the continued existence of the company had disappeared and that the directors of United Fuel and of Union Gas were accordingly discussing ways and means of integrating the operations of the two companies as a means of promoting the overall efficiency of their operations.

19 The directors having come to the decision that steps should be taken to bring about the dissolution of the petitioning company, Union Gas offered to acquire all the outstanding Class A and B preference shares of the company in exchange for shares of the Union Gas and a cash payment. In consequence of that offer 86,114 of the 90,000 issued and outstanding Class A shares and 47,222 of the issued and outstanding 69,689 Class B shares were acquired by Union Gas. Thus there remained only 3,186 Class A shares and 22,467 Class B shares outstanding in the hands of shareholders other than Union Gas.

20 On October 13, 1960 Union Gas as the holder of more than one-tenth of the issued shares of the company carrying the right to vote made a request of the Board of Directors of the company pursuant to the provisions of s. 101 of the *Companies Act*, R.S.C. 1952, c. 53, that they call a special general meeting of the shareholders of the company for the purpose of considering and, if they thought fit, of passing a resolution requiring the company to be wound up under the provisions of the *Winding-up Act* of Canada.

21 The officers of the company having taken the view that by the terms and provisions of the supplementary letters patent the holders of Class A shares were not entitled to notice of or to vote at any annual or special general meeting of the company except in certain circumstances which had not arisen, and that the holders of Class B shares were not under any circumstances entitled to notice of or to vote at any such meeting, notice of the special general meeting so requisitioned was duly given only to the holders of the common shares of the company and on November 8, 1960 a special general meeting was held at which only the holders of common shares voted. At that meeting the following resolution was passed by a majority of 89,925 votes in favour of the resolution as against eight votes contra, three shareholders holding eight shares having abstained from voting:

> Be It Resolved that United Fuel Investments, Limited be and it is hereby required to be wound up under the provisions of the Winding-up Act of Canada.

At the same meeting the following resolution was also passed:

> Be It Resolved that, upon an order being made by the Supreme Court of Ontario for the winding-up of United Fuel Investments, Limited, the said Honourable Court be requested to appoint The Clarkson Company Limited as Liquidator.

It is admitted that in the event of an order being made for the winding-up of the company Union Gas proposes to bid in the liquidation for the assets of the company, consisting mainly of its shares of the United Gas Company.

22 As stated earlier, the petition for the winding-up order brought by the company was based upon the provisions of s. 10 (*b*) the *Winding-up Act*. Having regard to an argument advanced by counsel for the respondent based on the provisions of s. 10 (*e*) of the Act in relation to the other clauses (*a*) to (*d*) it will be convenient to set out provisions of the section *in toto*. It reads as follows:

> 10. The court may make a winding-up order,
>
> (*a*) where the period, if any, fixed for the duration of the company by the Act, charter or instrument of incorporation has expired; or where the event, if any, has occurred, upon the occurrence of which it is provided by the Act or charter or instrument of incorporation that the company is to be dissolved;
>
> (*b*) where the company at a special meeting of shareholders called for the purpose has passed a resolution requiring the company to be wound up;
>
> (*c*) when the company is insolvent;
>
> (*d*) when the capital stock of the company is impaired to the extent of twenty-five per cent thereof, and when it is shown to the satisfaction of the court that the lost capital will not likely be restored within one year; or
>
> (*e*) when the court is of opinion that for any other reason it is just and equitable that the company should be wound up.

23 The ground upon which the learned Judge of first instance made the order in appeal dismissing the company's petition for a winding-up order makes it necessary to consider certain relevant provisions of the Dominion *Companies Act*, which are set out hereunder:

**Interpretation.**

24

> 3. In this Part and in all letters patent and supplementary letters patent issued under it . . .
>
> (n) "shareholder" means every subscriber for or holder of a share in the capital stock of the company, and includes the personal representatives of a deceased shareholder, a subscriber to the memorandum of agreement and every other person who agrees with the company to become a shareholder.

**Meetings of Shareholders.**

25

> 100(1) An annual meeting of the shareholders of the company shall be held at some date not later than eighteen months after the incorporation of the company and subsequently once at least in every calendar year and not more than fifteen months after the holding of the last preceding annual meeting.

(2) Where default is made in holding any annual meeting as aforesaid the court in the province in which the head office of the company is situate may on the application of any shareholder of the company, call or direct the calling of an annual meeting of the shareholders.

101(1) The directors of a company shall, on the requisition of shareholders holding at the date of the deposit of the requisition not less than one-tenth of the issued shares of the company of the class or classes that, at the date of the deposit, carry the right of voting at the meeting to be called pursuant to such requisition, forthwith proceed duly to call a special general meeting of the shareholders.

(2) The requisition shall state the general nature of the business to be transacted at the meeting and shall be signed by the requisitionists and deposited at the head office of the company and may consist of several documents in like form, each signed by one or more requisitionists.

(3) . . . .

(4) . . . .

(5) . . . .

(6) The directors may at any time of their own motion call a special general meeting of the shareholders for the transaction of any business of which the general nature is specified in the notice of the meeting.

102. Subject to the provisions of any by-law of the company duly enacted under the provisions of this Act, each share of the capital stock of any company issued and allotted, shall, subject to the provisions of this Part, carry voting rights and entitle the shareholder to one vote for each such share owned by him.

103. In the absence of other provisions in that behalf in the letters patent, supplementary letters patent or by-laws of the company,

(*a*) notice of the time and place for holding any meeting of shareholders shall be given by sending such notice to each shareholder entitled to vote at such meeting through the post, in a prepaid wrapper or letter, not less than fourteen days before the date of the meeting, to his last known address,

(*b*) at all meetings of shareholders every shareholder is entitled to give one vote for each share then held by him; and such votes may be given in person or by proxy, if such proxy is himself a shareholder, but no shareholder in arrear in respect of any call is entitled to vote at any meeting,

(*c*) all questions proposed for the consideration of the shareholders at any meeting of shareholders shall be determined by the majority of votes, and the chairman presiding at any such meeting shall have the casting vote in case of an equality of votes.

I referred earlier to the restrictions upon the voting rights of the holders of Class A and Class B shares. They are set out in para. 5(i) of the letters patent, which is reproduced hereunder:

5(i) If the Company from time to time shall fail to pay in the aggregate eight (8) quarterly dividends on the Class "A" Preference Shares on the days on which the same should be paid according to the terms hereof, whether such dividends have been declared or not and whether or not there are any moneys of the Company properly applicable to the payment of dividends, then from and after the due date of the eighth quarterly dividend which is not paid and so long as eight quarterly dividends remain in arrears, the holders of the Class "A" Preference Shares shall be entitled as a class to elect two of the Directors of the Company.

> In the event that pursuant to the provisions of Article 2, sub-division (b) of the Main Agreement either The Dominion Natural Gas Company Limited or Union Gas Company of Canada Limited purchases from the other of them the Voting Trust Certificates therein referred to and held by such other representing Common Shares of the Company, then from and after such event the holders of Class "A" Preference Shares shall be entitled as a class to elect two of the Directors of the Company.
>
> It is hereby declared that the foregoing provisions as to the rights of the holders of Class "A" Preference Shares to elect Directors shall not be cumulative and in no event shall the holders of Class "A" Preference Shares be entitled to elect more than two Directors of the Company.
>
> Save as aforesaid, no holder of Class "A" Preference Shares shall have any right to vote at or receive notice of any Annual or Special General Meetings of the Company. No holder of Class "B" Preference Shares shall have any right to vote at or receive notice of any such meetings.

The circumstances which would entitle the holders of Class A preference shares to vote have not come into being, hence the provisions of the supplementary letters patent *quoad* that class of shareholders are not material.

26 The learned trial Judge was of the view that there was a distinction between a "special meeting of shareholders duly called for the purpose" as used in s. 10(*b*) of the *Winding-up Act* and "special general meeting of shareholders" within the meaning of s. 101 of the *Companies Act* and the supplementary letters patent issued in 1938. The *Winding-up Act* was originally enacted in 1889 (Can.), c. 32 and s. 4(*b*) of that statute is identical in its terms to s. 10 (*b*) of the present Act. An examination of the Dominion *Companies Acts* going back to the *Canada Joint Stock Companies Letters Patent Act*, 1869 (Can.), c. 13, makes it appear that the meetings of shareholders are divisible into two broad categories namely: (1) meetings of all the shareholders of the company which are usually referred to in the legislation as "general meetings;" or (2) separate meetings of one or more classes of shareholders (with which we are not concerned here).

27 "General Meetings" are either ordinary meetings which are usually referred to in the legislation as "regular" or "annual," or "special". The meaning of these terms was helpfully discussed in the judgment of Rose., J, in *Austin Mining Co. v. Gemmel.* (1886), 10 O.R. 696 (C.A.). Referring to *Brice on Ultra Vires*, 2nd ed., p. 40, he quoted from that work as follows:

> Meetings are of two kinds, ordinary or general, and extraordinary or special. The former are held periodically at appointed times, and for the consideration of matters in general. The latter are called upon emergencies, and for the transaction of particular business.

"Special general meetings" are meetings called for special or particular purposes as *e.g.* the confirmation, repeal, amendment or re-enactment of by-laws, the election of directors when they were not elected at the annual meeting of the company or, as stated in s. 101(6) of the Dominion *Companies Act* "for the transaction of any business of which the general nature is specified in the notice of the meeting." It would therefore follow that all meetings of shareholders which are not separate meetings of one or more classes of shareholders fall within the definition of general meetings, and the latter may be either annual meetings (or annual general meetings) or special general meetings. There is no doubt that the *Winding-up Act* and the *Dominion Companies Act* are statutes *in pari materia*, and with the greatest deference to the view expressed by the learned Judge the "special meeting" referred to in s. 10(*b*) of the *Winding-up Act* signifies a general meeting of the company called for a special or particular purpose, namely, to consider and pass a resolution requiring the company to be wound up. That subsection presents but another instance which requires the calling of a "special general meeting of shareholders" within the meaning of the *Companies Act*, and since the holders of Class A and Class B preference shares of the company were clearly not entitled to notice of, or to attend or vote at such a meeting, it was competent for the common shareholders alone to pass the resolution upon which the petition for the winding-up order was based. It follows that upon this ground the appeal must succeed.

28 As to the respondents' second ground of opposition to the petition, namely, that the appellant company had not complied with the letters patent and supplementary letters patent in electing its directors, we made it clear during the hearing of the appeal that we did not consider this point to have any merit. If, as was alleged, the holders of Class A shares acquired the right to elect

two directors of the company in the year 1950 when Union Gas reacquired the common shares which had been transferred by it to Dominion Gas, they never made any move throughout the whole intervening period to assert that right and it is now too late in the day to offer a complaint upon that score. In any event the resolution that the company be wound up was a resolution not of the directors but of those shareholders duly entitled to vote upon the question at a meeting regularly convened and held. If, as it is now alleged, the Board of Directors in office at the material time had not been regularly elected, that is something which can have no possible bearing upon the issues involved here.

29 This brings me to a consideration of the respondents' main ground of opposition to the granting of the petition, namely, that although a winding-up order was sought under the provisions of s. 10(*b*), of the *Winding-up Act* and there has been proof of compliance with the requirements of that subsection, it was nevertheless relevant or competent for the Court to consider if, in all the circumstances, it was just and equitable that the company should be wound up. It was strongly urged by counsel for the respondent that the Court always has a broad discretion to refuse to grant the order sought on considerations of justice or equity, whether the petition is brought under s-ss. (*a*), (*b*), (*c*) or (*d*) of s. 10.

30 Great emphasis is laid upon the terms of a printed letter sent to the holders of the preferred shares and common shares of the company on October 28, 1938, proposing a modification of their rights, which was subsequently approved and embodied in the supplementary letters patent issued on February 7, 1939. I quote from a portion of this letter as follows:

> From the foregoing and from the enclosed memorandum it will be seen that the proposed arrangement is not primarily a reorganization of capital as between the Preferred and Common Shareholders but is a joint agreement by both classes of shareholders to give up certain rights in order to terminate the disastrous competitive situation with Dominion in the City of Hamilton.

As a result of the agreement the common shareholders each accepted nine-tenths of a share of the common stock for each share previously held by them and for each preferred share of $100 on which there were unpaid accumulated dividends of $37, the preferred shareholders accepted in exchange one $50 par "A" preferred 6% cumulative share, one $25 "B" share carrying no fixed dividend but with a right to participate fully with the common shareholders in the earnings of the company, plus a cash dividend of $2 in respect of each preferred share. They also agreed to accept the sum of $60 for each Class A preferred share as the redemption price, or the price payable on a voluntary winding-up and $25 for each Class B preferred share, or $30 if the company were voluntarily wound up. Attention was also directed to the following paragraph in the printed letter of October 28, 1938, namely:

> Under the proposed arrangement the Preferred shareholders will have a preference on dividends to the approximate amount earned on the average during the past ten years. However, their participation in earnings will not be limited as at present because through the medium of the new Class "B" shares the Preferred shareholders are also enabled to participate equally share per share with the common shareholders in any further distribution made possible by increased earnings.

31 It is submitted on behalf of the respondents that the effect of an order to wind up United Fuel would be to deprive the Class B shareholders of the accumulated net earnings or earnings retained for use in the business, and of their share of the anticipated earnings in 1961, and of future earnings attributable to the retention in the hands of the company of past earnings carried into surplus or expended upon capital investment. It is also suggested that the failure to declare a dividend on July 2, 1960 was not justified and that this was done deliberately to depress the value of the Class B shares. Further it is contended that in seeking a winding-up of United Fuel the directors and the majority shareholders are not motivated by a consideration of the best interests of the company, but by a desire to ward off enquiry into the purchase and supply policies of United Fuel as directed by Union Gas, and by a desire to capture the accrued and undistributed reinvested earnings of United Fuel for the benefit of Union Gas; further, to capture the earning potential of United Fuel, not only in the earnings predicted in March 1958 and confirmed by the experience of 1960, but also the increased earnings that the company could reasonably be expected to realize having regard to the introduction into use in Hamilton of natural gas as a fuel for blast furnaces, which should greatly increase industrial consumption of gas should the market be developed as anticipated. Counsel for the respondents argued that strict regard must be had to the facts surrounding the reorganization of the company in 1938 and the terms upon which the preferred shareholders entered into the new arrangement then put into effect; to the fact that during the intervening period, out of earnings

of approximately $10,000,000 only about $7,000,000 was paid out as dividends to the preferred and common shareholders and approximately $3,000,000 was carried to surplus or reinvested in the company; to the fact that in a prospectus issued by Union Gas that company recognized the interest that the Class B shareholders had in the earnings of the company through their right to share dividends *pro rata* with the holders of common shares; further that the company is actually seeking the winding-up order as a means of evading questions put by minority shareholders as to the supply agreement for natural gas entered into with a subsidiary of Union Gas Company, and that it is also really motivated by its purpose to increase the efficiency of the operations of Union Gas and at the same time to appropriate for the benefit of the common shareholders the undistributed accumulated earnings as well as the future anticipated augmented earnings in the new period of expansion. All this, it is contended, would make the granting of the order unjust and inequitable in relation to the rights and interests of the Class B shareholders.

32 In my opinion the criticism directed to the company, and the reasons attributed to the directors and majority shareholders as the motivating factors in the institution of the proceedings under review are not supported by the evidence. An examination of a statement showing the net profits of the company after taxes on income for the years 1940 to 1960 makes it clear that the earnings of the gas companies alone were rarely sufficient to pay the sum of $270,000 per year, the amount required to satisfy the interest payable in respect of the Class A preferred shares. There were times when the earnings were not sufficient to pay the dividends on this preference stock, much less to justify the declaration of a dividend in favour of the holders of Class B and common shares. The consolidated net profits of the company and its subsidiaries as shown in the annual reports of the company for each of its fiscal years ending on March 31st, 1940 to 1960 inclusive, was $10,907,508 and during that period net charges directly to surplus amounted to $764,900 which reduced the amount available for dividends to $10,142,608. The total dividends paid out during that same period amounted to $7,107,201. I am not prepared to say that the policy of the company in paying out 70% of its net earnings in dividends over that lengthy period and carrying only 30% to surplus, or investing it in capital assets merits criticism. On the contrary, it rather commends itself to my mind as a very sound policy, the application of which would be reflected in the increased value of the company's shares, both Class B preference shares as well as common. During the period extending from 1939 to 1959 the Class B shares, according to the records of the stock exchange, reached a low price of $2.50 and a high price of $70, and in September 1960 the highest market price of Class B shares was $41 and the lowest price was $36.50. It should also be pointed out that in the negotiations which preceded the launching of the petition for the winding-up order the holders of Class B preference shares were offered two and one-half common shares of Union Gas for each Class B preference share and in addition the sum of $2.50. Having regard to the market value of Union Gas shares at the material time the offer was approximately equivalent to the payment of $42.50 for each Class B share. This would appear to have been an advantageous offer taking into account the rights of the holders of these shares under the terms of the supplementary letters patent which provide that,

> Subject to the rights of the holders of Class "A" Preference Shares the holders of Class "B" Preference Shares shall have the right on the liquidation, dissolution or winding-up of the Company or other distribution of assets of the Company among Shareholders (other than by way of dividends out of moneys of the Company properly applicable to the payment of dividends) to repayment of the amount paid up on such Shares, and if such liquidation, dissolution, winding-up or distribution be voluntary, to an additional amount equal to $5 per Share before the holders of any of the Common Shares or any other Shares of the Company junior to the Class "B" Preference Shares shall be entitled to repayment of the amounts or any part thereof paid up on such Common Shares or other junior Shares or to participate in the assets of the Company, but the holders of the said Class "B" Preference Shares shall not have the right to any further participation in the assets of the Company.

Therefore, the highest price to which the holders of Class B preference shares were entitled upon a voluntary winding-up of the company was $30 per share. I am not at all impressed by the complaint that the respondent Deacon was refused the right to have a group of American public utility rate experts examine the company's contracts and its books and records as the basis for a report to be made for the benefit of the dissentient group of shareholders whom he represented. It is easy to understand why a large public utility corporation would not wish to have a group of experts representing a minority interest carrying out such an intensive exploratory investigation into the affairs of the company. It has not been shown that there was any lack of probity in the conduct and management of the company's affairs and the directors' reaction to the respondents' proposal was not in the least extraordinary. It would have been remarkable if they had assented to the proposal.

 

33 The objection of the respondents that if the company is now wound up they will be denied the privilege of sharing in the greater anticipated future earnings of the company would seem to imply that the majority shareholders of the company were under some obligation to the Class B shareholders to carry on the business of this company in perpetuity. It must be borne in mind that what is involved here is not a sale of the assets of the company but rather its voluntary winding-up as desired by the great majority of the shareholders. The point then arises as to whether a voluntary winding-up can be stopped by the Court and the majority of the shareholders of a company be compelled to carry on business at the behest of a minority, and that leads me to a consideration of the authorities relevant to that question.

34 A leading authority on this point is the judgment of the Scottish Appellate Court in *Symington v. Symington* (1905), 13 Sc. L.T. 509. There Lord M'Laren discussed the clauses of the English *Companies Act* equivalent to s. 10(*b*) of the Canadian *Winding-up Act*, and in particular the construction to be placed upon the final clause sometimes referred to as the "just and equitable clause" in its relation to the preceding clauses. I quote from Lord M'Laren's judgment as follows (p. 511):

> If I were forming an opinion for myself upon the true meaning of the clause in the Companies Act, which defines the conditions under which the Company is to be wound up, I should not have come to the conclusion that the general reference to the discretion of the Court was to be confined to things *ejusdem generis* with those conditions which precede it. I apprehend that the true rule for determining whether general words are to be confined to things *ejusdem generis* is this, that if the general words are bound up with the enumeration by proper words of relation, then their meaning is confined to the subject-matter indicated in the enumeration, but if the general words are severed from the enumeration of particulars, there is no logical reason for interpreting the one by the other. One familiar instance is the case where the general words precede the enumeration, in which case it was pointed out by Lord Westbury, in one of the entail cases, that the *ejusdem generis* rule of construction does not apply; and, on the contrary, the general words may be taken in the wider sense, the enumeration being regarded as illustrative. But, of course, the inversion of the order of arrangement is not the only way in which it is possible for the writer to shew that he means the general words to be taken in their comprehensive sense. In this Act of Parliament the general words have reference to the discretion and judgment of the Court. The case put is, "Whenever the Court shall be of opinion that it is just and equitable that the Company should be wound up." That introduces a different order of ideas altogether from the conditions which precede, because these are not conditions referred to the judgment of the Court, but are defined in the Act itself, and the function of the Court is only to say whether the facts of the case come within one or the other category. I have made these observations because, while I find in the English decisions that not much weight is now attached to the *ejusdem generis* rule of construction of this clause, yet, I think it desirable, at least for my own satisfaction, to see upon what grounds the true construction can be maintained and defended.

35 In *Loch v. John Blackwood Ld.*, [1924] A.C. 783, Lord Shaw of Dunfermline referred to the *Symington* case and stated at p. 792:

> Their Lordships think it not inexpedient to quote the following passages from that eminent judge and commentator Lord M'Laren. It expresses, in their view, the correct principle of interpretation.

He then proceeded to quote from the passage which I have extracted from Lord M'Laren's judgment.

36 In *Castello v. London Gen'l Omnibus Co.* (1912), 107 L.T. 575, the Court of Appeal in England affirmed a decision of Swinfen Eady, J., and held that where there was no *mala fides* or fraud in a proposed scheme of reconstruction of a company nor was it a sham or device, that although the result would be that the majority of the shareholders would obtain control of the undertaking of the company and compel the minority to accept a cash payment in lieu of shares in a new company to which that undertaking was to be sold, the scheme was one that ought not to be interfered with by the Court. Cozens-Hardy, M.R., stated at p. 580:

> And the Judicial Committee of the Privy Council held that the right to vote, being a right of the Company, might be freely exercised by every shareholder in the Company except and unless — and, of course, the execption generally goes without saying — you can find bad faith, or fraud, or anything approaching that.

 

I would also refer to the judgment of the Court of Appeal in New Brunswick in *Eastern Fur Finance Corp., Re* (1933), 7 M.P.R. 201, [1934] 1 D.L.R. 611 (N.B.C.A.) and to a judgment of Sedgewick, J., in *Base-O-Lite Products Ltd., Re*, [1933] O.R. 156, [1933] 1 D.L.R. 746 (H.C.). In the latter case a winding-up order was sought under the provisions of s. 10(*d*) of the *Winding-up Act*, namely, on the ground that the capital stock of the company was impaired to the extent of 25% thereof and that it was not likely that the lost capital would be restored within 1 year. The principle there enunciated appears on p. 748 D.L.R., p. 158 O.R. from which I quote:

> My own conclusion is that the clause under which the petitioners seek their order should be looked at in the following manner. If the petitioners bring themselves within the provisions of s. 10(*d*) of the Winding-up Act, then I think they are *prima facie* entitled to an order, and the Court should make the order, unless a situation is shown upon which the Court should exercise a discretion to refuse the order. I am inclined to think that that discretion is a narrow discretion and that the right of a shareholder to a winding-up order, when he has brought himself within s. 10(*d*) is as strong as the right of a creditor who has brought himself within the provision of s. 10(*c*) and has proved that "the company is insolvent."

The reasons assigned for winding up the company, *i.e.*, that it now owns the shares of only one subsidiary, United Gas, and that there is now no valid reason for its continued existence; also that if this holding company is wound up Union Gas will be able to carry on its undertaking more efficiently, have not been shown to be specious or without substance. Moreover there is nothing in the evidence which points to the conclusion that in their decision to have the company wound up there was bad faith or fraud or anything inclining toward that disposition of mind on the part of the majority of the holders of common shares. What the company proposes to do is completely *intra vires* and if the holders of the Class B preference shares receive the price stated in the terms of the supplementary letters patent of 1938, they can have no just grievance against those responsible for the passing of the resolution.

37 The powers set forth in cls. (j) and (l) of the letters patent indicate clearly that it was within the contemplation of the incorporators that the company's existence might be terminated. Those clauses are as follows:

> (j) To distribute in specie or otherwise, as may be determined, any assets of the Company among its shareholders and particularly the shares, bonds, debentures or other securities of any other company that may acquire the whole or any part of the assets or liabilities of the Company.
>
> (l) To amalgamate with any other company having objects altogether or in part similar to those of this Company.

Section 14 of the Dominion *Companies Act* which provides for incidental and ancillary powers of companies incorporated under that Act provides in cl. (*m*) as follows:

> 14(*m*) to sell or dispose of the undertaking of the company or any part thereof for such consideration as the company may think fit, and in particular for shares, debentures or securities of any other company that has objects altogether or in part similar to those of the company.

I am in accord with the submission of appellant's counsel that if there is a discretion in the Court to refuse an order for winding-up within the terms of s. 10(*b*), since, under the provisions of the *Companies Act* and the terms of the letters patent and supplementary letters patent the right to decide that the company should be wound up has been conferred upon the holders of the majority of the common shares issued and outstanding, their decision should not be overridden unless it can be shown that their intended action is fraudulent or is tainted with *mala fides* or something approaching it. The discretion, if any, conferred upon the Court is, as was stated by Sedgewick, J., in the *Base-O-Lite* case, a narrow one. It is a legal discretion founded upon stated conditions which call for judicial action as distinguished from a mere individual or personal view or desire, or from the wider discretion exercisable under the terms of s. 10(*e*). The shareholders are in effect a domestic tribunal upon which has been conferred the power to decide questions as to the administration of the affairs of the company, and the Court will not substitute its opinion for the decision of such a tribunal unless very strong grounds are shown for doing so. This proposition is fully supported by the following authorities: *Re Langham Skating Rink Co.* (1877), 36 L.T. 605; *Burland v. Earle*, [1902] A.C. 83; *Ritchie v. Vermillion Mining Co.* (1902), 4 O.L.R. 588 (C.A.); *Dominion Cotton Mills Co. v. Amyot*, [1912] A.C. 546, 4

 

D.L.R. 306 (P.C.); *Jury Gold Mine Development Co., Re* (1928), 10 C.B.R. 303, 63 O.L.R. 109, [1928] 4 D.L.R. 735 (C.A.). In the latter case Middleton, J.A., referred at p. 736 D.L.R., p. 110 O.L.R. to *Symington v. Symington's Quarries Ltd.* (1905), 8 F. (Ct. of Scss.) 121 from which he quoted the following:

> The company itself is the proper *forum* for the settlement of domestic differences, according to the powers of the majority under the constitution of the company.

Discussing the position of a minority shareholder Middleton, J.A., stated at pp. 736-7 D.L.R., p. 111 O.L.R.:

> He is a minority shareholder and must endure the unpleasantness incident to that situation. If he choose to risk his money by subscribing for shares, it is part of his bargain that he will submit to the will of the majority. In the absence of fraud or transactions *ultra vires*, the majority must govern, and there should be no appeal to the Courts for redress. This is the situation here, and the application for winding-up is quite misconceived. If there is any misapplication of the assets the applicant is not without remedy, for he can bring an action on behalf of himself and other shareholders, making the company and the directors against whom he charges wrongdoing parties defendant.

38 Also pertinent are the words of Maclennan, J.A., in *Ritchie v. Vermillion Co.*, 4 O.L.R. at p. 595 where he stated after having referred to *Menier v. Hooper's Telegraph Works* (1874), L.R. 9 Ch. 350 at p. 354:

> "In other words, he admits that a man may be actuated in giving his vote by interests entirely adverse to the interests of the company as a whole. He may think it more for his particular interest that a certain course may be taken, which may be in the opinion of others very adverse to the interests of the company as a whole, but he cannot be restrained from giving his vote in what way he pleases, because he is influenced by that motive. There is, if I may say so, no obligation on a shareholder of a company to give his vote merely with a view to what other persons may consider the interests of the company at large. He has a right if he thinks fit to give his vote from motives or promptings of what he considers his own interest." The Master of the Rolls adds: "This being so, the arguments which have been addressed to me, as to whether or not the object for which the votes were given would bring about the ruin of the company, or whether or not the motive was an improper one which induced these gentlemen to give their votes, or whether or not their conduct shews a want of appreciation of the principles on which the company was founded, appear to me to be wholly irrelevant."

39 There is no real significance in the fact that United Fuel and Union Gas have, except as to one director, interlocking directorates. The resolution with which we are concerned is a resolution passed not by the directors but by an overwhelming majority of the shareholders entitled to vote upon the matter. Union Gas being the owner of the majority interest, the principle applicable was that stated by Sir Richard Baggallay in *North-West Transportation Co. v. Beatty* (1887), 12 App. Cas. 589 at p. 593, as follows:

> The general principles applicable to cases of this kind are well established. Unless some provision to the contrary is to be found in the charter or other instrument by which the company is incorporated, the resolution of a majority of the shareholders, duly convened, upon any question with which the company is legally competent to deal, is binding upon the minority, and consequently upon the company, and every shareholder has a perfect right to vote upon any such question, although he may have a personal interest in the subject-matter opposed to, or different from, the general or particular interests of the company.

In support of his proposition that the Court was entitled to exercise a wide discretion in granting or withholding a winding-up order sought under the provisions of s. 10(*b*), counsel for the respondent cited *Strathy Wire Fence Co., Re* (1904), 8 O.L.R. 186 (C.A.). In my respectful opinion that case does not support the proposition advanced. There the company had made an assignment for the benefit of its creditors. Its assets had been sold with the approval of the great majority of the creditors and shareholders, and at that stage the petitioner, a creditor and shareholder of the company who had taken part in all the previous proceedings and had himself endeavoured unsuccessfully to purchase the assets, applied for a winding-up order. It is hardly conceivable having regard to the unnecessary expense involved in the making of a winding-up order at that stage that any Court would have allowed the application. I have also considered the other cases cited by counsel for the respondents upon the same

point. The dominant feature of those cases was the fact that the shareholders or creditors were opposed to a winding-up order. Furthermore they were decided many years before the governing principle was enunciated in *Loch v. John Blackwood Ld.*, [1924] A.C. 783.

40 Counsel for the respondents also cited another series of English cases, *Brown v. Br. Abrasive Wheel Co.*, [1919] 1 Ch. 290 at p. 294; *Dafen Tinplate Co. v. Llanelly Steel Co.*, [1920] 2 Ch. 124 at pp. 137 and 141 and *Sidebottom v. Kershaw, Leese & Co.*, [1920] 1 Ch. 154 at p. 167. I do not consider these cases to be in point. They involve attempts on the part of majority shareholders to bring about an amendment in the articles of association which would have enabled the majority to acquire the stock of the minority. Their intended action was restrained because, in the circumstances, it was oppressive, since the amendments which they sought to put into force would have constituted a serious interference with the previously acquired rights of the minority shareholders. That situation does not obtain here.

41 It is my conclusion that the learned Judge of first instance was right in rejecting the submission of the respondents that in the particular circumstances so exhaustively canvassed, the Court should have dismissed the petition on equitable grounds. But having come to the decision that it was competent for the majority of the holders of common shares to pass the resolution in question I would allow the appeal with costs, direct that the order in appeal be set aside and that in place thereof an order should issue in the terms of the prayer of the petition as expressed in clauses one to five thereof. The appellant should also have the costs of the proceedings before McLennan, J.

1963 CarswellOnt 66
Supreme Court of Canada

United Fuel Investments Ltd., Re

1963 CarswellOnt 66, [1963] S.C.R. 397, 40 D.L.R. (2d) 1

# G.A. Fallis and D.M. Deacon, Appellants and United Fuel Investments, Limited, Respondent

Kerwin C.J. and Taschereau, Martland, Judson and Ritchie JJ. Kerwin C.J. died before delivery of judgment.

Judgment: December 6, 1962
Judgment: December 7, 1962
Judgment: December 11, 1962
Judgment: June 24, 1963

Proceedings: On appeal from the Court of Appeal for Ontario

Counsel: *B.J. MacKinnon, Q.C.*, and *B.A. Kelsey*, for the appellants.
*A.S. Pattillo, Q.C.*, and *D.J. Wright*, for the respondent.

Subject: Corporate and Commercial

**Related Abridgment Classifications**
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

**Headnote**

**Corporations --- Winding-up — Under Dominion Act — Winding-up order — Grounds — Resolution of shareholders**

Winding-up — Under Dominion Act — Winding-up order — Grounds — Resolution of shareholders — Resolution of special meeting of shareholders — Considerations applicable in making order — Voting rights — Whether limited by voting rights under letters patent — Winding-up Act, R.S.C. 1952, c. 296, s. 10(a), (b) — Companies Act, R.S.C. 1952, c. 53, ss. 3(n), 101.

The letters patent of a company provided that voting rights attached only to the common shares. Pursuant to a resolution passed by a vast majority of the votes at a special general meeting of the common shareholders a petition was made for the winding-up of the company pursuant to s. 10(b) of the Winding-up Act. The petition was opposed by the preference shareholders, who alleged that they were entitled to attend and vote at the meeting. Held, the petition should be granted. The holders of the non-voting preference shares were not entitled to notice of the special meeting of the shareholders nor were they entitled to vote, because the special meeting referred to in s. 10(b) of the Winding-up Act was simply a special general meeting of the shareholders within the meaning of s. 101 of the Companies Act. The common shareholders of the company sought to wind it up in their own self-interest and for convenience and economy of administration, and although the Court had some discretionary power under all the paragraphs of s. 10 except s. 10(a) to refuse the order, such discretion should not be exercised in favour of preference shareholders who did not want to be redeemed. A dismissal of the petition

for winding-up would have put upon the supplementary letters patent a construction that they could not bear, namely, that there could be no winding-up without the consent of the preference shareholders.

**The judgment of the Court was delivered by *Judson J.*:**

1 This is an appeal by two shareholders of the respondent company from a winding-up order made by the Court of Appeal [1] under s. 10(*b*) of the *Winding-up Act*, R.S.C. 1952, c. 296, pursuant to a resolution of the common shareholders of the company requiring the company to be wound up. The appellants are the holders of class "B" preference shares of the company. They were granted leave to appeal by this Court on March 16, 1962.

2 United Fuel Investments Limited was incorporated in 1928 under the provisions of the *Companies Act*, R.S.C. 1927, c. 27, for the purpose of acquiring and operating natural and other gas systems and participating in the management and operation of companies with similar undertakings. Immediately after its incorporation it acquired two subsidiaries by the purchase of all the issued shares of these companies. These companies were United Gas Limited and Hamilton By-Product Coke Ovens Limited. The first was a distributing company and the second was a company producing manufactured gas which it sold to the distributing company. I will refer to these three companies from now on as the holding company, the distributing company and the manufacturing company.

3 At incorporation the capital structure of the holding company was as follows:

| | Authorized | Issued |
|---|---|---|
| Preferred shares, 6 per cent cumulative redeemable $100 par value ..... | 250,000 | 90,000 |
| Common shares no par value ..... | 250,000 | 100,000 |

All the issued shares, 90,000 preferred and 100,000 common, were issued to a firm of investment dealers for a price of $8,250,000. The preferred shares were sold to the public and the investment dealer retained the 100,000 common shares. These shares, in 1930, it sold to Union Gas of Canada, hereinafter referred to as "Union Gas". This was a large company engaged in Western Ontario in the distribution and production of natural gas.

4 As there were 100,000 common shares and only 90,000 preference shares, which only had a vote after four quarterly dividends were in arrear, the control of the holding company was always vested in the holders of the common shares. Because of competitive conditions in the Hamilton area from another company, Dominion Natural Gas Company Limited, neither the distributing company nor the producing company prospered as they might otherwise have done. The result was that Union Gas, as controlling company, the distributing company and Dominion Natural Gas made an agreement to provide for the reorganization of the business, capital and affairs of the holding company. It is unnecessary to go into more detail about this inter-company agreement but in these reasons the reorganization of the capital structure of the holding company is important and it is necessary to deal with it in some detail.

5 The reorganization was approved by order of the Court on January 17, 1939, and embodied in supplementary letters patent dated February 7, 1939. Before its approval, the arrears of dividends on the preference shares amounted to $37. The holder of each 6 per cent preference share of the par value of $100 received as a result of the reorganization:

(i) 1 6 per cent cumulative redeemable class "A" preference share, par value $50;

(ii) 1 non-cumulative class "B" preference share, par value $25;

(iii) a dividend of $2 cash per share, in full payment of $37 in accrued and unpaid dividends.

6 The preference shareholders gave up as a result of this reorganization:

(*a*) a capital amount of $25 per share, a total of $2,250,000;

(*b*) arrears of dividends of $35 per share, a total of $3,150,000, or a total of $5,400,000.

The following table shows the capital of the holding company before and after reorganization:

| Before reorganization | | After reorganization | |
|---|---|---|---|
| 100,000 common shares no par value | $ 100,000 | 90,000 common shares, without nominal or par value | $ 50,000 |
| 90,000 preference shares, $100 par value | $ 9,000,000 | 90,000, 6 per cent cumulative redeemable class "A" preference shares of the par value of $50 each | $ 4,500,000 |
| | | 90,000 non-cumulative class "B" preference shares of the par value of $25 each | $ 2,250,000 |
| | $ 9,100,000 | | $ 6,800,000 |

7 I have set out these figures in detail because the obvious disparity between the concessions made by the preference shareholders and the common shareholders is urged by counsel for the appellants as a ground for the refusal of the winding-up order. But this reorganization was worked out in 1937 and 1938 and approved by the Court after full consideration in 1939, (*Re United Fuels Investments Limited*[2] ). The dissenting vote was only about one-fortieth of the issued preference shares and the opposition on the motion for approval came from one individual, who did point out that the common shareholders were giving up very little.

8 I am concerned here with the rights of the holders of the class "B" preference shares on this reorganization. These rights and their inter-relation with the rights of the class "A" preference shares are set out in the supplementary letters patent as follows:

Clause (*a*) provides for a 6 per cent cumulative preferential dividend on the class "A" shares and for the non-payment of any dividends on the class "B" and common shares until all arrears of the class "A" shares have been paid.

Clause (*b*) provides for dividends on the class "B" and common shares in these terms:

> (*b*) Subject to the rights of the holders of the Class "A" Preference Shares, the moneys of the Company properly applicable to the payment of dividends which the Directors may determine to distribute in any fiscal year of the Company by way of dividends shall be distributed among the holders of the Class "B" Preference Shares and the Common Shares pro rata according to the number of Shares held.

Clause (*c*) provides for the priorities of the class "A" shares on a liquidation, dissolution or winding-up, gives them an additional $10 per share if the winding-up is voluntary, and denies further participation in the assets.

Clause (*d*) then deals with the rights of the class "B" shares in the same events in these terms:

> (*d*) Subject to the rights of the holders of Class "A" Preference Shares the holders of Class "B" Preference Shares shall have the right on the liquidation, dissolution or winding-up of the Company or other distribution of assets of the

> Company among Shareholders (other than by way of dividends out of moneys of the Company properly applicable to the payment of dividends) to repayment of the amount paid up on such Shares, and if such liquidation, dissolution, winding-up or distribution be voluntary, to an additional amount equal to $5 per Share before the holders of any of the Common Shares or any other Shares of the Company junior to the Class "B" Preference Shares shall be entitled to repayment of the amounts or any part thereof paid up on such Common Shares or other junior Shares or to participate in the assets of the Company, but the holders of the said Class "B" Preference Shares shall not have the right to any further participation in the assets of the Company.

Clause (*e*) provides for purchase in the market of both the class "A" and class "B" shares at certain prices in these terms:

> (*e*) The Company, pursuant to Resolution of the Board of Directors, may at any time purchase in the market the whole or from time to time any part of the Class "A" Preference Shares outstanding at a price not exceeding $60 per Shares and unpaid cumulative dividends and costs of purchase, or of the Class "B" Preference Shares outstanding at a price not exceeding $30 per Share and Costs of purchase. From and after the date of purchase of any Class "A" Preference Shares or Class "B" Preference Shares under the authority in this paragraph contained, the Class "A" Preference Shares or Class "B" Preference Shares so purchased shall be deemed to be redeemed and shall be cancelled.

Clauses (*f*), (*g*) and (*h*) provide for the redemption of the class "A" shares at $60 per share on notice.

Clause (*i*) gives the class "A" shares a right to elect 2 directors if 8 quarterly dividends are in arrears and then deals with the voting rights of both class "A" and class "B" shares in these terms:

> Save as aforesaid, no holder of Class "A" Preference Shares shall have any right to vote at or receive notice of any Annual or Special General Meetings of the Company. No holder of Class "B" Preference Shares shall have any right to vote at or receive notice of any such meetings.

9 It will be seen that the class "A" shares are redeemable both by purchase and on notice. The class "B" shares are only redeemable by purchase. The only other way of paying them off is on a winding-up. The class "A" shares have but limited voting rights and the class "B" shares have none at all unless, as McLennan J. held, they have a right to vote on a winding-up.

10 When the arrangement was submitted to the shareholders a letter was sent by the President of Union Gas (the controlling company) which held the 100,000 common shares (he was also the President of United Fuels, the holding company) with the following explanation:

> From the foregoing and from the enclosed memorandum it will be seen that the proposed arrangement is not primarily a re-organization of capital as between the preferred and common shareholders but is a joint agreement by both classes of shareholders to give up certain rights in order to terminate a disastrous competitive situation with Dominion in the City of Hamilton.
>
> The carrying out of the agreement will enable United Gas to control and extend the sale and distribution of all gas now served in the Hamilton area...
>
> Under the proposed arrangement, the preferred shareholders will have a preference on dividends to the approximate amount earned on the average during the past ten years. However, their participation in earnings will not be limited as at present because, through the medium of the new Class "B" shares, the preferred shareholders are also enabled to participate equally share per share with the common shareholders in any further distribution made possible by increased earnings.

11 I will not concern myself any further with the history of the class "A" shares but between 1942 and 1945, United Fuels (the holding company) purchased for cancellation 20,311 class "B" shares, leaving outstanding 69,689 of these shares.

12 In July 1960, Union Gas, the controlling company, made an offer both to the class "A" and class "B" shareholders. I am not interested in the terms of the offer to the class "A" shareholders. They were redeemable on notice. The offer to the class "B" shareholders was two and a half common shares of Union Gas plus $2.50 for one United Fuel class "B". Ninety-eight per cent

of the class "A" shareholders accepted but only 68 per cent of the class "B" shareholders accepted. The following table shows the particulars of the acceptances, the offer having remained open according to its terms until September 30, 1960:

| | Shares Out-standing | Shares Exchanged | Shares not Exchanged |
|---|---|---|---|
| Class "A" ..... | 90,000 | 86,814 | 3,186 |
| Class "B" ..... | 69,689 | 47,222 | 22,467 |

13 Then followed the winding-up proceedings. Union Gas requisitioned the summoning of a meeting for November 8, 1960, to pass a resolution to wind up the company. The company then sent out a notice to the common shareholders but not to the remaining class "A" or class "B" shareholders. Only the common shareholders attended and voted. The vote of the common shareholders was as follows: 89,920 votes for to 8 votes against, with 8 shares not voting. Of the "yes" votes, 89,906 were cast by Union Gas or its nominees. United Fuel then petitioned the Court under s. 10 (*b*) of the *Winding-up Act* for a winding-up order. McLennan J. rejected the petition solely on the ground that although only the common shareholders are given voting rights by the letters patent, this does not govern a special meeting of shareholders under s. 10 (*b*) of the *Winding-up Act* and that all shareholders, preferred as well as common, were entitled to notice and to vote at the meeting. The Court of Appeal took a different view. It was a unanimous judgment delivered by Schroeder J.A. They held that the preference shareholders were not entitled to a notice of the meeting and a vote, that the special meeting of shareholders referred to in s. 10 (*b*) is simply a special general meeting of the shareholders within the meaning of s. 101 of the *Companies Act* and, hence, the holders of non-voting preference shares were not entitled to notice or to vote.

14 They also held that where a majority of the common shareholders have passed a resolution under s. 10(*b*), any discretion the Court may have to refuse a winding-up order should not be exercised unless it can be shown that the action of the majority shareholders was fraudulent or equivalent to bad faith. Subject to this, the right to decide that a company should be wound up rests with the majority shareholders.

15 I agree with the judgment of the Court of Appeal that the preference shareholders were not entitled to notice of the meeting and a vote, and I have nothing to add to the reasons of Schroeder J.A. The main ground of appeal was that there exists in the Court an equitable jurisdiction, which in the circumstances of this case should be exercised against the winding-up order. The common shareholders submit that once they show a resolution of shareholders passed at a meeting properly called and conducted, they are entitled to a winding-up order or, in the alternative, if there is a discretion in the Court to refuse the order, it is exercisable only on very narrow grounds, which do not exist here.

16 Sections 10 and 13 of the *Winding-up Act* read:

> 10. The court may make a winding-up order,
>
> (a) where the period, if any, fixed for the duration of the company by the Act, charter or instrument of incorporation has expired; or where the event, if any, has occurred, upon the occurrence of which it is provided by the Act or charter or instrument of incorporation that the company is to be dissolved;
>
> (b) where the company at a special meeting of shareholders called for the purpose has passed a resolution requiring the company to be wound up;
>
> (c) when the company is insolvent;
>
> (d) when the capital stock of the company is impaired to the extent of twenty-five per cent thereof, and when it is shown to the satisfaction of the court that the lost capital will not likely be restored within one year; or
>
> (e) when the court is of opinion that for any other reason it is just and equitable that the company should be wound up.

13. The court may, on application for a winding-up order, make the order applied for, dismiss the petition with or without costs, adjourn the hearing conditionally or unconditionally, or make any interim or other order that it deems just.

17 I am satisfied that there is some discretionary power under all the subsections with the exception of subs. (*a*). If the charter has expired or the specified event has occurred a winding-up order must follow the application. There are, however, minor examples of the exercise of discretion under subss. (*b*), (*c*) and (*d*). There is a line of cases, beginning in 1894 and ending in 1918, set out in the footnote [3], where the assets of an insolvent company were being administered under the *Assignments and Preferences Act*. The Courts asserted a jurisdiction to reject a creditor's petition for a winding-up order, even where the insolvency was clear, because the application was contrary to the wishes of the majority of the creditors and against convenience and economy in the administration of the assets.

18 Shareholders' petitions have been dismissed in cases apparently within the purview of the Act on the ground of triviality of interest and regard for the wishes of the majority. [4] I merely mention these cases in order to put them on one side, for they afford no help in this problem.

19 Nor do I think that *Symington v. Symington* [5] and *Loch v. John Blackwood Ltd.* [6], strongly relied upon in the respondent's submission, deal with this particular problem. These were concerned with the "just and equitable" subsection. Before they were decided it had been held in England that the "just and equitable" item was merely intended to include cases of the same kind as those covered in previous items of the section, (*In re Suburban Hotel Company* [7]). *Symington v. Symington* and *Loch v. John Blackwood Ltd.* deny this rule of construction and give subs. 10(*e*) an independent operation which has been widely recognized in a variety of situations. But this independent recognition of the scope of subs. 10(*e*) does not involve, as counsel for the respondent submitted, the denial of a "just and equitable jurisdiction" under subss. (*b*), (*c*) and (*d*).

20 The oddity of this case is that a winding-up order is sought for a very prosperous company. It was doing well until 1957 but with the bringing of natural gas into the area served by the company, a period of increasing prosperity and expansion began. The future looks very bright. The class "B" shareholders wish to retain their position and share in this prosperity with the common shareholders. The common shareholders wish to wind up the company and pay the class "B" shareholders off in accordance with the terms of the supplementary letters patent. The class "B" shares, with their right to participate in dividends, have some of the attributes of common shares but they are undoubtedly preference shares with defined rights on a winding-up.

21 The claims of the class "B" shareholders may be summarized as follows:

(*a*) That to the extent of their right to participate in dividends, they are in the same position as the common shareholders and should not be eliminated from the company. They assert a right to the continued existence of this company.

(*b*) That their sacrifices on the reorganization assured the continued existence of the company.

(*c*) That during the period 1947 to 1957, the company retained in the business for the purpose of expansion out of earnings the sum of $3,800,308. These earnings, if the company had not chosen to retain them, would have been available for the declaration of dividends to the "B" and common shareholders. A winding-up will deprive them of any participation in this accumulation.

22 The "B" shareholders also question the reason given by the common shareholders for the winding-up. Union Gas, the common shareholder, says that there is now no reason to continue United Fuel as a holding company with only one subsidiary. In 1959, because of the available supply of natural gas, the Coke company was sold. The result of a winding-up order will be to put all the assets of the holding company and its subsidiary distributing company into Union Gas after payment of all claims. There will undoubtedly be some saving and convenience of administration if this is done.

23 The "B" shareholders answer that this is not the true reason. United Fuel, the holding company, began as a company distributing gas as a result of the operations of two subsidiaries. It is still in the business of distributing gas through the operation

 

of one subsidiary. This one subsidiary, instead of buying manufactured gas from another subsidiary, is buying it from an independent source, Ontario Natural Gas Storage, which happens to be a wholly owned subsidiary of Union Gas.

24 We have, therefore, on one hand an allegation of a "freeze-out"; on the other, a submission that convenience of administration justifies the winding-up, and that in any event, the common shareholders are entitled to wind it up. I think the material discloses a good deal of substance in the allegations of the class "B" shareholders concerning the reasons for winding up this company but does this make any difference? They are holders of preference shares. It is true that they are not redeemable by notice but there has always been the right to buy the shares for cancellation and there has always been what, to me, is a clear provision in the constitution of the company for their prior payment on a winding-up and a premium if the winding-up is voluntary.

25 What does voluntary winding-up mean in these supplementary letters patent? It appears in the conditions relating to the preference shares and the common shares. In a Canadian context it must include a petition based on a shareholders' resolution under s. 10(*b*), for the Canadian Act, in contrast to the English Act, does not recognize any winding-up outside the Act.

26 Therefore, when the reorganization was put through in 1939, the rights of the "B" shareholders were clearly ascertained. They were subject to redemption on a voluntary winding-up. The supplementary letters patent contemplated the possibility of a voluntary winding-up. It appears very doubtful whether in 1939 anyone thought of a voluntary winding-up because of prosperity but that cannot alter the meaning of the charter of the company.

27 I assume that Union Gas is exercising its right, as the common shareholder of this company, to wind up the company in its own self-interest and for convenience and economy of administration. Can a preference shareholder who wants the company to continue prevent this being done?

28 Where can one find a discretion to refuse a winding-up order on the application of a preference shareholder who does not want to be redeemed? It is a normal incident of preference shares that they are subject to redemption. It is true that the "B" shares in contrast to the "A" shares are not redeemable in the ordinary sense. It is also true that they resulted from a reorganization. But the "B" shareholders are really trying to tell the company that in its prosperity it must carry on indefinitely because of their right to participate in the common dividends. A dismissal of the petition would inevitably be an affirmation of this position and would put upon the supplementary letters patent a construction that they cannot bear, namely, that there can be no winding-up without the consent of the "B" shares. This is asking the Court to do what a shareholders' committee might well have tried to do at the time of the reorganization, if it had been able in 1938 to foresee conditions in 1958. If the company has the right to wind up now, as I think it has, the motives which were so strongly emphasized by counsel for the "B" shareholders have no relevance. Whenever a company chooses to redeem preference shares according to their terms, it is wasting time and effort unless the motive is self-interest.

29 Counsel for the class "B" shareholders relied on certain authorities in the United States relating to the dissolution of solvent, prosperous corporations. These cases are: *Theis v. Spokane Falls Gaslight Co.* [8]; *William B. Riker & Son Co. v. United Drug Co.* [9]; *In re Paine* [10]; *In re Doe Run Lead Co.* [11]; *In re Security Finance Co., Rouda v. Crocker* [12]. Without going into details, these cases are all concerned with a common problem, an attempt of a majority of common shareholders to get the assets of the corporation into another corporation in which they alone are interested and the minority is not, and to pay off the minority common shareholders in cash. This is an entirely different problem from the right to wind up for the purpose of redeeming preference shares.

30 The dangers inherent in the use of dissolution procedure in such a case are obvious. The first is that the assets may be sold by the majority to themselves under the cloak of a new corporation at an unfair price and the second is the denial to the minority of the opportunity to participate.

31 I am not overlooking the case of *Castello v. London General Omnibus Co. Ltd.* [13], referred to in the reasons for judgment of the Court of Appeal. In that case the Court of Appeal in England refused to restrain a sale of assets to another company exclusively owned by the majority in the old company and compelled the minority in the old company to take a cash payment.

It is true that the cash payment was, on its face, a very generous one but the shareholders did not want cash. They wanted to stay with the company instead of being paid off. The case is referred to with approval in the judgment of the Court of Appeal but it is not the present case and I do not think it should receive approval in this Court. As far as I can see, it has never been referred to in any English or Canadian text and has never been judicially noticed either in England or in Canada.

32 I would dismiss the appeal with costs, including the costs of the application for leave to appeal.

*Appeal dismissed with costs, including the costs of the application for leave to appeal.*

Solicitors of record:
Solicitors for the appellants: *Wright & McTaggart*, Toronto.
Solicitors for the respondent: *Blake, Cassells & Graydon*, Toronto.

Footnotes

1 [1962] O.R. 162, 31 D.L.R. (2d) 331.

2 [1939] O.W.N. 52, 1 D.L.R. 779.

3 *Wakefield Rattan Co. v. Hamilton Whip Co.* (1894), 24 O.R. 107; *Re Maple Leaf Dairy Co.* (1901), 2 O.L.R. 590; *In re Strathy Wire Fence Co.* (1904), 8 O.L.R. 186; *Re Charles H. Davis Co. Limited* (1907), 9 O.W.R. 993; *Re Olympia Co.* (1915), 25 D.L.R. 620 (Man.); *Marsden v. Minnekahda Land Co.* (1918), 40 D.L.R. 76 (B.C.).

4 *In re London Suburban Bank* (1871), L.R. 6 Ch. App. 641; *In re Middlesborough Assembly Rooms Co.* (1880), 14 Ch. D. 104; *Re The Tomlin Patent Horse Shoe Co. Ltd.* (1886), 55 L.T. 314.

5 (1905), 13 Sc. L.T. 509.

6 [1924] A.C. 783.

7 (1867), L.R. 2 Ch. App. 737.

8 (1904), 74 Pac. 1004; 34 Wash. 23 (Wash. C.A.).

9 (1912), 82 A. 930 (N.J.C.A.).

10 (1918), 166 N.W. 1036 (Mich. C.A.).

11 (1920), 223 S.W. 600 (Mo. C.A.).

12 (1957), 317 P. 2d 1 (Calif. C.A.) at p. 5.

13 (1912), 107 L.T. 575.

# Tab 7

*Case Name:*

# Hollinger v. Hollinger

**SARAH KOPYTO HOLLINGER, Appellant**
**v.**
**LISA FRAN HOLLINGER, LISA FRAN HOLINGER, ès qualités of liquidator of the estate of Martin Hollinger, Respondent**
**and**
**MICHAEL PRADOS HOLLINGER, ANDREY JUNE HOLLINGER, ROBERT TORRALBO, BARBARA RUTH HOLLINGER, Impleaded Parties**

[2012] Q.J. No. 8912

2012 QCCA 1682

2012EXP-3514

EYB 2012-211490

No.: 500-09-022126-114 (500-11-021834-037)

Quebec Court of Appeal
District of Montreal

**The Honourable Yves-Marie Morissette J.A., Jacques R. Fournier J.A. and Marie St-Pierre J.A.**

Oral Judgment: September 21, 2012.

(21 paras.)

*Corporation law -- Corporations -- Shareholders -- Shareholder agreements -- Opposability -- Shares -- Sale and transfer -- Restrictions -- We cannot accept Hollinger's submission that the agreement would give her an unconditional right to claim funds, at her own and sole discretion, and with no obligation to establish, or even allege a need -- The facts establishing that in the future, and in all likelihood, Hollinger would not need funds to attend to her needs, as noted by the judge, provided the backdrop against which she had to exercise her discretion and she acted accordingly -- Appeal dismissed.*

Appeal by Hollinger from a judgment which declined to grant the order that she sought. Hollinger asked that a provision be made on the occasion of the liquidation of 157198 Canada Inc. (Company) to protect her interests under a unanimous shareholders' agreement entered into by the Company's shareholders. Hollinger contends that the judgment rests on an erroneous interpretation of s. 217(h) of the Canada Business Corporations Act. According to her, the judge misconstrued the provision, as if it only applied to present or future obligations, and she overlooked the possibility of making a provision for the discharge of a contingent obligation. Hollinger argues that her reasonable expectation of financial security under the agreement is being curtailed: the agreement provides for financial support in the event of future needs, with no obligation on her part to prove needs or to establish their quantum.

HELD: Appeal dismissed. We cannot accept Hollinger's submission that the agreement would give her an unconditional right to claim funds, at her own and sole discretion, and with no obligation to establish, or even allege a need. To provide for Hollinger's future needs, the agreement establishes a two steps formula where she can sell to the Company her class D share. Furthermore, should all Appellant's class D shares be sold, and should she still require funds, the creation of a new category of preferred shares to provide her with a right to unlimited dividends becomes possible. In such a framework, it is obvious that the words "require" and "still require" mean need, not just want. Therefore, one must dismiss the suggestion that the judge should have contemplated that the reasonable expectations of the signatories of the agreement included the possibility for Hollinger to exercise rights under the agreement even in the absence of any need for funds. Hollinger offered no evidence whatsoever of possible future needs. Indeed, the evidence leads to the conclusion that it can be reasonably anticipated that she will not require funds since she ought be perfectly able to provide for all her future needs, whatever they may be. The facts establishing that in the future, and in all likelihood, Hollinger would not need funds to attend to her needs, as noted by the judge, provided the backdrop against which she had to exercise her discretion, and she acted accordingly.

**Statutes, Regulations and Rules Cited:**

Canada Business Corporations Act, R.S.C., 1985, c. C-44, s. 217, s. 217(h)

**Court Summary:**

Winding-up order and order of appointment of a liquidator.

**Appeal from:**

On appeal from a judgement rendered on September 26, 2011 by the honourable Chantal Corriveau of the Superior Court.

**Counsel:**

Mtre Doug Mitchell, for the Appellant.

Mtre Max R. Bernard, for the Respondent.

Mtre Sandra Mastrogiuseppe, Me George G. Sand, for the Impleaded Parties.

---

**JUDGMENT**

**1** Sarah Kopyto Hollinger ("the Appellant") appeals from a judgment rendered on September 26, 2011, by the Superior Court, district of Montreal (the Honourable Madam Justice Chantal Corriveau). By this judgment, the Court declined to grant the order sought by the Appellant.

**2** The Appellant had asked that, pursuant to s. 217 (*h*) of the *Canada Business Corporations Act*[1] ("*CBCA*"), a provision be made on the occasion of the liquidation of 157198 Canada Inc. ("the Company") to protect her interests under a unanimous shareholders' agreement ("the agreement") entered into by the Company's shareholders.

**3** The Appellant contends that this judgment rests on an erroneous interpretation of s. 217 (*h*) of the *CBCA*. According to her, the judge misconstrued the provision, as if it only applied to present or future obligations, and she overlooked the possibility of making a provision for the discharge of a contingent obligation.

**4** The Appellant argues that her reasonable expectation of financial security under the agreement is being curtailed: the agreement provides for financial support in the event of future needs, with no obligation on her part to prove needs or to establish their quantum. She claims she has the right under the agreement to determine her own financial requirements and to receive unlimited dividends at any time and in her absolute discretion.

**5** Given the words "may" and "make any order it thinks fit" used by Parliament in s. 217 of the *CBCA*, the Respondent argues that the Act grants a discretionary power to the court to decide, in equity, whether or not any order should be made for the discharge of the Company's obligations.

**6** The Respondent further argues that a need for funds is a prerequisite to the exercise of the Appellant's rights under the agreement, whose language is very general and uses the words "*may require funds*" and "*should she still require funds*" in its second clause.

**7** The Respondent emphasises that, according to the uncontested evidence heard below:

- the Appellant was 74 years of age at the time of the hearing;
- she had never lacked funds to provide for all her needs;
- she had never exercised the right to sell any of her class D shares under clause 2 (a) of the agreement since its signature in 1997;

- she never was in need to exercise the right to sell any of her class D shares under article 2 (a) of the agreement since its signature in 1997;

she would receive close to 1.2 million $ from the liquidation of the Company, to add to her other assets of more than 4.6 million $ and to her annual income of 228 034,00 $ (as of 2009), the control of which rests in her hands.

**8** In light of the specific facts and circumstances of the case, the Respondent concludes that the judge exercised her discretion judicially and judiciously and that, absent any palpable and overriding error of fact, our Court should not intervene.

**9** S. 217 (*h*) of the *CBCA* reads as follows:

> **217**. In connection with the dissolution or the liquidation and dissolution of a corporation, the court **may**, if it is satisfied that the corporation is able to pay or adequately provide for the discharge of all its obligations, **make any order it thinks fit** including, without limiting the generality of the foregoing.
>
> (...)
>
> (h) an order approving the payment, satisfaction or compromise of claims against the corporation and the **retention of assets for such purpose**, and determining the **adequacy of provisions** for the payment or discharge of obligations of the corporation, whether liquidated, unliquidated, future or contingent;
>
> (Emphasis added)

**10** As for the agreement, it reads in its entirety, as follows:

> July 23, 1997
>
> We, the undersigned, being all shareholders of 157198 Canada Inc. (the "CORPORATION") hereby agree as follows:
>
> 1. Lisa Hollinger, Michael Hollinger, Barbara Hollinger and Andrey Hollinger (hereinafter collectively referred to as the "CHILDREN") acknowledge that, in the past, Sarah Hollinger has conveyed shares in the capital stock of family companies to us and has also frozen her interest in various family companies, the whole to the benefit of the CHILDREN;
> 2. The CHILDREN further acknowledge that, in the future, Sarah may require

funds on an ongoing basis. The CHILDREN hereby consent and agree to the following procedures:

(a) at any time or times, Sarah may enter into an agreement or agreements with the CORPORATION pursuant to which she shall sell such number of Class D preferred shares of the CORPORATION to the CORPORATION for cancellation as she desires;

the CHILDREN acknowledge that such sales are more favourable to the CHILDREN than the receipt by Sarah of dividends on the said Class D preferred shares;

(b) should all of Sarah's Class D shares have been cancelled and should she still require funds, the CHILDREN hereby consent and agree that all corporate procedures be adopted to amend the charter of the CORPORATION to authorize a class of preferred shares which will have a nominal redemption value, but a right to unlimited dividends; Sarah shall subscribe for a nominal number of such newly authorized shares at a nominal subscription price and shall thereafter be entitled to receive such dividend or dividends, at such time or times, as she may decide in her absolute discretion;

(c) the CHILDREN agree to sign any and all corporate and other documentation required to implement the foregoing and hereby irrevocably appoint Sarah as their proxy to sign such documentation.

The parties acknowledge that they have required and consented that this agreement be drawn up in the English language.

Les parties reconnaissent avoir exigé que la présente convention soit rédigée en anglais.

(Emphasis added)

**11** We cannot accept the Appellant's submission that the agreement would give her an unconditional right to claim funds, at her own and sole discretion, and with no obligation to establish, or even allege, a need.

**12** To provide for the Appellant's future needs, clause 2 of the agreement establishes a two steps formula:

1. First step - section (a): the Appellant can sell to the Company such number of her class D shares as she desires;
2. Second step - section (b): should all Appellant's class D shares be sold, and should she still require funds, the creation of a new category of preferred shares to provide her with a right to unlimited dividends becomes possible.

**13** In such a framework, it is obvious that the words "require" and "still require" mean need, not just want.

**14** Therefore, one must dismiss the suggestion that the judge should have contemplated that the reasonable expectations of the signatories of the agreement included the possibility for the Appellant to exercise rights under clause 2 of the agreement even in the absence of any need for funds.

**15** S. 217 of the *CBCA* grants Courts broad discretionary powers in the liquidation process, including the power to make provisions for the payment of liquidated, unliquidated, future or contingent obligation of the corporation.

**16** The judge did not fail to recognize that s. 217 (*h*) of the *CBCA* allowed her to make a provision. In paragraphs 104 to 112 of her judgment, she expressly acknowledges that she has a discretion in that regard, despite the fact that the liquidation of the Company is not a scenario contemplated in the agreement.

**17** The judge did not conclude that there was a legal impediment to the making of an order. While she accepted that an order could be made in theory, she concluded that it should not be made in the particular circumstances of the case and in light of the reasonable expectations of the Appellant.

**18** The Appellant offered no evidence whatsoever of possible future needs. Indeed, the evidence leads to the conclusion that it can be reasonably anticipated that she will not require funds since she ought be perfectly able to provide for all her future needs, whatever they may be.

**19** The facts establishing that in the future, and in all likelihood, the Appellant would not need funds to attend to her needs, as noted by the judge in paragraphs 98 to 100 of her judgment, provided the backdrop against which she had to exercise her discretion and she acted accordingly.

**20** In light of the above, we have no hesitation to conclude that the trial judge exercised her discretion both judicially and judiciously.

**21** The appeal is therefore dismissed with costs.

YVES-MARIE MORISSETTE, J.A.
JACQUES R. FOURNIER, J.A.

MARIE ST-PIERRE, J.A.

cp/e/qlspt/qlmlt

1 R.S.C., 1985, c. C-44.

# Tab 8

*Case Name:*

# Falus v. Martap Developments 87 Ltd.

**Between**
**Thomas Falus, Applicant (Appellant), and**
**Martap Developments 87 Limited, Vince Benedetto, Antoinette Benedetto, Andrew Benedetto, Paul Benedetto and Julia McGeown, Respondents**

[2013] O.J. No. 2881

**2013 ONSC 4115**

17 B.L.R. (5th) 49

2013 CarswellOnt 8461

229 A.C.W.S. (3d) 423

Divisional Court File No. 411/12

Ontario Superior Court of Justice
Divisional Court - Toronto, Ontario

**K.E. Swinton, T.P. Herman and T.R. Lederer JJ.**

Heard: June 13, 2013.
Oral judgment: June 13, 2013.

(9 paras.)

**Counsel:**

*Michael J. W. Round*, for the Appellant.

*Ronald B. Moldaver, Q.C.*, for the Respondents, Vince Benedetto, Antoinette Benedetto, Andrew Benedetto, Paul Benedetto and Julia McGeown.

The judgment of the Court was delivered by

**1 K.E. SWINTON J.** (orally):-- The application judge had a broad discretion as to whether to order the winding-up of the corporation or order other equitable relief pursuant to s. 207(1)(b)(iv) and 207(2) of the *Business Corporations Act*, R.S.O. 1990, c. B. 16. He set out the correct legal principles, noting the courts usually intervene where there has been a breakdown in mutual confidence such that the parties cannot work together as mutually contemplated or a party's ability to exercise his legal rights in the governance of the corporation has been impaired.

**2** In particular, the application judge quoted from the decision of Wilton Siegel J. in *Animal House Investments Inc. v. Lisgar Development Ltd.* (2007), 87 O.R. (3d) 529 (S.C.J.) [upheld [2008] O.J. No. 2240 (Div. Ct.)] at para. 46 of his Reasons, emphasizing the following sentence:

> Accordingly, incompatibility is significant only insofar as it has resulted in a state of affairs in which the reasonable expectations of the parties are unattainable and from which the Court can reasonably infer that the business arrangement between the parties has been repudiated or terminated.

**3** The application judge found that the disagreement between the parties had not impaired the operations of the corporation nor impaired the ability of either shareholder to exercise his legal rights in the governance of the corporation. He rejected the appellant's argument that he had a reasonable expectation that he would only have to deal with Vince in the management and affairs of the corporation, basing his conclusion on the failure of the parties to deal with retirement or withdrawal at the time of the incorporation of the company, the long-term nature of the corporation's business and Tom's agreement to allow Vince's children to participate in the corporation's governance.

**4** The appellant argues that the application judge erred in failing to consider what the parties would have contemplated with respect to retirement or exit had they turned their minds to this issue in 1987. He also argues that the application judge should have taken into account the *Partnership Act* exit provisions.

**5** In our view, there was no legal error. The application judge correctly held that the *Partnership Act* did not apply, as he was dealing with dissolution of a corporation. However, he did consider cases in which the courts have intervened in the affairs of a partnership operating in the guise of a corporation.

**6** A full and complete reading of the Reasons of the application judge leads to the conclusion that he appropriately considered the reasonable expectation of the parties at the time of incorporation and through the years of the corporation's operations.

**7** The application judge had a broad discretion whether to grant the equitable relief sought. He found there was no irreconcilable conflict or exclusion from management and no reasonable expectation of the parties over the life of the corporation that there would be a wind-up or a forced sale of shares if either of the original parties no longer wished to remain active in the business. Accordingly, he concluded that the relief sought should not be granted.

**8** The appellant has not demonstrated any palpable and overriding error of fact nor any error of law. Therefore, the appeal is dismissed.

**COSTS**

**9** I have endorsed the back of the Appeal Book, "This appeal is dismissed for oral reasons delivered in court today. Costs to the respondent fixed at $6,000 all inclusive."

K.E. SWINTON J.
T.P. HERMAN J.
T.R. LEDERER J.

# Tab 9

*Indexed as:*

# Hercules Managements Ltd. v. Ernst & Young

**Hercules Managements Ltd., Guardian Finance of Canada Ltd. and Max Freed, appellants (plaintiffs/respondents), and Friendly Family Farms Ltd., Woodvale Enterprises Ltd., Arlington Management Consultants Ltd., Emarjay Holdings Ltd. and David Korn, (plaintiffs);**

**v.**

**Ernst & Young and Alexander Cox, respondents (defendants/applicants), and Max Freed, David Korn and Marshall Freed, (third parties), and The Canadian Institute of Chartered Accountants, intervener.**

**[1997] 2 S.C.R. 165**

[1997] 2 R.C.S. 165

[1997] S.C.J. No. 51

[1997] A.C.S. no 51

File No.: 24882.

Supreme Court of Canada

1996: December 6 / 1997: May 22.

**Present: La Forest, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.**

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

*Negligence -- Negligent misrepresentation -- Auditors' report prepared for company -- Report required by statute -- Individual investors alleging investment losses and losses in value of existing shareholdings incurred because of reliance on audit reports -- Whether auditors owed individual investors a duty of care with respect to the investment losses and the losses in the value of existing shareholdings -- Whether the rule in Foss v. Harbottle affects the appellants' action.*

Northguard Acceptance Ltd. ("NGA") and Northguard Holdings Ltd. ("NGH") carried on business lending and investing money on the security of real property mortgages. The appellant Guardian Finance of Canada Ltd. ("Guardian") was the sole shareholder of NGH and it held non-voting class B shares in NGA. The appellants Hercules Managements Ltd. ("Hercules") and Max Freed were also shareholders in NGA. At all relevant times, ownership in the corporations was separated from management. The respondent Ernst & Young was originally hired by NGA and NGH in 1971 to perform annual audits of their financial statements and to provide audit reports to the companies' shareholders. The partner in charge of the audits for the years 1980 and 1981, Cox, held personal investments in some of the syndicated mortgages administered by NGA and NGH.

In 1984, both NGA and NGH went into receivership. The appellants, and a number of other shareholders or investors in NGA, brought an action against the respondents in 1988 alleging that the audit reports for the years 1980, 1981 and 1982 were negligently prepared and that in reliance on these reports, they suffered various financial losses. They also alleged that a contract existed between themselves and the respondents in which the respondents explicitly undertook to protect the shareholders' individual interests in the audits as distinct from the interests of the corporations themselves.

The respondents brought a motion for summary judgment in the Manitoba Court of Queen's Bench seeking to have the plaintiffs' claims dismissed. The grounds for the motion were (a) that there was no contract between the plaintiffs and the respondents; (b) that the respondents did not owe the individual plaintiffs any duty of care in tort; and (c) that the claims asserted by the plaintiffs could only properly be brought by the corporations themselves and not by the shareholders individually. The motions judge granted the motion with respect to four plaintiffs, including the appellants, and dismissed their actions on the basis that they raised no genuine issues for trial. By agreement, the claims of the remaining plaintiffs were adjourned sine die. An appeal to the Manitoba Court of Appeal was unanimously dismissed with costs.

At issue here are: (1) whether the respondents owe the appellants a duty of care with respect to (a) the investment losses they incurred allegedly as a result of reliance on the 1980-82 audit reports, and (b) the losses in the value of their existing shareholdings they incurred allegedly as a result of reliance on the 1980-82 audit reports; and (2) whether the rule in Foss v. Harbottle (which provides that individual shareholders have no cause of action in law for any wrongs done to the corporation) affects the appellants' action.

Held: The appeal should be dismissed.

Four preliminary matters were addressed before the principal issue. Firstly, the question to be decided on a motion for summary judgment under rule 20 of the Manitoba Court of Queen's Bench Rules is whether there is a genuine issue for trial. Although a defendant who seeks dismissal of an action has an initial burden of showing that the case is one in which the existence of a genuine issue

is a proper question for consideration, it is the plaintiff who must then, according to the rule, establish his claim as being one with a real chance of success. Thus, the appellants (who were the plaintiffs-respondents on the motion) bore the burden of establishing that their claim had "a real chance of success". Secondly, no contract existed between the appellant shareholders and the respondents and, in any event, the contract claim was not properly before this Court. Consequently, the appellants' submissions in this regard must fail. Thirdly, the independence requirements set out in s. 155 of the Manitoba Corporations Act do not themselves give rise to a cause of action in negligence. Similarly, breach of those independence requirements could not establish a duty of care in tort. Finally, it was not necessary to inquire into whether the appellants actually relied on the audited reports prepared by the respondents because the finding of an absence of a duty of care rendered the question of actual reliance inconsequential.

The existence of a duty of care in tort is to be determined through an application of the two-part Anns/Kamloops test (Anns v. Merton London Borough Council; Kamloops (City of) v. Nielsen). That approach should be taken here. To create a "pocket" of negligent misrepresentation cases in which the existence of a duty of care is determined differently from other negligence cases would be incorrect. Whether the respondents owe the appellants a duty of care for their allegedly negligent preparation of the audit reports, therefore, depends on (a) whether a prima facie duty of care is owed, and (b) whether that duty, if it exists, is negated or limited by policy considerations.

The existence of a relationship of "neighbourhood" or "proximity" distinguishes those circumstances in which the defendant owes a prima facie duty of care to the plaintiff from those where no such duty exists. In the context of a negligent misrepresentation action, deciding whether a prima facie duty of care exists necessitates an investigation into whether the defendant-representor and the plaintiff-representee can be said to be in a relationship of proximity or neighbourhood. The term "proximity" itself is nothing more than a label expressing a result, judgment or conclusion and does not, in and of itself, provide a principled basis on which to make a legal determination.

"Proximity" in negligent misrepresentation cases pertains to some aspect of the relationship of reliance. It inheres when (a) the defendant ought reasonably to foresee that the plaintiff will rely on his or her representation, and (b) reliance by the plaintiff would, in the particular circumstances of the case, be reasonable.

Looking to whether reliance by the plaintiff would be reasonable in determining whether a prima facie duty of care exists (as opposed to looking at reasonable foreseeability alone) is not to abandon the basic tenets underlying the first branch of the Anns/Kamloops test. While specific inquiries into the reasonableness of the plaintiff's expectations are not normally required in the context of physical damage cases (since the law has come to recognize implicitly that plaintiffs are reasonable in expecting that defendants will take reasonable care of their persons and property), such an inquiry is necessary in the negligent misrepresentation context. This is because reliance by a plaintiff on a defendant's representation will not always be reasonable. Only by inquiring into the reasonableness of the plaintiff's reliance will the Anns/Kamloops test be applied consistently in both contexts.

The reasonable foreseeability/reasonable reliance test for determining a prima facie duty of care is somewhat broader than the tests used both in the cases decided before Anns and in those that have rejected the Anns approach. Those cases typically require (a) that the defendant know the identity of either the plaintiff or the class of plaintiffs who will rely on the statement, and (b) that the reliance losses claimed by the plaintiff stem from the particular transaction in respect of which the statement at issue was made. In reality, inquiring into such matters is nothing more than a means by which to circumscribe -- for reasons of policy -- the scope of a representor's potentially infinite liability. In other words, adding further requirements to the duty of care test provides a means by which concerns that are extrinsic to simple justice -- but that are, nevertheless, fundamentally important -- may be taken into account in assessing whether the defendant should be compelled to compensate the plaintiff for losses suffered.

In light of this Court's endorsement of the Anns/Kamloops test, enquiries concerning (a) the defendant's knowledge of the identity of the plaintiff (or of the class of plaintiffs) and (b) the use to which the statements at issue are put may now quite properly be conducted in the second branch of that test when deciding whether policy considerations ought to negate or limit a prima facie duty that has already been found to exist. Criteria that in other cases have been used to define the legal test for the duty of care can now be recognized as policy-based ways by which to curtail liability and they can appropriately be considered under the policy branch of the Anns/Kamloops test.

The fundamental policy consideration that must be addressed in negligent misrepresentation actions centres around the possibility that the defendant might be exposed to "liability in an indeterminate amount for an indeterminate time to an indeterminate class". While the criteria of reasonable foreseeability and reasonable reliance serve to distinguish cases where a prima facie duty is owed from those where it is not, these criteria can, in certain types of situations, quite easily be satisfied and, absent some means by which to circumscribe the ambit of the duty, the prospect of limitless liability will loom. The general area of auditors' liability is a case in point. Here, the problem of indeterminate liability will often arise because the reasonable foreseeability/reasonable reliance test for ascertaining a prima facie duty of care may be satisfied in many, even if not all, such cases.

While policy concerns surrounding indeterminate liability will serve to negate a prima facie duty of care in many auditors' negligence cases, there may be particular situations where such concerns do not inhere. The specific factual matrix of a given case may render it an "exception" to the general class of cases, in that while considerations of proximity might militate in favour of finding that a duty of care inheres, the typical policy considerations stemming from indeterminate liability do not arise.

This concept can be articulated within the framework of the Anns/Kamloops test. Under this test, factors such as (1) whether the defendant knew the identity of the plaintiff (or the class of plaintiff) and (2) whether the defendant's statements were used for the specific purpose or transaction for which they were made ought properly to be considered in the "policy" branch of the test once the first branch concerning "proximity" has been found to be satisfied. The absence of these factors will

normally mean that concerns over indeterminate liability inhere and, therefore, that the prima facie duty of care will be negated. Their presence, however, will mean that worries stemming from indeterminacy should not arise since the scope of liability is sufficiently delimited. In such cases, policy considerations will not override a positive finding on the first branch of the Anns/Kamloops test and a duty of care will quite properly be found to exist.

On the facts of this case, the respondents clearly owed a prima facie duty of care to the appellants. Firstly, the possibility that the appellants would rely on the audited financial statements in conducting their affairs and that they might suffer harm if the reports were negligently prepared must have been reasonably foreseeable to the respondents. Secondly, reliance on the audited statements by the appellant shareholders would, on the facts, be reasonable given both the relationship between the parties and the nature of the statements themselves. The first branch of the Anns/Kamloops test is therefore satisfied.

As regards the second branch of this test, it is clear that the respondents knew the identity of the appellants when they provided the audit reports. In determining whether this case is an "exception" to the generally prevailing policy concerns regarding auditors, the central question is therefore whether the appellants can be said to have used the audit reports for the specific purpose for which they were prepared. The answer will determine whether policy considerations surrounding indeterminate liability ought to negate the prima facie duty of care owed by the respondents.

The respondent auditors' purpose in preparing the reports was to assist the collectivity of shareholders of the audited companies in their task of overseeing management. The respondents did not prepare the audit reports in order to assist the appellants in making personal investment decisions or, indeed, for any purpose other than the standard statutory one. The only purpose for which the reports could have been used so as to give rise to a duty of care on the part of the respondents, therefore, is as a guide for the shareholders, as a group, in supervising or overseeing management.

In light of this finding, the specific claims of the appellants could each be assessed. Those claims were in respect of: (1) moneys injected into NGA and NGH by Hercules and Freed, and (2) the devaluation of existing equity caused by the appellants' alleged inability (a) to oversee personal investments properly, and (b) to supervise the management of the corporations with a view to protecting their personal holdings.

As regards the first claim, the appellants alleged that they relied on the respondents' audit reports for the purpose of making individual investments. Since this was not a purpose for which the reports were prepared, policy concerns surrounding indeterminate liability are not obviated and these claims must fail. Similarly, the first branch of the appellants' second claim must fail since monitoring existing personal investments is likewise not a purpose for which the audited statements were prepared.

With respect to the second branch relating to the devaluation of appellants' equity, the appellants'

position may at first seem consistent with the purpose for which the reports were prepared. In reality, however, their claim did not involve the purpose of overseeing management per se. Rather, it ultimately depended on being able to use the auditors' reports for the individual purpose of overseeing their own investments. Thus, the purpose for which the reports were used was not, in fact, consistent with the purpose for which they were prepared. The policy concerns surrounding indeterminate liability accordingly inhered and the prima facie duty of care was negated in respect of this claim as well.

The absence of a duty of care with respect to the appellant's alleged inability to supervise management in order to monitor their individual investments is consistent with the rule in Foss v. Harbottle which provides that individual shareholders have no cause of action for wrongs done to the corporation. When, as a collectivity, shareholders oversee the activities of a corporation through resolutions adopted at shareholder meetings, they assume what may be seen to be a "managerial" role. In this capacity, they cannot properly be understood to be acting simply as individual holders of equity. Rather, their collective decisions are made in respect of the corporation itself. Any duty owed by auditors in respect of this aspect of the shareholders' functions is owed not to shareholders qua individuals, but rather to all shareholders as a group, acting in the interests of the corporation. Since the decisions taken by the collectivity of shareholders are in respect of the corporation's affairs, the shareholders' reliance on negligently prepared audit reports in taking such decisions will result in a wrong to the corporation for which the shareholders cannot, as individuals, recover. A derivative action would have been the proper method of proceeding with respect to this claim.

**Cases Cited**

Considered: Fidkalo v. Levin (1992), 76 Man. R. (2d) 267; Caparo Industries plc. v. Dickman, [1990] 1 All E.R. 568; Anns v. Merton London Borough Council, [1978] A.C. 728; Kamloops (City of) v. Nielsen, [1984] 2 S.C.R. 2; Canadian National Railway Co. v. Norsk Pacific Steamship Co., [1992] 1 S.C.R. 1021; Hedley Byrne & Co. v. Heller & Partners Ltd., [1964] A.C. 465; Haig v. Bamford, [1977] 1 S.C.R. 466; Ultramares Corp. v. Touche, 174 N.E. 441 (1931); Glanzer v. Shepard, 135 N.E. 275 (1922); referred to: Foss v. Harbottle (1843), 2 Hare 460, 67 E.R. 189; Hercules Management Ltd. v. Clarkson Gordon (1994), 91 Man. R. (2d) 216; R. in right of Canada v. Saskatchewan Wheat Pool, [1983] 1 S.C.R. 205; Queen v. Cognos Inc., [1993] 1 S.C.R. 87; Murphy v. Brentwood District Council, [1991] 1 A.C. 398; Sutherland Shire Council v. Heyman (1985), 60 A.L.R. 1; B.D.C. Ltd. v. Hofstrand Farms Ltd., [1986] 1 S.C.R. 228; London Drugs Ltd. v. Kuehne & Nagel International Ltd., [1992] 3 S.C.R. 299; Winnipeg Condominium Corporation No. 36 v. Bird Construction Co., [1995] 1 S.C.R. 85; Edgeworth Construction Ltd. v. N. D. Lea & Associates Ltd., [1993] 3 S.C.R. 206; Scott Group Ltd. v. McFarlane, [1978] 1 N.Z.L.R. 553; Donoghue v. Stevenson, [1932] A.C. 562; Candler v. Crane, Christmas & Co., [1951] 2 K.B. 164; H. Rosenblum (1983), Inc. v. Adler, 461 A.2d 138 (1983); Roman Corp. Ltd. v. Peat Marwick Thorne (1992), 11 O.R. (3d) 248; Roman Corp. v. Peat Marwick Thorne (1993), 12 B.L.R. (2d) 10; Prudential Assurance Co. v. Newman Industries Ltd. (No. 2), [1982] 1 All E.R. 354; Goldex Mines Ltd. v. Revill (1974), 7 O.R. (2d) 216.

**Statutes and Regulations Cited**

Business Corporations Act, R.S.O. 1990, c. B.16.
Companies Act 1985 (U.K.), 1985, c. 6.
Corporations Act, R.S.M. 1987, c. C225, ss. 149(1), 155(1), (2), (6), 163(1), 232.
Court of Queen's Bench Rules, Man. Reg. 553/88, Rule 20.03(1).

**Authors Cited**

Cheffins, Brian R. "Auditors' Liability in the House of Lords: A Signal Canadian Courts Should Follow" (1991), 18 C.B.L.J. 118.
Cherniak, Earl A., and Kirk F. Stevens. "Two Steps Forward or One Step Back? Anns at the Crossroads in Canada" (1992), 20 C.B.L.J. 164.
Feldthusen, Bruce. Economic Negligence, 3rd ed. Scarborough: Carswell, 1994.
Fleming, J. G. "The Negligent Auditor and Shareholders" (1990), 106 L.Q. Rev. 349.
Ivankovich, Ivan F. "Accountants and Third-Party Liability -- Back to the Future" (1991), 23 Ottawa L. Rev. 505.
McHugh, M. H. "Neighbourhood, Proximity and Reliance". In P. D. Finn, ed., Essays on Torts. Sydney: Law Book Co., 1989.
Sexton, J. Edgar, and John W. Stevens. "Accountants' Legal Responsibilities and Liabilities". In Meredith Memorial Lectures 1983-84, Professional Responsibility in Civil Law and Common Law. Faculty of Law, McGill University. Don Mills, Ont.: Richard De Boo, 1985, 88.
Stapleton, Jane. "Duty of Care and Economic Loss: a Wider Agenda" (1991), 107 L.Q. Rev. 249.
Wiener, Howard B. "Common Law Liability of the Certified Public Accountant for Negligent Misrepresentation" (1983), 20 San Diego L. Rev. 233.

APPEAL from a judgment of the Manitoba Court of Appeal (1995), 102 Man. R. (2d) 241, 93 W.A.C. 241, 125 D.L.R. (4th) 353, 19 B.L.R. (2d) 137, 24 C.C.L.T. (2d) 284, dismissing an appeal from judgment by Dureault J. Appeal dismissed.

Mark M. Schulman, Q.C., and Brian A. Crane, Q.C., for the appellants.
Robert P. Armstrong, Q.C., and Thor J. Hansell, for the respondents.
W. Ian C. Binnie, Q.C., and Geoff R. Hall, for the intervener.

Solicitors for the appellants: Schulman & Schulman, Winnipeg.
Solicitors for the respondents: Aikins, MacAulay, Thorvaldson, Winnipeg.
Solicitors for the intervener: McCarthy, Tétrault, Toronto.

The judgment of the Court was delivered by

1 **LA FOREST J.**:-- This appeal arises by way of motion for summary judgment. It concerns the issue of whether and when accountants who perform an audit of a corporation's financial statements owe a duty of care in tort to shareholders of the corporation who claim to have suffered losses in reliance on the audited statements. It also raises the question of whether certain types of claims against auditors may properly be brought by shareholders as individuals or whether they must be brought by the corporation in the form of a derivative action.

Facts

2 Northguard Acceptance Ltd. ("NGA") and Northguard Holdings Ltd. ("NGH") carried on business lending and investing money on the security of real property mortgages. The appellant Guardian Finance of Canada Ltd. ("Guardian") was the sole shareholder of NGH and it held non-voting class B shares in NGA. The appellants Hercules Managements Ltd. ("Hercules") and Max Freed were also shareholders in NGA. At all relevant times, ownership in the corporations was separated from management. The respondent Ernst & Young (formerly known as Clarkson Gordon) is a firm of chartered accountants that was originally hired by NGA and NGH in 1971 to perform annual audits of their financial statements and to provide audit reports to the companies' shareholders. The partner in charge of the audits for the years 1980 and 1981 is the respondent William Alexander Cox. Mr. Cox held personal investments in some of the syndicated mortgages administered by NGA and NGH.

3 In 1984, both NGA and NGH went into receivership. The appellants, as well as Friendly Family Farms Ltd. ("F.F. Farms"), Woodvale Enterprises Ltd. ("Woodvale"), Arlington Management Consultants Ltd. ("Arlington"), Emarjay Holdings Ltd. ("Emarjay") and David Korn (all of whom were shareholders or investors in NGA) brought an action against the respondents in 1988 alleging that the audit reports for the years 1980, 1981 and 1982 were negligently prepared and that in reliance on these reports, they suffered various financial losses. More specifically, the appellant Hercules sought damages for advances totalling $600,000 which it made to NGA in January and February of 1983, and the appellant Freed sought damages for monies he added to an investment account in NGH in 1982. All the plaintiffs claimed damages in tort for the losses they suffered in the value of their existing shareholdings. In addition to their tort claims, the plaintiffs also alleged that a contract existed between themselves and the respondents in which the respondents explicitly undertook, as of 1978, to protect the shareholders' individual interests in the audits as distinct from the interests of the corporations themselves.

4 After a series of amendments to the initial statement of claim, over 40 days of discovery, and numerous pre-trial conferences and case management sessions, the respondents brought a motion for summary judgment in the Manitoba Court of Queen's Bench seeking to have the plaintiffs' claims dismissed. The grounds for the motion were (a) that there was no contract between the

plaintiffs and the respondents; (b) that the respondents did not owe the individual plaintiffs any duty of care in tort; and (c) that the claims asserted by the plaintiffs could only properly be brought by the corporations themselves and not by the shareholders individually. The motions judge granted the motion with respect to the plaintiffs Hercules, F.F. Farms, Woodvale, Guardian and Freed and dismissed their actions on the basis that they raised no genuine issues for trial. By agreement, the claims of the remaining plaintiffs were adjourned sine die. An appeal to the Manitoba Court of Appeal by Hercules, Guardian and Freed was unanimously dismissed with costs. Leave to appeal to this Court was granted on March 7, 1996 and the appeal was heard on December 6, 1996.

Judicial History

Manitoba Court of Queen's Bench

**5** Dureault J. began his reasons by noting that only the claims of Hercules, F.F. Farms, Woodvale, Guardian and Freed had to be addressed since, by agreement, the claims of the other plaintiffs had been adjourned. He then proceeded to set out the appropriate test to be applied in summary judgment motions. Referring to Rule 20.03(1) of the Manitoba Court of Queen's Bench Rules, Reg. 553/88, (which governs summary judgment motions) and citing Fidkalo v. Levin (1992), 76 Man. R. (2d) 267 (C.A.), he explained that while the defendant bears the initial burden of proving that the case is one where the question whether there exists a genuine issue for trial can properly be raised, the plaintiff bears the subsequent burden of establishing that his claim has a real chance of success.

**6** After rejecting the claim of the plaintiff F.F. Farms on the ground that it failed from the outset to establish any cause of action, Dureault J. turned to the more substantive issues in the motion. He began by addressing the question whether the plaintiffs qua shareholders may properly bring an action for the devaluation in their shareholdings in NGA and NGH, and held that

> . . . shareholders have no cause of action in law for any wrongs which may have been inflicted upon a corporation. This principle of law is often referred to as "the rule in Foss v. Harbottle". The plaintiff shareholders are trying to get around this principle. At best, if any wrong was done in the conduct of the defendants' audits, it was done to [NGA] and [NGH] and cannot be considered an injury sustained by the shareholders.

Dureault J. found on this basis that the claims of Hercules, Guardian, Woodvale and Freed did not disclose any genuine issue for trial since they ought to have been brought by the corporations and not by the plaintiffs as individual shareholders.

**7** The motions judge next addressed the question whether any duty of care in tort was owed by the defendants to the plaintiffs in their capacities as either shareholders or investors in the audited corporations. He noted that

> [g]enerally speaking, the law requires more than foreseeability and reliance. Actual knowledge on the part of the accountant/auditor of the limited class that will use and rely on the statements, referred to as the "proximity test", is also required.

Adopting the defendants' submissions on this issue, Dureault J. found that no duty of care was owed the plaintiffs because the audited statements were not prepared specifically for the purpose of assisting them in making investment decisions.

**8** Finally, Dureault J. addressed the plaintiffs' claim that their losses stemmed from a breach of contract by the defendants. He recognized that the engagement of the auditors by the corporations is a contractual relationship, but rejected the contention that this relationship can be extended to include the shareholders so as to permit them to bring personal actions against the auditors in the event of breach. Finding that none of the plaintiffs' claims raised a genuine issue for trial, Dureault J. granted the motion with costs.

Manitoba Court of Appeal (1995), 102 Man. R. (2d) 241 (Philp, Lyon and Helper JJ.A.)

**9** An appeal was brought to the Manitoba Court of Appeal by Hercules, Guardian and Freed. Helper J.A., writing for the court, began her reasons by finding that the learned motions judge had correctly applied the Fidkalo test for summary judgment motion under Rule 20.03(1) She also distinguished that test from that applicable on a motion to strike pleadings on the ground that, unlike the situation on a motion to strike, a Rule 20 motion requires an examination of the evidence in support of the plaintiff's claim.

**10** Turning to the question whether the respondents owed a duty of care in tort to the appellants, Helper J.A. noted the latter's two alternative submissions. The first (at p. 244) was that

> . . . a common law duty of care arose . . . because the respondents knew or ought to have known: i) that the appellants were relying on the audited statements and the services and advice provided by the respondents; ii) the purpose for which the appellants would rely upon the respondents' services and statements; iii) that the appellants did so rely upon those audited statements for investment and other purposes; and iv) that the respondents breached their duties to the appellants thereby causing them a financial loss.

In response to this claim, Helper J.A. explained, the respondents contended that the appellants were simply trying to avoid the rule in Foss v. Harbottle (1843), 2 Hare 460, 67 E.R. 189 (H.L.), by asserting their claims as individual shareholders rather than by way of derivative action. The respondents also argued that they had no knowledge that investments would be made on the basis of the audited statements and that there was no evidence to support the contention that they ought to have known that their reports would be relied upon in this manner. Finally, Helper J.A. noted, the respondents asserted that there was no evidence demonstrating that the appellants had, in fact, relied

on the audited statements at issue.

**11** In analysing this first main submission, Helper J.A. undertook a thorough review of Caparo Industries plc. v. Dickman, [1990] 1 All E.R. 568, where the House of Lords considered the question of the scope of the duty of care owed by auditors to shareholders and investors. After reviewing the Canadian case law on the matter, she concluded, at p. 248, that

> [t]he appellants were unable to direct this court to any evidence in support of their position which was ignored by the motions judge. Nor am I persuaded that the order dismissing the appellants' claims is contrary to the existing jurisprudence.
>
> The evidence showed that the auditors had prepared the annual reports to comply with their statutory obligations. There was a total absence of evidence to indicate the respondents knew the appellants would rely upon the reports for any specific purpose or that the appellants did rely upon the reports before infusing more capital into their companies. The appellants were content to allow management to continue running the companies despite a drop in profitability reflected in the 1982 audited report and invested more capital in the face of that report. The evidence filed in opposition to the motion did not support the appellants' claim on this issue.

In the view of the Manitoba Court of Appeal, then, the first of the appellants' submissions regarding the existence of a duty of care could not succeed.

**12** The appellants' second main submission concerning the existence of a duty of care consisted in an allegation that the respondent auditors contravened the statutory independence requirements set out in s. 155 of the Manitoba Corporations Act, R.S.M. 1987, c. C225, and that this in itself gave rise to a cause of action in the individual shareholders. The relevant portions of s. 155 are as follows:

> 155(1) Subject to subsection (5), a person is disqualified from being an auditor of a corporation if he is not independent of the corporation, all of its affiliates, and the directors or officers of the corporation and its affiliates.
>
> 155(2) For the purposes of this section,
>
> (a) independence is a question of fact; and

(b) a person is deemed not to be independent if he or his business partner

(i) is a business partner, a director, an officer or an employee of the corporation or any of its affiliates, or a business partner of any director, officer or employee of the corporation or any of its affiliates, or
(ii) beneficially owns or controls, directly or indirectly, a material interest in the securities of the corporation or any of its affiliates, or
(iii) has been a receiver, receiver-manager, liquidator or trustee in bankruptcy of the corporation or any of its affiliates within two years of his proposed appointment as auditor of the corporation.

. . .

155(6) The shareholders of a corporation may resolve to appoint as auditor, a person otherwise disqualified under subsections (1) and (2) if the resolution is consented to by all the shareholders including shareholders not otherwise entitled to vote.

Specifically, the appellants alleged that because s. 155(6) of the Act allows a single shareholder to exercise a veto power over the appointment of the auditors, each shareholder also has a right of action against the auditors where damage has been occasioned by a breach of the independence requirement in s. 155(2). Helper J.A. rejected this submission both on the ground that it was unsupported by authority and on the basis that the wording of s. 155 as a whole does not suggest the interpretation urged by the appellants.

**13** Finally, Helper J.A. addressed the appellants' contractual claim and held that the respondents' engagement to audit the financial statements of NGA and NGH in accordance with the Act did not give rise to a contractual relationship between them and the appellants. Similarly, she found the appellants could not sue on the contract between the corporations and the respondent Ernst & Young because of the lack of privity. Finding no evidence to support the existence of the requisite contractual relationship, Helper J.A. rejected the appellants' claim in this regard. For all these reasons, the Court of Appeal unanimously dismissed the appeal with costs.

Issues

**14** The issues in this case may be stated as follows:

(1) Do the respondents owe the appellants a duty of care with respect to

(a) the investment losses they incurred allegedly as a result of reliance on the

1980-82 audit reports; and

(b) the losses in the value of their existing shareholdings they incurred allegedly as a result of reliance on the 1980-82 audit reports?

(2) Does the rule in Foss v. Harbottle affect the appellants' action?

Analysis

Preliminary Matters

**15** Four preliminary matters should be addressed before turning to the principal issues in this appeal. The first concerns the procedure to be followed in a motion for summary judgment brought under Rule 20.03(1) of the Manitoba Court of Queen's Bench Rules. That rule provides as follows:

> 20.03(1) Where the court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the court shall grant summary judgment accordingly.

I would agree with both the Court of Appeal and the motions judge in their endorsement of the procedure set out in Fidkalo, supra, at p. 267, namely:

> The question to be decided on a rule 20 motion is whether there is a genuine issue for trial. Although a defendant who seeks dismissal of an action has an initial burden of showing that the case is one in which the existence of a genuine issue is a proper question for consideration, it is the plaintiff who must then, according to the rule, establish his claim as being one with a real chance of success.

In the instant case, then, the appellants (who were the plaintiffs-respondents on the motion) bore the burden of establishing that their claim had "a real chance of success". They bear the same burden in this Court.

**16** The second preliminary matter concerns the appellants' claim that as a result of a meeting in the summer of 1978 between David Korn, Max Freed and the respondent Cox and in light of an engagement letter sent by the respondents to NGA and NGH in 1981, a contract was formed between the shareholders of the audited corporations, on the one hand, and the respondents, on the other. This purported contract ostensibly required the respondents to conduct their audits for the benefit of the shareholders themselves and not merely for the benefit of the corporations. I have reviewed the portions of the record upon which the appellants base this submission and I am unable to find that the requisite elements of contract formation inhere on the facts. In any event, as the respondents pointed out, the appellants' request to amend their pleadings before trial to include a claim for breach of contract was denied by Kennedy J. and no appeal was brought from that

decision. (See: Hercules Management Ltd. v. Clarkson Gordon (1994), 91 Man. R. (2d) 216 (Q.B.).) I would find, therefore, that the claim in breach of contract is not properly before this Court and that the appellants' submissions in this regard must fail.

**17** Thirdly, the appellants allege that the respondent Cox's investments in certain syndicated mortgages administered by NGA and NGH constituted a breach of the statutory independence requirements set out in s. 155 of the Manitoba Corporations Act and that such a breach either gives rise to a private law cause of action or, alternatively, that it provides an independent basis for finding a duty of care in a tort action. Assuming without deciding that the respondent Cox was in breach of the independence requirements set out in that section, I would agree with Helper J.A. in finding that the section does not, in and of itself, give rise to a cause of action in negligence; see: R. in right of Canada v. Saskatchewan Wheat Pool, [1983] 1 S.C.R. 205. Similarly, I cannot see how breach of the independence requirements could establish a duty of care in tort. This does not mean, of course, that the statutory audit requirements set out in the Manitoba Corporations Act are entirely irrelevant to the appellants' claim. Rather, it simply means that a breach of the independence provisions does not, by itself, give rise either to an independent right of action or to a duty of care.

**18** The final preliminary matter concerns whether or not the appellants actually relied on the 1980-82 audited reports prepared by the respondents. More specifically, the appellants allege that the Court of Appeal erred in finding, at p. 248, that

> [t]here was a total absence of evidence to indicate the respondents knew the appellants would rely upon the reports for any specific purpose or that the appellants did rely upon the [1980-82] reports before infusing more capital into their companies. The appellants were content to allow management to continue running the companies despite a drop in profitability reflected in the 1982 audited report and invested capital in the face of that report. The evidence filed in opposition to the motion did not support the appellants' claim on this issue. [Emphasis added.]

Needless to say, actual reliance is a necessary element of an action in negligent misrepresentation and its absence will mean that the plaintiff cannot succeed in holding the defendant liable for his or her losses; see: Queen v. Cognos Inc., [1993] 1 S.C.R. 87, at p. 110. In light of my disposition on the duty of care issue, however, it is unnecessary to inquire into this matter here -- the absence of a duty of care renders inconsequential the question of actual reliance. Having dealt with all four preliminary matters, then, I can now turn to a discussion of the principal issues in this appeal.

Issue 1: Whether the Respondents owe the Appellants a Duty of Care

(i) Introduction

**19** It is now well established in Canadian law that the existence of a duty of care in tort is to be determined through an application of the two-part test first enunciated by Lord Wilberforce in Anns

v. Merton London Borough Council, [1978] A.C. 728 (H.L.), at pp. 751-52:

> First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter -- in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise. . . .

While the House of Lords rejected the Anns test in Murphy v. Brentwood District Council, [1991] 1 A.C. 398, and in Caparo, supra, at p. 574, per Lord Bridge and at pp. 585-86, per Lord Oliver (citing Brennan J. in Sutherland Shire Council v. Heyman (1985), 60 A.L.R. 1 (H.C.), at pp. 43-44), the basic approach that test embodies has repeatedly been accepted and endorsed by this Court. (See, e.g.: Kamloops (City of) v. Nielsen, [1984] 2 S.C.R. 2; B.D.C. Ltd. v. Hofstrand Farms Ltd., [1986] 1 S.C.R. 228; Canadian National Railway Co. v. Norsk Pacific Steamship Co., [1992] 1 S.C.R. 1021; London Drugs Ltd. v. Kuehne & Nagel International Ltd., [1992] 3 S.C.R. 299; Winnipeg Condominium Corporation No. 36 v. Bird Construction Co., [1995] 1 S.C.R. 85.)

**20** In Kamloops, supra, at pp. 10-11, Wilson J. restated Lord Wilberforce's test in the following terms:

> (1) is there a sufficiently close relationship between the parties (the [defendant] and the person who has suffered the damage) so that, in the reasonable contemplation of the [defendant], carelessness on its part might cause damage to that person? If so,
> (2) are there any considerations which ought to negative or limit (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise?

As will be clear from the cases earlier cited, this two-stage approach has been applied by this Court in the context of various types of negligence actions, including actions involving claims for different forms of economic loss. Indeed, it was implicitly endorsed in the context of an action in negligent misrepresentation in Edgeworth Construction Ltd. v. N. D. Lea & Associates Ltd., [1993] 3 S.C.R. 206, at pp. 218-19. The same approach to defining duties of care in negligent misrepresentation cases has also been taken in other Commonwealth courts. In Scott Group Ltd. v. McFarlane, [1978] 1 N.Z.L.R. 553, for example, a case that dealt specifically with auditors' liability for negligently prepared audit reports, the Anns test was adopted and applied by a majority of the New Zealand Court of Appeal.

**21** I see no reason in principle why the same approach should not be taken in the present case.

Indeed, to create a "pocket" of negligent misrepresentation cases (to use Professor Stapleton's term) in which the existence of a duty of care is determined differently from other negligence cases would, in my view, be incorrect; see: Jane Stapleton, "Duty of Care and Economic Loss: a Wider Agenda" (1991), 107 L.Q. Rev. 249. This is not to say, of course, that negligent misrepresentation cases do not involve special considerations stemming from the fact that recovery is allowed for pure economic loss as opposed to physical damage. Rather, it is simply to posit that the same general framework ought to be used in approaching the duty of care question in both types of case. Whether the respondents owe the appellants a duty of care for their allegedly negligent preparation of the 1980-82 audit reports, then, will depend on (a) whether a prima facie duty of care is owed, and (b) whether that duty, if it exists, is negatived or limited by policy considerations. Before analysing the merits of this case, it will be useful to set out in greater detail the principles governing this appeal.

(ii) The Prima Facie Duty of Care

**22** The first branch of the Anns/Kamloops test demands an inquiry into whether there is a sufficiently close relationship between the plaintiff and the defendant that in the reasonable contemplation of the latter, carelessness on its part may cause damage to the former. The existence of such a relationship -- which has come to be known as a relationship of "neighbourhood" or "proximity" -- distinguishes those circumstances in which the defendant owes a prima facie duty of care to the plaintiff from those where no such duty exists. In the context of a negligent misrepresentation action, then, deciding whether or not a prima facie duty of care exists necessitates an investigation into whether the defendant-representor and the plaintiff-representee can be said to be in a relationship of proximity or neighbourhood.

**23** What constitutes a "relationship of proximity" in the context of negligent misrepresentation actions? In approaching this question, I would begin by reiterating the position I took in Norsk, supra, at pp. 1114-15, that the term "proximity" itself is nothing more than a label expressing a result, judgment or conclusion; it does not, in and of itself, provide a principled basis on which to make a legal determination. This view was also explicitly adopted by Stevenson J. in Norsk, supra, at p. 1178, and McLachlin J. also appears to have accepted it when she wrote, at p. 1151, of that case that "[p]roximity may usefully be viewed, not so much as a test in itself, but as a broad concept which is capable of subsuming different categories of cases involving different factors"; see also: M. H. McHugh, "Neighbourhood, Proximity and Reliance", in P. D. Finn, ed., Essays on Torts (1989), 5, at pp. 36-37; and John G. Fleming, "The Negligent Auditor and Shareholders" (1990), 106 L.Q. Rev. 349, at p. 351, where the author refers to proximity as a "vacuous test". While Norsk, supra, was concerned specifically with whether or not a defendant could be held liable for "contractual relational economic loss" (as I called it, at p. 1037), I am of the view that the same observations with respect to the term "proximity" are applicable in the context of negligent misrepresentation. In order to render "proximity" a useful tool in defining when a duty of care exists in negligent misrepresentation cases, therefore, it is necessary to infuse that term with some meaning. In other words, it is necessary to set out the basis upon which one may properly reach the conclusion that proximity inheres between a representor and a representee.

**24** This can be done most clearly as follows. The label "proximity", as it was used by Lord Wilberforce in Anns, supra, was clearly intended to connote that the circumstances of the relationship inhering between the plaintiff and the defendant are of such a nature that the defendant may be said to be under an obligation to be mindful of the plaintiff's legitimate interests in conducting his or her affairs. Indeed, this idea lies at the very heart of the concept of a "duty of care", as articulated most memorably by Lord Atkin in Donoghue v. Stevenson, [1932] A.C. 562, at pp. 580-81. In cases of negligent misrepresentation, the relationship between the plaintiff and the defendant arises through reliance by the plaintiff on the defendant's words. Thus, if "proximity" is meant to distinguish the cases where the defendant has a responsibility to take reasonable care of the plaintiff from those where he or she has no such responsibility, then in negligent misrepresentation cases, it must pertain to some aspect of the relationship of reliance. To my mind, proximity can be seen to inhere between a defendant-representor and a plaintiff-representee when two criteria relating to reliance may be said to exist on the facts: (a) the defendant ought reasonably to foresee that the plaintiff will rely on his or her representation; and (b) reliance by the plaintiff would, in the particular circumstances of the case, be reasonable. To use the term employed by my colleague, Iacobucci J., in Cognos, supra, at p. 110, the plaintiff and the defendant can be said to be in a "special relationship" whenever these two factors inhere.

**25** I should pause here to explain that, in my view, to look to whether or not reliance by the plaintiff on the defendant's representation would be reasonable in determining whether or not a prima facie duty of care exists in negligent misrepresentation cases as opposed to looking at reasonable foreseeability alone is not, as might first appear, to abandon the basic tenets underlying the first branch of the Anns/Kamloops formula. The purpose behind the Anns/Kamloops test is simply to ensure that enquiries into the existence of a duty of care in negligence cases is conducted in two parts: The first involves discerning whether, in a given situation, a duty of care would be imposed by law; the second demands an investigation into whether the legal duty, if found, ought to be negatived or ousted by policy considerations. In the context of actions based on negligence causing physical damage, determining whether harm to the plaintiff was reasonably foreseeable to the defendant is alone a sufficient criterion for deciding proximity or neighbourhood under the first branch of the Anns/Kamloops test because the law has come to recognize (even if only implicitly) that, absent a voluntary assumption of risk by him or her, it is always reasonable for a plaintiff to expect that a defendant will take reasonable care of the plaintiff's person and property. The duty of care inquiry in such cases, therefore, will always be conducted under the assumption that the plaintiff's expectations of the defendant are reasonable.

**26** In negligent misrepresentation actions, however, the plaintiff's claim stems from his or her detrimental reliance on the defendant's (negligent) statement, and it is abundantly clear that reliance on the statement or representation of another will not, in all circumstances, be reasonable. The assumption that always inheres in physical damage cases concerning the reasonableness of the plaintiff's expectations cannot, therefore, be said to inhere in reliance cases. In order to ensure that the same factors are taken into account in determining the existence of a duty of care in both instances, then, the reasonableness of the plaintiff's reliance must be considered in negligent

misrepresentation actions. Only by doing so will the first branch of the Kamloops test be applied consistently in both contexts.

**27** As should be evident from its very terms, the reasonable foreseeability/reasonable reliance test for determining a prima facie duty of care is somewhat broader than the tests used both in the cases decided before Anns, supra, and in those that have rejected the Anns approach. Rather than stipulating simply that a duty of care will be found in any case where reasonable foreseeability and reasonable reliance inhere, those cases typically require (a) that the defendant know the identity of either the plaintiff or the class of plaintiffs who will rely on the statement, and (b) that the reliance losses claimed by the plaintiff stem from the particular transaction in respect of which the statement at issue was made. This narrower approach to defining the duty can be seen in a number of the more prominent English decisions dealing either with auditors' liability specifically or with liability for negligent misstatements generally. (See, e.g.: Candler v. Crane, Christmas & Co., [1951] 2 K.B. 164 (C.A.), at pp. 181-82 and p. 184, per Denning L.J. (dissenting); Hedley Byrne & Co. v. Heller & Partners Ltd., [1964] A.C. 465; Caparo, supra, per Lord Bridge, at p. 576, and per Lord Oliver, at pp. 589.) It is also evident in the approach taken by this Court in Haig v. Bamford, [1977] 1 S.C.R. 466.

**28** While I would not question the conclusions reached in any of these judgments, I am of the view that inquiring into such matters as whether the defendant had knowledge of the plaintiff (or class of plaintiffs) and whether the plaintiff used the statements at issue for the particular transaction for which they were provided is, in reality, nothing more than a means by which to circumscribe -- for reasons of policy -- the scope of a representor's potentially infinite liability. As I have already tried to explain, determining whether "proximity" exists on a given set of facts consists in an attempt to discern whether, as a matter of simple justice, the defendant may be said to have had an obligation to be mindful of the plaintiff's interests in going about his or her business. Requiring, in addition to proximity, that the defendant know the identity of the plaintiff (or class of plaintiffs) and that the plaintiff use the statements in question for the specific purpose for which they were prepared amounts, in my opinion, to a tacit recognition that considerations of basic fairness may sometimes give way to other pressing concerns. Plainly stated, adding further requirements to the duty of care test provides a means by which policy concerns that are extrinsic to simple justice -- but that are, nevertheless, fundamentally important -- may be taken into account in assessing whether the defendant should be compelled to compensate the plaintiff for losses suffered. In other words, these further requirements serve a policy-based limiting function with respect to the ambit of the duty of care in negligent misrepresentation actions.

**29** This view is confirmed by the judgments themselves. In Caparo, supra, at p. 576, for example, Lord Bridge refers to the criteria of knowledge of the plaintiff (or class of plaintiffs) and use of the statements for the intended transaction as a " 'limit or control mechanism . . . imposed on the liability of the wrongdoer towards those who have suffered some economic damage in consequence of his negligence'" (emphasis added). Similarly, in Haig, supra, at p. 476, Dickson J. (as he then was) explicitly discusses the policy concern arising from unlimited liability before finding that the

statements at issue in Haig were used for the very purpose for which they were prepared and that the appropriate test for a duty of care in the case before him was "actual knowledge of the limited class that will use and rely on the statement". (See also Candler, supra, at p. 183, per Denning L.J. (dissenting).) Certain scholars have adopted this view of the case law as well. (See, e.g.: Bruce Feldthusen, Economic Negligence (3rd ed. 1994), at pp. 93-100, where the author explains that the approach taken in both Haig, supra, and Caparo, supra, toward defining the duty of care was motivated by underlying policy concerns; see also: Earl A. Cherniak and Kirk F. Stevens, "Two Steps Forward or One Step Back? Anns at the Crossroads in Canada" (1992), 20 C.B.L.J. 164, and Ivan F. Ivankovich, "Accountants and Third-Party Liability -- Back to the Future" (1991), 23 Ottawa L. Rev. 505, at p. 518.)

**30** In light of this Court's endorsement of the Anns/Kamloops test, however, enquiries concerning (a) the defendant's knowledge of the identity of the plaintiff (or of the class of plaintiffs) and (b) the use to which the statements at issue are put may now quite properly be conducted in the second branch of that test when deciding whether or not policy considerations ought to negate or limit a prima facie duty that has already been found to exist. In other words, criteria that in other cases have been used to define the legal test for the duty of care can now be recognized for what they really are -- policy-based means by which to curtail liability -- and they can appropriately be considered under the policy branch of the Anns/Kamloops test. To understand exactly how this may be done and how these criteria are pertinent to the case at bar, it will first be useful to set out the prevailing policy concerns in some detail.

(iii) Policy Considerations

**31** As Cardozo C.J. explained in Ultramares Corp. v. Touche, 174 N.E. 441 (N.Y.C.A. 1931), at p. 444, the fundamental policy consideration that must be addressed in negligent misrepresentation actions centres around the possibility that the defendant might be exposed to "liability in an indeterminate amount for an indeterminate time to an indeterminate class". This potential problem can be seen quite vividly within the framework of the Anns/Kamloops test. Indeed, while the criteria of reasonable foreseeability and reasonable reliance serve to distinguish cases where a prima facie duty is owed from those where it is not, it is nevertheless true that in certain types of situations these criteria can, quite easily, be satisfied and absent some means by which to circumscribe the ambit of the duty, the prospect of limitless liability will loom.

**32** The general area of auditors' liability is a case in point. In modern commercial society, the fact that audit reports will be relied on by many different people (e.g., shareholders, creditors, potential takeover bidders, investors, etc.) for a wide variety of purposes will almost always be reasonably foreseeable to auditors themselves. Similarly, the very nature of audited financial statements -- produced, as they are, by professionals whose reputations (and, thereby, whose livelihoods) are at stake -- will very often mean that any of those people would act wholly reasonably in placing their reliance on such statements in conducting their affairs. These observations are consistent with the following remarks of Dickson J. in Haig, supra, at pp. 475-76, with respect to the accounting

profession generally:

> The increasing growth and changing role of corporations in modern society has been attended by a new perception of the societal role of the profession of accounting. The day when the accountant served only the owner-manager of a company and was answerable to him alone has passed. The complexities of modern industry combined with the effects of specialization, the impact of taxation, urbanization, the separation of ownership from management, the rise of professional corporate managers, and a host of other factors, have led to marked changes in the role and responsibilities of the accountant, and in the reliance which the public must place upon his work. The financial statements of the corporations upon which he reports can affect the economic interests of the general public as well as of shareholders and potential shareholders.

(See also: Cherniak and Stevens, supra, at pp. 169-70.) In light of these considerations, the reasonable foreseeability/reasonable reliance test for ascertaining a prima facie duty of care may well be satisfied in many (even if not all) negligent misstatement suits against auditors and, consequently, the problem of indeterminate liability will often arise.

**33** Certain authors have argued that imposing broad duties of care on auditors would give rise to significant economic and social benefits in so far as the spectre of tort liability would act as an incentive to auditors to produce accurate (i.e., non-negligent) reports. (See, e.g.: Howard B. Wiener, "Common Law Liability of the Certified Public Accountant for Negligent Misrepresentation" (1983), 20 San Diego L. Rev. 233.) I would agree that deterrence of negligent conduct is an important policy consideration with respect to auditors' liability. Nevertheless, I am of the view that, in the final analysis, it is outweighed by the socially undesirable consequences to which the imposition of indeterminate liability on auditors might lead. Indeed, while indeterminate liability is problematic in and of itself inasmuch as it would mean that successful negligence actions against auditors could, at least potentially, be limitless, it is also problematic in light of certain related problems to which it might give rise.

**34** Some of the more significant of these problems are thus set out in Brian R. Cheffins, "Auditors' Liability in the House of Lords: A Signal Canadian Courts Should Follow" (1991), 18 C.B.L.J. 118, at pp. 125-27:

> In addition to providing only limited benefits, imposing widely drawn duties of care on auditors would probably generate substantial costs. . . .
>
> One reason [for this] is that auditors would expend more resources trying to protect themselves from liability. For example, insurance premiums would probably rise since insurers would anticipate more frequent claims. Also, auditors would probably incur higher costs since they would try to rely more

> heavily on exclusion clauses. Hiring lawyers to draft such clauses might be expensive because only the most carefully constructed provisions would be likely to pass judicial scrutiny. . . .
>
> Finally, auditors' opportunity costs would increase. Whenever members of an accounting firm have to spend time and effort preparing for litigation, they forego revenue generating accounting activity. More trials would mean that this would occur with greater frequency.
>
> . . .
>
> The higher costs auditors would face as a result of broad duties of care could have a widespread impact. For example, the supply of accounting services would probably be reduced since some marginal firms would be driven to the wall. Also, because the market for accounting services is protected by barriers to entry imposed by the profession, the surviving firms would pass [sic] at least some of the increased costs to their clients.

Professor Ivankovich describes similar sources of concern. While he acknowledges certain social benefits to which expansive auditors' liability might conduce, he also recognizes the potential difficulties associated therewith (at pp. 520-21):

> . . . [expansive auditors' liability] is also likely to increase the time expended in the performance of accounting services. This will trigger a predictable negative impact on the timeliness of the financial information generated. It is equally likely to increase the cost of professional liability insurance and reduce its availability, and to increase the cost of accounting services which, as a result, may become less generally available. Additionally, it promotes "free ridership" on the part of reliant third parties and decreases their incentive to exercise greater vigilance and care and, as well, presents an increased risk of fraudulent claims.

Even though I do not share the discomfort apparently felt by Professors Cheffins and Ivankovich with respect to using an Anns-type test in the context of negligent misrepresentation actions (See: Cheffins, supra, at pp. 129-31, and Ivankovich, supra, at p. 530), I nevertheless agree with their assessment of the possible consequences to both auditors and the public generally if liability for negligently prepared audit reports were to go unchecked.

**35** I should, at this point, explain that I am aware of the arguments put forth by certain scholars and judges to the effect that concerns over indeterminate liability have sometimes been overstated. (See, e.g.: J. Edgar Sexton and John W. Stevens, "Accountants' Legal Responsibilities and Liabilities", in Professional Responsibility in Civil Law and Common Law (Meredith Memorial Lectures, McGill University, 1983-84) (1985), 88, at pp. 101-2; and H. Rosenblum (1983), Inc. v.

Adler, 461 A.2d 138 (N.J. 1983), at p. 152, per Schreiber J.) Arguments to this effect rest essentially on the premise that actual liability will be limited in so far as a plaintiff will not be successful unless both negligence and reliance are established in addition to a duty of care. While it is true that damages will not be owing by the defendant unless these other elements of the cause of action are proved, neither the difficulty of proving negligence nor that of proving reliance will preclude a disgruntled plaintiff from bringing an action against an auditor and such actions would, we may assume, be all the more common were the establishment of a duty of care in any given case to amount to nothing more than a mere matter of course. This eventuality could pose serious problems both for auditors, whose legal costs would inevitably swell, and for courts, which, no doubt, would feel the pressure of increased litigation. Thus, the prospect of burgeoning negligence suits raises serious concerns, even if we assume that the arguments positing proof of negligence and reliance as a barrier to liability are correct. In my view, therefore, it makes more sense to circumscribe the ambit of the duty of care than to assume that difficulties in proving negligence and reliance will afford sufficient protection to auditors, since this approach avoids both "indeterminate liability" and "indeterminate litigation".

**36** As I have thus far attempted to demonstrate, the possible repercussions of exposing auditors to indeterminate liability are significant. In applying the two-stage Anns/Kamloops test to negligent misrepresentation actions against auditors, therefore, policy considerations reflecting those repercussions should be taken into account. In the general run of auditors' cases, concerns over indeterminate liability will serve to negate a prima facie duty of care. But while such concerns may exist in most such cases, there may be particular situations where they do not. In other words, the specific factual matrix of a given case may render it an "exception" to the general class of cases in that while (as in most auditors' liability cases) considerations of proximity under the first branch of the Anns/Kamloops test might militate in favour of finding that a duty of care inheres, the typical concerns surrounding indeterminate liability do not arise. This needs to be explained.

**37** As discussed earlier, looking to factors such as "knowledge of the plaintiff (or an identifiable class of plaintiffs) on the part of the defendant" and "use of the statements at issue for the precise purpose or transaction for which they were prepared" really amounts to an attempt to limit or constrain the scope of the duty of care owed by the defendants. If the purpose of the Anns/Kamloops test is to determine (a) whether or not a prima facie duty of care exists and then (b) whether or not that duty ought to be negated or limited, then factors such as these ought properly to be considered in the second branch of the test once the first branch concerning "proximity" has been found to be satisfied. To my mind, the presence of such factors in a given situation will mean that worries stemming from indeterminacy should not arise, since the scope of potential liability is sufficiently delimited. In other words, in cases where the defendant knows the identity of the plaintiff (or of a class of plaintiffs) and where the defendant's statements are used for the specific purpose or transaction for which they were made, policy considerations surrounding indeterminate liability will not be of any concern since the scope of liability can readily be circumscribed. Consequently, such considerations will not override a positive finding on the first branch of the Anns/Kamloops test and a duty of care may quite properly be found to exist.

**38** As I see it, this line of reasoning serves to explain the holding of Cardozo J. (as he then was) in Glanzer v. Shepard, 135 N.E. 275 (N.Y.C.A. 1922) . There, the New York Court of Appeals held that the defendant weigher was liable in damages for having negligently prepared a weight certificate he knew would be given to the plaintiff, who relied upon it for the specific purpose for which it was issued. In reaching his decision, Cardozo J. explicitly noted that the weight certificate was used for the very "end and aim of the transaction" and not for any collateral or unintended purpose (Glanzer, supra, at p. 275). On the facts of Glanzer, supra, then, the scope of the defendant's liability could readily be delimited and indeterminacy, therefore, was not a concern.

**39** The same idea serves to explain the rationale underlying the seminal judgment of the House of Lords in Hedley Byrne, supra. While that case did not involve an action against auditors, similar concerns about indeterminate liability were, nonetheless, clearly relevant. On the facts of Hedley Byrne, supra, the defendant bank provided a negligently prepared credit reference in respect of one of its customers to another bank which, to the knowledge of the defendants, passed on the information to the plaintiff for a stipulated purpose. The plaintiff relied on the credit reference for the specific purpose for which it was prepared. The House of Lords found that but for the presence of a disclaimer, the defendants would have been liable to the plaintiff in negligence. While indeterminate liability would have raised some concern to the Lords had the plaintiff not been known to the defendants or had the credit reference been used for a purpose or transaction other than that for which it was actually prepared, no such difficulties about indeterminacy arose on the particular facts of the case.

**40** This Court's decision in Haig, supra, can be seen to rest on precisely the same basis. There, the defendant accountants were retained by a Saskatchewan businessman, one Scholler, to prepare audited financial statements of Mr. Scholler's corporation. At the time they were engaged, the accountants were informed by Mr. Scholler that the audited statements would be used for the purpose of attracting a $20,000 investment in the corporation from a limited number of potential investors. The audit was conducted negligently and the plaintiff investor, who was found to have relied on the audited statements in making his investment, suffered a loss. While Dickson J. was clearly cognizant of the potential problem of indeterminacy arising in the context of auditors' liability (at p. 476), he nevertheless found that the defendants owed the plaintiff a duty of care. In my view, his conclusion was eminently sound given that the defendants were informed by Mr. Scholler of the class of persons who would rely on the report and the report was used by the plaintiff for the specific purpose for which it was prepared. Dickson J. himself expressed this idea as follows, at p. 482:

> The case before us is closer to Glanzer than to Ultramares. The very end and aim of the financial statements prepared by the accountants in the present case was to secure additional financing for the company from [a Saskatchewan government agency] and an equity investor; the statements were required primarily for these third parties and only incidentally for use by the company.

On the facts of Haig, then, the auditors were properly found to owe a duty of care because concerns over indeterminate liability did not arise. I would note that this view of the rationale behind Haig, supra, is shared by Professor Feldthusen. (See Feldthusen, supra, at pp. 98-100.)

**41** The foregoing analysis should render the following points clear. A prima facie duty of care will arise on the part of a defendant in a negligent misrepresentation action when it can be said (a) that the defendant ought reasonably to have foreseen that the plaintiff would rely on his representation and (b) that reliance by the plaintiff, in the circumstances, would be reasonable. Even though, in the context of auditors' liability cases, such a duty will often (even if not always) be found to exist, the problem of indeterminate liability will frequently result in the duty being negated by the kinds of policy considerations already discussed. Where, however, indeterminate liability can be shown not to be a concern on the facts of a particular case, a duty of care will be found to exist. Having set out the law governing the appellants' claims, I now propose to apply it to the facts of the appeal.

(iv) Application to the Facts

**42** In my view, there can be no question that a prima facie duty of care was owed to the appellants by the respondents on the facts of this case. As regards the criterion of reasonable foreseeability, the possibility that the appellants would rely on the audited financial statements in conducting their affairs and that they may suffer harm if the reports were negligently prepared must have been reasonably foreseeable to the respondents. This is confirmed simply by the fact that shareholders generally will often choose to rely on audited financial statements for a wide variety of purposes. It is further confirmed by the fact that under ss. 149(1) and 163(1) of the Manitoba Corporations Act, it is patently clear that audited financial statements are to be placed before the shareholders at the annual general meeting. The relevant portions of those sections read as follows:

> 149(1) The directors of a corporation shall place before the shareholders at every annual meeting
>
> . . .
>
> (b) the report of the auditor, if any; and
>
> . . .
>
> 163(1) An auditor of a corporation shall make the examination that is in his opinion necessary to enable him to report in the prescribed manner on the financial statements required by this Act to be placed before the shareholders, except such financial statements or part thereof as relate to the period referred to in sub-clause 149(1)(a)(ii).

In my view, it would be untenable to argue in the face of these provisions that some form of

reliance by shareholders on the audited reports would be unforeseeable.

**43** Similarly, I would find that reliance on the audited statements by the appellant shareholders would, on the facts of this case, be reasonable. Professor Feldthusen (at pp. 62-63) sets out five general indicia of reasonable reliance; namely:

(1) The defendant had a direct or indirect financial interest in the transaction in respect of which the representation was made.
(2) The defendant was a professional or someone who possessed special skill, judgment, or knowledge.
(3) The advice or information was provided in the course of the defendant's business.
(4) The information or advice was given deliberately, and not on a social occasion.
(5) The information or advice was given in response to a specific enquiry or request.

While these indicia should not be understood to be a strict "test" of reasonableness, they do help to distinguish those situations where reliance on a statement is reasonable from those where it is not. On the facts here, the first four of these indicia clearly inhere. To my mind, then, this aspect of the prima facie duty is unquestionably satisfied on the facts.

**44** Having found a prima facie duty to exist, then, the second branch of the Anns/Kamloops test remains to be considered. It should be clear from my comments above that were auditors such as the respondents held to owe a duty of care to plaintiffs in all cases where the first branch of the Anns/Kamloops test was satisfied, the problem of indeterminate liability would normally arise. It should be equally clear, however, that in certain cases, this problem does not arise because the scope of potential liability can adequately be circumscribed on the facts. An investigation of whether or not indeterminate liability is truly a concern in the present case is, therefore, required.

**45** At first blush, it may seem that no problems of indeterminate liability are implicated here and that this case can easily be likened to Glanzer, supra, Hedley Byrne, supra, and Haig, supra. After all, the respondents knew the very identity of all the appellant shareholders who claim to have relied on the audited financial statements through having acted as NGA's and NGH's auditors for nearly 10 years by the time the first of the audit reports at issue in this appeal was prepared. It would seem plausible to argue on this basis that because the identity of the plaintiffs was known to the respondents at the time of preparing the 1980-82 reports, no concerns over indeterminate liability arise.

**46** To arrive at this conclusion without further analysis, however, would be to move too quickly. While knowledge of the plaintiff (or of a limited class of plaintiffs) is undoubtedly a significant factor serving to obviate concerns over indeterminate liability, it is not, alone, sufficient to do so. In my discussion of Glanzer, supra, Hedley Byrne, supra, and Haig, supra, I explained that

indeterminate liability did not inhere on the specific facts of those cases not only because the defendant knew the identity of the plaintiff (or the class of plaintiffs) who would rely on the statement at issue, but also because the statement itself was used by the plaintiff for precisely the purpose or transaction for which it was prepared. The crucial importance of this additional criterion can clearly be seen when one considers that even if the specific identity or class of potential plaintiffs is known to a defendant, use of the defendant's statement for a purpose or transaction other than that for which it was prepared could still lead to indeterminate liability.

**47** For example, if an audit report which was prepared for a corporate client for the express purpose of attracting a $10,000 investment in the corporation from a known class of third parties was instead used as the basis for attracting a $1,000,000 investment or as the basis for inducing one of the members of the class to become a director or officer of the corporation or, again, as the basis for encouraging him or her to enter into some business venture with the corporation itself, it would appear that the auditors would be exposed to a form of indeterminate liability, even if they knew precisely the identity or class of potential plaintiffs to whom their report would be given. With respect to the present case, then, the central question is whether or not the appellants can be said to have used the 1980-82 audit reports for the specific purpose for which they were prepared. The answer to this question will determine whether or not policy considerations surrounding indeterminate liability ought to negate the prima facie duty of care owed by the respondents.

**48** What, then, is the purpose for which the respondents' audit statements were prepared? This issue was eloquently discussed by Lord Oliver in Caparo, supra, at p. 583:

> My Lords, the primary purpose of the statutory requirement that a company's accounts shall be audited annually is almost self-evident. . . . The management is confided to a board of directors which operates in a fiduciary capacity and is answerable to and removable by the shareholders who can act, if they act at all, only collectively and only through the medium of a general meeting. Hence the legislative provisions requiring the board annually to give an account of its stewardship to a general meeting of the shareholders. This is the only occasion in each year on which the general body of shareholders is given the opportunity to consider, to criticise and to comment on the conduct by the board of the company's affairs, to vote the directors' recommendation as to dividends, to approve or disapprove the directors' remuneration and, if thought desirable, to remove and replace all or any of the directors. It is the auditors' function to ensure, so far as possible, that the financial information as to the company's affairs prepared by the directors accurately reflects the company's position in order first, to protect the company itself from the consequences of undetected errors or, possibly, wrongdoing . . . and, second, to provide shareholders with reliable intelligence for the purpose of enabling them to scrutinise the conduct of the company's affairs and to exercise their collective powers to reward or control or remove those to whom that conduct has been

> confided. [Emphasis added.]

Similarly, Farley J. held in Roman Corp. Ltd. v. Peat Marwick Thorne (1992), 11 O.R. (3d) 248 (Gen. Div.), at p. 260 (hereinafter Roman I) that

> as a matter of law the only purpose for which shareholders receive an auditor's report is to provide the shareholders with information for the purpose of overseeing the management and affairs of the corporation and not for the purpose of guiding personal investment decisions or personal speculation with a view to profit.

(See also: Roman Corp. v. Peat Marwick Thorne (1993), 12 B.L.R. (2d) 10 (Ont. Gen. Div.).) Lord Oliver was referring to the relevant provisions of the U.K. Companies Act 1985 (U.K.), 1985, c. 6, in making his pronouncements, and Farley J. rendered his judgment against the backdrop of the statutory audit requirements set out in the Ontario Business Corporations Act, R.S.O. 1990, c. B.16.

**49** To my mind, the standard purpose of providing audit reports to the shareholders of a corporation should be regarded no differently under the analogous provisions of the Manitoba Corporations Act. Thus, the directors of a corporation are required to place the auditors' report before the shareholders at the annual meeting in order to permit the shareholders, as a body, to make decisions as to the manner in which they want the corporation to be managed, to assess the performance of the directors and officers, and to decide whether or not they wish to retain the existing management or to have them replaced. On this basis, it may be said that the respondent auditors' purpose in preparing the reports at issue in this case was, precisely, to assist the collectivity of shareholders of the audited companies in their task of overseeing management.

**50** The appellants, however, submit that, in addition to this statutorily mandated purpose, the respondents further agreed to perform their audits for the purpose of providing the appellants with information on the basis of which they could make personal investment decisions. They base this claim largely on a conversation that allegedly took place at the 1978 meeting between Mr. Cox, Mr. Freed and Mr. Korn, as well as on certain passages of the engagement letter sent to them by the respondents. I have read the relevant portions of the record on this question and I am unable to accept the appellants' submission. Indeed, on examination for discovery, Mr. Freed discussed the engagement letter of the respondents and stated as follows:

> Q It is this that you say is the document that says, it will speak for itself, but you interpret it to mean that they [the respondents] will look after your interests specifically [sic]? . . .
>
> A I am saying that I took for granted that that was their duty.
>
> Q I see. All right. Was there ever anything in writing specifically that says that is your duty, is to look after my interests, I am away all the time?

A I am not aware.

Q Either, from you, or to you in that respect?

A I am not aware of any.

Q This letter happens to say, "We are always prepared upon instruction to extend our services beyond these required procedures." Did you ever give them any additional instructions?

A No. I never saw them.

Q Nor did you communicate with them in writing, or otherwise? Is that right?

A Not that I recall.

Similarly, the transcript of Mr. Korn's examination for discovery reveals the following exchange:

Q You emphasized [at the 1978 meeting] you say to Mr. Cox that because you were no longer in the management stream or chain, you would be relying more on the audited statements?

A Yes, and that -- well, I wanted a sort of commitment that he understood that he was the shareholders' auditor and I did refer to the fact that he had [a] close personal association with Mr. Morris and he said no, he fully understood, have no fear.

Q Did you consider that to be a change from the normal kind of audit engagement, or were you just emphasizing something that was part of the normal audit engagement?

A I just pointed out the change. As a matter of fact, he already knew about the change.

. . .

Q But my question was whether you considered that to be any kind of alteration from the

usual audit engagement process.

A Well, that's what happened. That's the fact that I said it to him and those are the words I said, and however he took it, that's however he took it.

Q But I'm asking you if you considered that to be a change from a normal audit engagement.

A Well, I'm not -- whether that was -- whether those words were some sort of special instructions, those were the words and I guess there will be experts to say what consequences should have flown [sic] from them, and I'm not here as an expert on audit --

Q I'm entitled to know what you consider to be the case.

A Well, I made it clear that he should remember that he's the shareholders' auditor, that Clarkson was the shareholders' auditor, notwithstanding his personal relationship with Murray Morris.

Q Auditors are always the shareholders' auditors, are they not?

A And that's what I -- if they are, they are.

Q And that's in fact what they are always?

A Well, that's good, I'm glad to hear that, glad to hear you say it.

Q Do you agree?

A That the auditors are the shareholders' auditors?

Q Yes.

A I agree precisely.

To my mind, these passages serve to demonstrate that despite the appellants' submissions, the respondents did not, in fact, prepare the audit reports in order to assist the appellants in making personal investment decisions or, indeed, for any purpose other than the standard statutory one. This finding accords with that of Helper J.A. in the Court of Appeal, and nothing in the record before this Court suggests the contrary.

**51** It follows from the foregoing discussion that the only purpose for which the 1980-82 reports

could have been used in such a manner as to give rise to a duty of care on the part of the respondents is as a guide for the shareholders, as a group, in supervising or overseeing management. In assessing whether this was, in fact, the purpose to which the appellants purport to have put the audited reports, it will be useful to take each of the appellants' claims in turn. First, the appellant Hercules seeks compensation for its $600,000 injection of capital into NGA over January and February of 1983 and the appellant Freed seeks damages commensurate with the amount of money he contributed in 1982 to his investment account in NGH. Secondly, all the appellants seek damages for the losses they suffered in the value of their existing shareholdings.

**52** The claims of Hercules and Mr. Freed with respect to their 1982-83 investments can be addressed quickly. The essence of these claims must be that these two appellants relied on the respondents' reports in deciding whether or not to make further investments in the audited corporations. In other words, Hercules and Mr. Freed are claiming to have relied on the audited reports for the purpose of making personal investment decisions. As I have already discussed, this is not a purpose for which the respondents in this case can be said to have prepared their reports. In light of the dissonance between the purpose for which the reports were actually prepared and the purpose for which the appellants assert they were used, then, the claims of Hercules and Mr. Freed with respect to their investment losses are not such that the concerns over indeterminate liability discussed above are obviated; viz., if a duty of care were owed with respect to these investment transactions, there would seem to be no logical reason to preclude a duty of care from arising in circumstances where the statements were used for any other purpose of which the auditors were equally unaware when they prepared and submitted their report. On this basis, therefore, I would find that the prima facie duty that arises respecting this claim is negated by policy considerations and, therefore, that no duty of care is owed by the respondents in this regard.

**53** With respect to the claim concerning the loss in value of their existing shareholdings, the appellants make two submissions. First, they claim that they relied on the 1980-82 reports in monitoring the value of their equity and that, owing to the (allegedly) negligent preparation of those reports, they failed to extract it before the financial demise of NGA and NGH. Secondly, and somewhat more subtly, the appellants submit that they each relied on the auditors' reports in overseeing the management of NGA and NGH and that had those reports been accurate, the collapse of the corporations and the consequential loss in the value of their shareholdings could have been avoided.

**54** To my mind, the first of these submissions suffers from the same difficulties as those regarding the injection of fresh capital by Hercules and Mr. Freed. Whether the reports were relied upon in assessing the prospect of further investments or in evaluating existing investments, the fact remains that the purpose to which the respondents' reports were put, on this claim, concerned individual or personal investment decisions. Given that the reports were not prepared for that purpose, I find for the same reasons as those earlier set out that policy considerations regarding indeterminate liability inhere here and, consequently, that no duty of care is owed in respect of this claim.

**55** As regards the second aspect of the appellants' claim concerning the losses they suffered in the diminution in value of their equity, the analysis becomes somewhat more intricate. The essence of the appellants' submission here is that the shareholders would have supervised management differently had they known of the (alleged) inaccuracies in the 1980-82 reports, and that this difference in management would have averted the demise of the audited corporations and the consequent losses in existing equity suffered by the shareholders. At first glance, it might appear that the appellants' claim implicates a use of the audit reports which is commensurate with the purpose for which the reports were prepared, i.e., overseeing or supervising management. One might argue on this basis that a duty of care should be found to inhere because, in view of this compatibility between actual use and intended purpose, no indeterminacy arises. In my view, however, this line of reasoning suffers from a subtle but fundamental flaw.

**56** As I have already explained, the purpose for which the audit reports were prepared in this case was the standard statutory one of allowing shareholders, as a group, to supervise management and to take decisions with respect to matters concerning the proper overall administration of the corporations. In other words, it was, as Lord Oliver and Farley J. found in the cases cited above, to permit the shareholders to exercise their role, as a class, of overseeing the corporations' affairs at their annual general meetings. The purpose of providing the auditors' reports to the appellants, then, may ultimately be said to have been a "collective" one; that is, it was aimed not at protecting the interests of individual shareholders but rather at enabling the shareholders, acting as a group, to safeguard the interests of the corporations themselves. On the appellants' argument, however, the purpose to which the 1980-82 reports were ostensibly put was not that of allowing the shareholders as a class to take decisions in respect of the overall running of the corporation, but rather to allow them, as individuals, to monitor management so as to oversee and protect their own personal investments. Indeed, the nature of the appellants' claims (i.e. personal tort claims) requires that they assert reliance on the auditors' reports qua individual shareholders if they are to recover any personal damages. In so far as it must concern the interests of each individual shareholder, then, the appellants' claim in this regard can really be no different from the other "investment purposes" discussed above, in respect of which the respondents owe no duty of care.

**57** This argument is no different as regards the specific case of the appellant Guardian, which is the sole shareholder of NGH. The respondents' purpose in providing the audited reports in respect of NGH was, we must assume, to allow Guardian to oversee management for the better administration of the corporation itself. If Guardian in fact chose to rely on the reports for the ultimate purpose of monitoring its own investment it must, for the policy reasons earlier set out, be found to have done so at its own peril in the same manner as shareholders in NGA. Indeed, to treat Guardian any differently simply because it was a sole shareholder would do violence to the fundamental principle of corporate personality. I would find in respect of both Guardian and the other appellants, therefore, that the prima facie duty of care owed to them by the respondents is negated by policy considerations in that the claims are not such as to bring them within the "exceptional" cases discussed above.

Issue 2:

The Effect of the Rule in Foss v. Harbottle

**58** All the participants in this appeal -- the appellants, the respondents, and the intervener -- raised the issue of whether the appellants' claims in respect of the losses they suffered in their existing shareholdings through their alleged inability to oversee management of the corporations ought to have been brought as a derivative action in conformity with the rule in Foss v. Harbottle rather than as a series of individual actions. The issue was also raised and discussed in the courts below. In my opinion, a derivative action -- commenced, as required, by an application under s. 232 of the Manitoba Corporations Act -- would have been the proper method of proceeding with respect to this claim. Indeed, I would regard this simply as a corollary of the idea that the audited reports are provided to the shareholders as a group in order to allow them to take collective (as opposed to individual) decisions. Let me explain.

**59** The rule in Foss v. Harbottle provides that individual shareholders have no cause of action in law for any wrongs done to the corporation and that if an action is to be brought in respect of such losses, it must be brought either by the corporation itself (through management) or by way of a derivative action. The legal rationale behind the rule was eloquently set out by the English Court of Appeal in Prudential Assurance Co. v. Newman Industries Ltd. (No. 2), [1982] 1 All E.R. 354, at p. 367, as follows:

> The rule [in Foss v. Harbottle] is the consequence of the fact that a corporation is a separate legal entity. Other consequences are limited liability and limited rights. The company is liable for its contracts and torts; the shareholder has no such liability. The company acquires causes of action for breaches of contract and for torts which damage the company. No cause of action vests in the shareholder. When the shareholder acquires a share he accepts the fact that the value of his investment follows the fortunes of the company and that he can only exercise his influence over the fortunes of the company by the exercise of his voting rights in general meeting. The law confers on him the right to ensure that the company observes the limitations of its memorandum of association and the right to ensure that other shareholders observe the rule, imposed on them by the articles of association. If it is right that the law has conferred or should in certain restricted circumstances confer further rights on a shareholder the scope and consequences of such further rights require careful consideration.

To these lucid comments, I would respectfully add that the rule is also sound from a policy perspective, inasmuch as it avoids the procedural hassle of a multiplicity of actions.

**60** The manner in which the rule in Foss v. Harbottle, supra, operates with respect to the appellants' claims can thus be demonstrated. As I have already explained, the appellants allege that

they were prevented from properly overseeing the management of the audited corporations because the respondents' audit reports painted a misleading picture of their financial state. They allege further that had they known the true situation, they would have intervened to avoid the eventuality of the corporations' going into receivership and the consequent loss of their equity. The difficulty with this submission, I have suggested, is that it fails to recognize that in supervising management, the shareholders must be seen to be acting as a body in respect of the corporation's interests rather than as individuals in respect of their own ends. In a manner of speaking, the shareholders assume what may be seen to be a "managerial role" when, as a collectivity, they oversee the activities of the directors and officers through resolutions adopted at shareholder meetings. In this capacity, they cannot properly be understood to be acting simply as individual holders of equity. Rather, their collective decisions are made in respect of the corporation itself. Any duty owed by auditors in respect of this aspect of the shareholders' functions, then, would be owed not to shareholders qua individuals, but rather to all shareholders as a group, acting in the interests of the corporation. And if the decisions taken by the collectivity of shareholders are in respect of the corporation's affairs, then the shareholders' reliance on negligently prepared audit reports in taking such decisions will result in a wrong to the corporation for which the shareholders cannot, as individuals, recover.

**61** This line of reasoning finds support in Lord Bridge's comments in Caparo, supra, at p. 580:

> The shareholders of a company have a collective interest in the company's proper management and in so far as a negligent failure of the auditor to report accurately on the state of the company's finances deprives the shareholders of the opportunity to exercise their powers in general meeting to call the directors to book and to ensure that errors in management are corrected, the shareholders ought to be entitled to a remedy. But in practice no problem arises in this regard since the interest of the shareholders in the proper management of the company's affairs is indistinguishable from the interest of the company itself and any loss suffered by the shareholders . . . will be recouped by a claim against the auditor in the name of the company, not by individual shareholders. [Emphasis added.]

It is also reflected in the decision of Farley J. in Roman I, supra, the facts of which were similar to those of the case at bar. In that case, the plaintiff shareholders brought an action against the defendant auditors alleging, inter alia, that the defendant's audit reports were negligently prepared. That negligence, the shareholders contended, prevented them from properly overseeing management which, in turn, led to the winding up of the corporation and a loss to the shareholders of their equity therein. Farley J. discussed the rule in Foss v. Harbottle and concluded that it operated so as to preclude the shareholders from bringing personal actions based on an alleged inability to supervise the conduct of management.

**62** One final point should be made here. Referring to the case of Goldex Mines Ltd. v. Revill (1974), 7 O.R. (2d) 216 (C.A.), the appellants submit that where a shareholder has been directly and individually harmed, that shareholder may have a personal cause of action even though the

corporation may also have a separate and distinct cause of action. Nothing in the foregoing paragraphs should be understood to detract from this principle. In finding that claims in respect of losses stemming from an alleged inability to oversee or supervise management are really derivative and not personal in nature, I have found only that shareholders cannot raise individual claims in respect of a wrong done to the corporation. Indeed, this is the limit of the rule in Foss v. Harbottle. Where, however, a separate and distinct claim (say, in tort) can be raised with respect to a wrong done to a shareholder qua individual, a personal action may well lie, assuming that all the requisite elements of a cause of action can be made out.

**63** The facts of Haig, supra, provide the basis for an example of where such a claim might arise. Had the investors in that case been shareholders of the corporation, and had a similarly negligent report knowingly been provided to them by the auditors for a specified purpose, a duty of care separate and distinct from any duty owed to the audited corporation would have arisen in their favour, just as one arose in favour of Mr. Haig. While the corporation would have been entitled to claim damages in respect of any losses it might have suffered through reliance on the report (assuming, of course, that the report was also provided for the corporation's use), the shareholders in question would also have been able to seek personal compensation for the losses they suffered qua individuals through their personal reliance and investment. On the facts of this case, however, no claims of this sort can be established.

Conclusion

**64** In light of the foregoing, I would find that even though the respondents owed the appellants (qua individual claimants) a prima facie duty of care both with respect to the 1982-83 investments made in NGA and NGH by Hercules and Mr. Freed and with respect to the losses they incurred through the devaluation of their existing shareholdings, such prima facie duties are negated by policy considerations which are not obviated by the facts of the case. Indeed, to come to the opposite conclusion on these facts would be to expose auditors to the possibility of indeterminate liability, since such a finding would imply that auditors owe a duty of care to any known class of potential plaintiffs regardless of the purpose to which they put the auditors' reports. This would amount to an unacceptably broad expansion of the bounds of liability drawn by this Court in Haig, supra. With respect to the claim regarding the appellants' inability to oversee management properly, I would agree with the courts below that it ought to have been brought as a derivative action. On the basis of these considerations, I would find under Rule 20.03(1) of the Manitoba Court of Queen's Bench Rules that the appellants have failed to establish that their claims as alleged would have "a real chance of success".

**65** I would dismiss the appeal with costs.

# Tab 10

# Shareholders' Remedies in Canada

**Igor Ellyn, QC, FCIArb.**
**ELLYN-BARRISTERS**
*Business Litigation Lawyers - Arbitration & Mediation*
*Avocats en litiges commerciaux - arbitrage & médiation*
1100 Standard Life Centre, 121 King Street West, Toronto, Canada M5H 3T9
(416) 365-3750 Fax (416) 368-2982 iellyn@ellynlaw.com http://www.ellynlaw.com

**Karine de Champlain]**
Chaitons LLP, Toronto, Canada

## *Table of Contents*



### *The Authors*

**Igor Ellyn, QC, FCIArb.** is a senior commercial litigation lawyer, chartered arbitrator and mediator and the senior partner of ELLYN-BARRISTERS Business Litigation Lawyers, Toronto. He was designated Queens Counsel in 1984 and has been a Certified Specialist in Civil Litigation since 1989. He is a fellow of the Chartered Institute of Arbitrators and a member of the arbitration panel of ADR Chambers International. Mr. Ellyn is a past president of the Canadian Bar Association-Ontario and a recipient of the Law Society's Bicentennial Award of Merit. He is the author of numerous articles on litigation matters. Copies of other articles written by Igor Ellyn on commercial litigation and advocacy are available online at www.ellynlaw.com. Igor Ellyn speaks five languages.

**Karine de Champlain** is a lawyer with Chaitons LLP in Toronto. She has experience in a variety of corporate law matters, including bankruptcy and insolvency, mergers and acquisitions and securities. She recently co-authored a paper entitled "Debtor-in-Possession Financing: The Dark Lending Hole" which appeared in the *Commercial Insolvency Reporter*.

### Important Note

## *Introduction*

When advising business clients about doing business in Canada[1] lawyers must turn their minds not only to the kinds of corporate vehicles which Canadian law permits but also the remedies permitted if disputes arise. In this paper, we highlight the range of remedies available in the common law jurisdictions of Canada to protect shareholders and others from abusive corporate action.

Canadian corporate statutes[2] place few hurdles in the way of achieving incorporation. Any individual over 18 years of age who is of sound mind and is not a bankrupt, or any corporation, may incorporate a company simply by signing articles of incorporation and presenting them to the appropriate government ministry for stamping and registration.

In the face of this enabling philosophy, corporate law has been described as a form of constitutional law that attempts to regulate the rights and obligations of those who participate in or who are affected by the corporation[3]. A central theme of this regulation is "the struggle to balance the protection of corporate stakeholders and the ability of

---

[1] Canada is divided into 10 provinces and three territories. Corporate law statutes have been enacted by each of the Canadian provinces and by the federal Parliament of Canada. These include Business Corporations Act(s) and Securities Acts. Many of these are may be accessed online at www.canlii.org. The Ontario Business Corporations Act to which reference is made in this paper is found online at www.canlii.org/on/laws/sta/b-16/index.html. The Ontario Securities Act is online at www.canlii.org/on/laws/sta/s-5/index.html. Anglo-Canadian common law principles are applicable throughout Canada except for the province of Quebec, which has a Civil Code. Statutes enacted by the federal Parliament are applicable across Canada. Provincial statutes in the common law provinces are not fully harmonized but tend to be similar. The caution readers to verify the applicable law in Quebec.

[2] See f.n. 1.

[3] J.S. Ziegel et al., Cases and Materials on Partnerships and Canadian Business Corporations, 3rd ed. (Toronto: Carswell, 1994) at 925

management to conduct the affairs of the company in an efficient manner without undue interference".[4]

We will begin by discussing the various sources of shareholder rights, including corporate statutes, articles of incorporation and by-laws, and shareholder agreements. Although securities laws will also be briefly mentioned, the securities regime is exceedingly complex and it is beyond the scope of this paper to address it in detail.[5]

We will then move on to a discussion of the remedies provided by corporate statute to shareholders who are aggrieved by the manner in which management conducts the business and affairs of the corporation, including voting, court-ordered meetings, derivative actions, the oppression remedy, investigations, appraisals and court-ordered winding-up on the "just and equitable principle".

The oppression remedy, widely acknowledged to be the most powerful weapon in the shareholder's arsenal of remedies will focus on two particular points: the broad definition of "complainant" under corporate statutes, and the manner in which the courts have defined the legitimate expectations of shareholders and other "proper persons" under the oppression remedy.

---

[4] D.H. Peterson, Shareholder Remedies in Canada (Toronto: Butterworths,1989) at 1.6

[5] See reference to Securities Acts online at www.e-laws.gov.on.ca/DBLaws/Statutes/English/90s05_e.htm for the Ontario Securities Act and for the other provinces and territories at www.canlii.org.

## Shareholder Rights

### *Corporate Statutes*

In Canada, a company may be incorporated under either federal or provincial legislation.[6] Although the statutes cover broadly the same categories of rights and remedies of shareholders, there are minor variations between the statutes. For the purposes of this paper, we will use the Ontario Business Corporations Act[7] (the "OBCA")[8] as our model. However, counsel should be sure to consult the corporate statute under which the company was incorporated for the appropriate provisions.[9]

The rights provided to shareholders under corporate statute can be broadly divided into three categories: Voting rights, rights with respect to meetings, and rights pertaining to access to information. Each is discussed below.

### Voting

The right to vote is the most fundamental right accorded to shareholders under Canadian corporate law statutes. Through voting, shareholders can control the makeup of the board of directors[10], which is by statute responsible for the management of the corporation[11], and participate in major business decisions affecting the company[12]. Further, the articles of

---

[6] See f.n. 1.

[7] D.H. Peterson, ibid. p. 18.1

[8] R.S.O. 990, c.B-16. online at www.e-laws.gov.on.ca/DBLaws/Statutes/English/90b16_e.htmat.

[9] It is beyond the scope of this paper to address the strategic and tax considerations which affect the selection of the most favourable jurisdiction in which to incorporate.

[10] OBCA s.119(4)

[11] OBCA s.115

[12] See for example OBCA s.184(3), which requires shareholders to vote on a sale of "all or substantially all" of the assets of the corporation.

incorporation and by-laws may impose limits on corporate and intra-shareholder activities.

**Meetings**

A corollary of the right to vote is the right of the shareholder to attend at meetings. Corporate statutes provide for the calling of an annual meeting of shareholders not later than fifteen months following the last held annual meeting, as well as special meetings at any time.[13]

The annual meeting usually involves the election of directors, the appointment of the auditor and the presentation of the company financials, although other business may also be transacted. Business requiring shareholder approval can be transacted between annual meetings by the calling of a special meeting of shareholders. The statutes also provide for shareholders who hold not less than 5% of the voting shares of a corporation to requisition the directors to call a meeting for any purpose stated in the requisition.[14]

**Access to Information**

Key to a shareholder's ability to exercise the right to vote is access to information about the business and affairs of the company. The OBCA, as with other corporate statutes, provides that a corporation shall prepare and maintain in a designated place certain types of records. These include:

---

[13] OBCA s.94(1)

[14] OBCA s.105(1)

(a) the articles and by-laws of the corporation and all amendments thereto;

(b) copies of any unanimous shareholders agreements known to the directors;

(c) minutes of meetings and resolutions of shareholders;

(d) a register of directors setting out specified information; and

(e) a securities register setting out certain specified information.[15]

In addition, the corporation is to prepare adequate accounting records and a record of directors' meetings and meetings of any committee thereof.[16] Shareholders and creditors and their agents and legal representatives are to be provided access to the books and records maintained by the corporation during the usual business hours of the corporation and are permitted to take extracts of the records where appropriate.[17]

Shareholders are also entitled to be provided with notice of meetings and related information. Such notices and materials, including proxy forms and circulars, must describe the nature of the business to be conducted at the meeting "in sufficient detail to permit the shareholder to form a reasoned judgment thereon".[18] For example, it was held in *Pace Savings & Credit Union Ltd. v. Cu-Connection Ltd.* [19] that a notice was insufficient where a draft agreement had been provided to shareholders. The draft, it was

---

[15] OBCA s.140(1)

[16] OBCA s.140(2)

[17] OBCA s.145(1), (2), 146(1)

[18] See OBCA s.96(6) for notice of meetings and s.30(31) of O. Reg. 62 regarding information circulars.

[19] [2000] O.J. No. 3830 (Ont. S.C.)

held, could change substantially throughout the course of negotiation, and could not form the basis on which a reasoned judgment could be formed as to the impact of the transaction. In Giannotti et al. v. Wellington Enterprises Ltd.,[20] the Ontario Superior Court held that the transfer of a principal asset of a corporation was invalid when the notice of the meeting failed to specify in detail the full nature of the transaction and the proposed agreement of purchase and sale.

### *Articles of Incorporation and By-Laws*

The articles of incorporation and by-laws of the corporation may trump the statutory provisions in some circumstances. Articles of incorporation and by-laws set out the types and classes of shares the corporation is authorized to issue and the rights of shareholders relative to both the corporation and to owners of other types of shares. They may set out voting rights, rights to dividends and rights upon dissolution of the company. They may also contain restrictions on the ability of the shareholder to transfer shares.

### *Shareholder Agreements*

Shareholders' agreements may take many forms, from a simple agreement to vote shares in a particular way through to unanimous shareholders' agreements, which restricts the powers of the directors of the corporation and transfers those rights and responsibilities to the shareholders. Such agreements may embellish or supplement rights provided under corporate law statute. For example, shareholders' agreements could include provisions

[20] *Giannotti v. Wellington Enterprises Ltd.* [1997] O.J. No. 574 (Ont. Gen. Div.)

such as buyout mechanisms, pre-emptive rights, drag-along and tag-along provisions on sale of shares. They may also set out definitions of who can be a shareholder and provide for restrictions on transfer of shares.

In closely-held corporations, shareholder agreements often include provisions describing or limiting the scope of some shareholders' management functions; plans for succession and undertaking of new corporate opportunities. Abuse of these provisions by shareholders active in the management of the corporation form the genesis of assertion of shareholders' rights by the minority or other aggrieved shareholders. How the assertion of rights by minority or aggrieved shareholders is limited by a mandatory arbitration clause is an important consideration which will be considered later in this paper.

### *Securities Laws*

Securities Acts in each province enact an entire regime regulating public companies and their actions in relation to the Canadian securities market.[21] These statutes contain a set of complex rules and regulations overseen by provincial regulatory bodies. These include rules on voting and access to information, much like the corporate statutes described above, as well as rules regarding disclosure of information to shareholders. It is beyond the scope of this paper to discuss these statutes in detail.

---

[21] See reference to Securities Acts online at www.e-laws.gov.on.ca/DBLaws/Statutes/English/90s05_e.htm for the *Ontario Securities Act* and for the other provinces at www.canlii.org. Securities legislation is enforced and administered in Ontario by the Ontario Securities Commission. Information about the OSC is available online at http://www.osc.gov.on.ca/. Securities commissions also exist in the other provinces. Links to websites of other securities commissions are found at www.osc.gov.on.ca/RelatedLinks/rl_links_index.jsp. The securities and investment dealer/broker industry is also administered by several self-regulating organizations, including the Investment Dealers Association of Canada. Market Regulation Services Inc. and the stock exchanges in Toronto Montreal and Vancouver. Links to the sites of these organization are also found at the above page on the OSC site..

## Shareholders' Remedies

If the rights given to shareholders are to be effective and worthwhile, it is clear that corresponding remedies must be available to the shareholder to cure their breach. In the following sections of the paper, we examine some of the remedies made available to shareholders and their application.

### *Court Ordered Meetings*

As discussed above, the shareholder meeting plays an important role in the successful exercise of voting rights by shareholders. The corporate statutes therefore provide the Court with discretion to order a shareholder meeting where a meeting is impeded by lack of quorum or other disruptive action by one or a group of shareholders.

In particular, section 106(1) of the OBCA states that the court may "order a meeting to be called, held and conducted in such manner as the court directs" where it is "impracticable" to call a meeting of shareholders or to conduct a meeting in the manner provided for under the articles and by-laws of the corporation or under statute or "for any other reason the court thinks fit".[22] The remedy is available on application by a director or shareholder entitled to vote at a meeting. The classic statement of what is meant by

[22] OBCA s.106(1)

"impracticable" in the context of section 106(1) comes from the judgment of the English Court of Appeal in *Re El Sombrero Ltd.*[23]:

> *It is to be observed that the section opens with the words "If for any reason," and therefore it follows that the section is intended to have, and, indeed, has by reason of its language, a necessarily wide scope. The next words are "...it is impracticable to call a meeting of a company..." The question then arises, what is the scope of the word "impracticable"? It is conceded that the word "impracticable" is not synonymous with the word "impossible"; and it appears to me that the question necessarily raised by the introduction of that word "impracticable" is merely this: examine the circumstances of the particular case and answer the question whether, as a practical matter, the desired meeting of the company can be conducted, there being no doubt, of course, that it can be convened and held.*

"Impracticability" must be interpreted broadly in order "to govern the affairs of practical men engaged in business."[24] In addition, the courts have held that "the right of the shareholders to democratically determine the future course of the company is paramount consideration, even when there is ongoing litigation" between the parties.[25] The fact that the application is opposed should not preclude the calling of the shareholders' meeting.

In appropriate circumstances, the Court may order a meeting to be "called held and conducted in such manner as the court directs", which provides broad jurisdiction to the court in terms of the types of orders granted under section 106(1) of the OBCA. The legislation also provides for ancillary orders that may be granted in the context of the meeting. For example, the court may order that the quorum required by the articles of

---

[23] [1958] 1 Ch. 900 (U.K. C.A.)

[24] *B. Love Ltd. v. Bulk Steel & Salvage Ltd.* (No. 2) (1982), 40 O.R. (2d) 1 (H.C.J.) (QL)

[25] *FTS Worldwide Corp. v. Unique Broadband Systems Inc.* [2001] O.J. No. 5126 (Ont. Sup. Ct.) (QL)

incorporation and by-laws of the corporation or by the statute "be varied or dispensed with" at a meeting ordered pursuant to section 106.[26]

***Derivative Action***

The powerful but infrequently-used remedy of "derivative action' permits a shareholder or other "complainant" to advance an action on behalf of the corporation when the corporation refuses to bring the action itself. The action is available to rectify wrongs done to the corporation itself rather than to the individual shareholder. The intent of the remedy is to circumvent the problem of management not taking action to rectify a wrong where they may have been involved in or responsible for the wrong sustained by the corporation.

Standing to begin a derivative action is given to a "complainant", a defined term under the OBCA. Section 245 of the OBCA defines a "complainant" as:

> (a) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates;
>
> (b) a director or an officer or a former director or officer of a corporation or of any of its affiliates;
>
> (c) any other person who, in the discretion of the court, is a proper person to make an application.

A person with standing may seek leave to do one of two things: to "bring an action in the name and on behalf of a corporation or any of its subsidiaries", or to "intervene in an

[26] OBCA s.106(2)

action to which any such body corporate is a party" in order to prosecute, defend or discontinue the action on behalf of the body corporate.[27]

The four statutory pre-conditions necessary to bring a statutory derivative action may be summarized as follows:

(a) the directors of the corporation or its subsidiary will not bring, diligently prosecute or defend or discontinue the action;

(b) the complainant has given reasonable notice to the directors of the corporation or its subsidiary of his or her intention to seek leave to commence a derivative action;

(c) the complainant is acting in good faith; and

(d) it appears to be in the interests of the corporation or its subsidiary that the action be brought, prosecuted, defended or discontinued.[28]

With respect to the notice provision, it was held by the British Columbia Supreme Court in *Re Daon Development Corp.*[29] that the condition could not be waived, in part because the "condition can be easily performed without undue expense of effort".

In *Re Loeb and Provigo Inc.*,[30] Steele J. of the Supreme Court of Ontario discussed the onus of proof for leave to begin an action, stating that "There is an onus on an applicant to bring before the court more than mere suspicion to warrant the granting of leave." The requirement has been interpreted broadly, and it has been decided that the notice is not

---

[27] OBCA s.246(1)

[28] See OBCA s.246(2) and Peterson, supra note 2 at 17.35

[29] (1984) 54 B.C.L.R. 235 (S.C.) (QL)

[30] (1978), 88 D.L.R. (3d) 139 (Ont. H. C.)

required to contain every cause of action that is eventually brought in the derivative action. The notice should, however, contain enough information to permit the directors to determine the nature and extent of the complaint and it must be delivered to the appropriate parties.[31]

"Good faith" is not a defined term in the in corporate law statutes. Each case is therefore analyzed on its own terms for indications of bad faith. Where the Court finds indications bad faith on the part of majority shareholders, leave to commence the derivative action will be granted if the other pre-conditions are met. The Court must be satisfied that the derivative action is likely to benefit the corporation and that the corporation will not be unduly exposed to legal costs.

Under Canadian common law procedure, "costs" refers to the power of the Court to award some or substantially all of a successful party's legal expenses to be paid by the losing party. In a complex action, an allegation of shareholder or management fraud or other abuse will result in expensive legal proceedings.

In these circumstances, the Court must assess whether the corporation should fund the action and whether the applicant should be obliged to indemnify the corporation for legal costs, including those payable to the impugned by party if the action does not succeed. Further, if the derivative action is against the controlling shareholder or principal

[31] D.H. Peterson, supra note 4 at 17.37

manager of the corporation, the Court must assess the impact on the continued operation of the corporation's business.

The final pre-condition to obtaining leave to commence a derivative action is that it "appear" to be in the interests of the corporation" that the action move forward. This differs from other provisions of the OBCA which require the courts to be "satisfied" that certain conduct has been carried out. This pre-condition affords the Court a mechanism to provide relief to a deserving complainant where access to all the relevant information was not possible at the time of bringing the motion for leave to bring the action.

It is also worth noting that while the typical claim for leave to commence a derivative action, a majority shareholder or senior management has abused his or her power and usurped the right of the corporation. However, the derivative action is not limited to claims against other shareholders or management.

Where a complainant is successful in persuading the Court that leave to commence a derivative action should be given, the Court may make "any order it thinks fit," including, but are not limited to:[32]

- an order authorizing the complainant or any other person to control the conduct of the action;
- an order giving directions for the conduct of the action;
- an order requiring that any amount adjudged payable by the defendant in the action shall be paid, in whole or in part, directly to former and

[32] OBCA, s.247

present security holders of the corporation or its subsidiary instead of to the corporation or its subsidiary; and

- an order requiring the corporation or its subsidiary to pay reasonable legal fees and any other costs reasonably incurred by the complainant in connection with the action.[33]

***The Oppression Remedy***

The oppression remedy[34] is widely acknowledged as being one of the most powerful weapons in the arsenal of the shareholder. The remedy was introduced largely in response to the difficulties encountered by minority shareholders in a corporate environment that runs by majority rules.

Nearly 80 years ago, the Ontario Court of Appeal enunciated the dilemma of minority shareholders in these words in *Re Jury Gold Mine Development Co.*:[35]

> *He is a minority shareholder and must endure the unpleasantness incident to that situation. If he chooses to risk his money by subscribing for shares, it is part of his bargain that he will submit to the rule of the majority. In the absence of fraud or transactions ultra vires, the majority must govern, and there should be no appeal to the Courts for redress.*

Where one group of shareholders abuses their power over another group, inequitable results can occur. The result was the introduction of the oppression remedy. Since its introduction, and since the coming into force of the oppression remedy provision of the *Business Corporation Acts*, in July 1983, the remedy has gained prominence and has developed a large body of jurisprudence across Canada.

---

[33] See OBCA s.247

[34] See OBCA s.248

[35] [1928] 4 D.L.R. 735 (Ont. C.A.)

The Ontario Court of Appeal reiterated the state of the law in the recent and oft-referred to case of *Waxman et al. v. Waxman et al.*[36] in which Morris Waxman succeeded in recovering nearly $50 million following his dismissal and exclusion from a family business by his brother, Chester Waxman and others. It was the culmination of a 10-year legal battle, which may see another round as leave to appeal to the Supreme Court of Canada is pending at the time of this paper. The decision applied the principles espoused 20 years earlier by the same Court in *Ferguson v. IMAX Systems Corp.*[37], a case decided under the *Canada Business Corporations Act*.

In essence, the oppression remedy amounts to this: the Court has a broad remedial authority where it finds conduct that qualifies as oppressive. It may make any order it thinks fit to rectify the matters complained of. This explicitly includes setting aside a transaction or contract to which the corporation is a party or amending unanimous shareholder agreements, corporate articles or by-laws. This statutory language is to be given a broad interpretation consistent with its remedial purpose.[38]

Oppressive conduct which occurred before the oppression remedy came into effect and continued may be considered by the Court.[39] This is so because the oppression remedy is

---

[36] [2002] O.J. No. 2528, (2002) 25 B.L.R. (3d) 1 (Ont. S.C. Sanderson J.) aff'd with minor variations [2004] O.J. No. 1765, (2004) 44 B.L.R. (3d) 165 (Ont. C.A.)

[37] (1983), 43 O.R. (2d) 128 at 137 (C.A.), leave to appeal to S.C.C. refused (1983), 2 O.A.C. 158n.

[38] *Waxman v. Waxman* [2002] O.J. No. 2528 at para. 523 (Ont. C.A.)

[39] *Waxman v. Waxman* [2002] O.J. No. 2528 at para. 529-533 (Ont. C.A.)

considered part of substantive law has been interpreted as having retrospective effect.[40] In Ontario, no specific limitation period applies to an oppression claim.[41]

A "complainant", as defined in s. 245 of the OBCA and referred to above, may apply to a court for an order and where the court is satisfied that

> (a) any act or omission of the corporation or its affiliates effects a result;
>
> (b) the business or affairs of the corporation or its affiliates are or have been carried on or conducted, or
>
> (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised
>
> in a manner that is "oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.[42]

The great flexibility of the oppression remedy stems from the inclusiveness of its language, which allows any type of corporate activity to be the subject of scrutiny, and which makes the remedy available to a broad class of individuals.

For example, it has been held that "the court has jurisdiction to find an action is oppressive, unfairly prejudicial, or unfairly taken in disregard of the interests of a security holder if it is wrongful, even if it is not actually unlawful."[43] In addition, conduct may be isolated or may form a pattern of conduct that is considered oppressive to shareholders.

---

[40] *Re Mason and Intercity Properties Ltd.* (1986), 32 A.C.W.S. (2d) 366 (Ont. Div. Ct.), varied on unrelated other grounds (1987), 59 O.R. (2d) 631 (C.A.).

[41] *Waxman v. Waxman* [2002] O.J. No. 2528 at para. 534-535 (Ont. C.A.)

[42] OBCA s.248(1) and (2)

[43] *Maple Leaf Foods Inc. v. Schneider Corp.* (1998) 42 O.R. (3d) 177 (QL)

Importantly, it has been held that no bad faith is required in order to establish conduct as oppressive. It is the effect of the conduct, and not the intention of the party engaging in the conduct, that is of primary importance in oppression remedy cases.[44]

***Legitimate Expectations***

In *Brant Investments Ltd. v. KeepRite Inc.*,[45] the Ontario Court of Appeal held that the oppression remedy protects only the legitimate expectations of shareholders. Those expectations must be "reasonable under the circumstances and reasonableness is to be ascertained on an objective basis." In the same case, the Court expressed the concept in the following language:

> *Shareholder interests would appear to be intertwined with shareholder expectations. It does not appear to me that the shareholder expectations that are to be considered are those that a shareholder has as his own individual "wish list". They must be expectations which could be said to have been (or ought to have been considered as) part of the compact with shareholders.*

The legitimate expectations of a shareholder may be affected by the provisions contained in the articles of incorporation and by-laws of the corporation or the provisions of any agreements between shareholders. They may also be affected by the size and nature of the corporation and general commercial practice. On making a finding of oppression, a court may make "an order to rectify the matter complained of".[46] Section 248(3) sets out a number of specific orders that may be made by the court, including, for example:

(a) an order restraining the conduct complained of;

---

[44] *Brant Investments Ltd. v. KeepRite Inc.* (1991) 3O.R. (3d) 289 (Ont. C.A.) (QL)

[45] *Brant Investments Ltd. v. KeepRite Inc., supra., f.n. 39*

[46] OBCA s. 248(2)

(b) an order appointing a receiver or receiver-manager;

(c) an order amending the articles or by-laws of the corporation or the provisions of a unanimous shareholders' agreement;

(d) an order appointing directors in place of or in addition to the directors then in office;

(e) an order directing the company or any other person to purchase securities of a security holder;

(f) an order winding up the corporation; and

(g) an order requiring the trial of any issue.[47]

In addition, the Court may order the corporation or its affiliates to "pay to the complainant interim costs, including reasonable legal fees and disbursements".[48] In order to obtain such an order, the applicant must establish that there is a case of sufficient merit to warrant pursuit and that the applicant is genuinely in financial circumstances which, but for an order, would preclude the claim from being pursued.[49]

However, where a complainant, a minority shareholder, is unable to persuade the Court that he does not have the resources to pursue the action or fails to disclose his financial circumstances, the Court will refuse to make an order for interim disbursements.[50]

---

[47] OBCA s.248(3). Not all available remedies are listed here. The entire section may be viewed online at http://www.e-laws.gov.on.ca/DBLaws/Statutes/English/90b16_e.htm#BK269

[48] OBCA s.249(4)

[49] *Alles v. Maurice* (1992) 9 C.P.C.(3d) 42 (Ont. Gen. Div.) (QL)

[50] *Molinaro v. U-Buy Discount Foods Limited* [2000] O.J. No. 4642 (Ont. Superior Court of Justice)

The management by the Court of shareholder expectations is an important aspect of the oppression remedy. Even at the interim stage of the proceedings, the Court's objective is to main a semblance of the status quo ante even if allegations of oppression have not been fully proved. In *Alizadeh et al. v. Akhavan et al.*[51], a judge of the Ontario Superior Court restored historic payments of management fees to an equal shareholder pending trial without drawing any conclusions about the merit of the oppression allegations.

**Use of the Oppression Remedy by Non-Shareholders**

As set out above, the definition of "complainant" under the derivative action and oppression remedy is extremely broad, including current and former shareholders, current or former directors and officers, and "any other person who, in the discretion of the court, is a proper person" to bring the application.[52]

In *First Edmonton Place Ltd. v. 315888 Alberta Ltd.*,[53] an Alberta case examining the scope of an identical oppression remedy provision in the Alberta statute, the Court identified two circumstances under which a creditor could be considered a "proper person" to bring an application:

(a) where the directors or management of the corporation have used the corporation as a vehicle for committing fraud upon the applicant; and

---

[51] *Alizadeh v. Akhavan* [2004] O.J. No. 2147 (Jarvis J.) (Ont. Superior Court)

[52] OBCA s.245

[53] [1988] A.J. No. 511 (Alta. Q.B.) (QL)

(b) where the directors or management of the corporation have breached the underlying expectations of the applicant arising from the circumstances in which the applicant's relationship with the company arose.

On the basis of these principles, the oppression remedy has been available to a trade creditor where the corporation had taken actions to conceal its insolvency,[54] and to a wrongfully dismissed employee against former directors where a corporate reorganization resulted in the corporation which paid the employee's salary ceasing to exist.[55]

## Oppression and Arbitration

In *Deluce Holdings Inc. v. Air Canada*[56], the court was asked to examine in what circumstances, if any, oppressive conduct could operate to postpone arbitration proceedings, which were mandatory under the terms of a shareholders' agreement. In that that case, a shareholders' agreement provided for arbitration for disputes as to value of the shares held by each of the parties in Air Ontario, a regional carrier for Air Canada. The valuation provision was triggered by the termination of Deluce from his employment as CEO, which was effected by Air Canada (the majority shareholder) in an effort to obtain 100% control of Air Ontario and to reorganize its corporate operations.

---

[54] *C.C. Petroleum v. Allen et al.* [2002] O.J. No. 2203 (S.C.J.) (QL)

[55] *Downtown Eatery (1993) Ltd. v. Ontario* [2001] O.J. No. 1879 (C.A.) (QL)

[56] (1992) 98 D.L.R. (4th) 509 (Ont. Gen. Div.) (QL)

Senior Regional Justice Blair (as he then was) of the Ontario Superior Court held that the actions of Air Canada in removing Deluce could be found to be "oppressive" and that Deluce's holding corporation (the minority shareholder) had a reasonable expectation that Mr. Deluce would only be terminated where such a move was in the best interests of Air Ontario.

In terminating Deluce, the representatives of Air Canada on Air Ontario board of directors had been fulfilling an Air Canada agenda and had paid little attention to the best interests of Air Ontario itself. Under the circumstances, the court held that the entire underpinning of the arbitration structure had been destroyed, taking the subject of the dispute out of the purview of the matters to be dealt with under the agreement. The arbitration was therefore stayed and the oppression remedy action proceeded.

***Investigations***

The effective exercise of shareholder remedies will frequently depend on possessing the relevant information. An important statutory aid to shareholders in this respect is the court-ordered investigation of the corporation's affairs where the shareholder can satisfy the court that there are circumstances that warrant the court order. In particular, section 161(2) of the OBCA provides that an investigation may be ordered by the court where it appears to the court that:

(a) the business of the corporation or any of its affiliates is or has been carried on with intent to defraud any person;

(b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted, or the powers of the directors are or have been exercised, in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards, the interests of a security holder;

(c) the corporation or any of its affiliates was formed for a fraudulent or unlawful purpose or is to be dissolved for a fraudulent or unlawful purpose; or

(d) persons concerned with the formation, business or affairs of the corporation or any of its affiliates have in connection therewith acted fraudulently or dishonestly.

An application for an investigation may be brought by a shareholder without notice to the corporation.[57] To balance the needs of the shareholders with the ability of management of the corporation to effectively conduct the business, the hearing of an application under section 161(2) is closed to the public[58] and is subject to a publication ban.[59]

It is worth noting that unlike many other provisions of the statute, which require the court to be "satisfied", the court may make the order granting the investigation where it "appears" that the impugned conduct fits into the listed categories. This may result in a lower burden of proof being placed on the shareholder and could be an appropriate remedy where an aggrieved shareholder does not have access to the information required to meet a higher burden.

The investigation provisions provide that the court may make any order it thinks fit and proceed to enumerate twelve specific orders that may be made by the court.[60] The most

---

[57] OBCA s.161(1)

[58] OBCA s.161(5)

[59] OBCA s.161(6)

[60] OBCA s.162(1)

important of these is obviously the order to investigate.[61] The other listed orders are ancillary to this general order, generally focusing on the appointment of the investigator and the powers of the inspector once appointed. For example, the investigator may, if so ordered:

- enter any premises in which the court is satisfied there might be relevant information, and examine any thing and make copies of any document or record found on the premises;
- compel any person to produce documents or records; and
- conduct a hearing, administer oaths and examine any person on oath.

Although the investigation remedy could be of great assistance to shareholders, the courts have traditionally been reluctant to order an investigation unless a shareholder can demonstrate that the information was not available through other means.[62]

### *Appraisal Remedy*

An appraisal right is the right of a shareholder to require the company to purchase his shares at an appraised "fair value" under certain circumstances. There are three circumstances under which the appraisal remedy is triggered under the OBCA:

> (a) where shareholders are granted rights of dissent upon certain fundamental changes. These changes include amendments to articles, amalgamations, and sales of all or substantially all of the assets of the corporation;[63]

---

[61] OBCA s.162(1)(a). s.162(1) is online at www.e-laws.gov.on.ca/DBLaws/Statutes/English/90b16_e.htm#BK178

[62] *Re Royal Trustco Ltd. (No.3)* (1981) 14 B.L.R. 307 (Ont. S.C.) (QL)

[63] OBCA s.185(1)

(b) compulsory acquisitions, which arise where a person making a take-over bid purchases 90% or more of the shares of a particular class;[64] and

(c) shareholder's right to request acquisition where he holds 10% or less of the outstanding shares of a particular class.[65]

The OBCA sets out the procedural steps and timelines under which each appraisal remedy may be exercised, which are beyond the scope of this paper to discuss. In *Re Domglas Inc.,*[66] the Quebec Superior Court held that "fair value" is the just and equitable value of the shares. The Court identified four methods to assess value:

- market value: this method uses quotes from the stock exchange;
- net asset value: this method takes into account the current value of the company's assets and not just the book value;
- investment value: this method relates to the earning capacity of the company;
- a combination of the preceding three methods.

***Winding-up***

The dissolution order is "the most drastic form of shareholder relief".[67] The OBCA, like other corporate statutes, sets out a number of circumstances under which a court may order a winding-up of the corporation.[68] These include where an oppression remedy

[64] OBCA s.188(1)

[65] OBCA s.189(1)

[66] (1980) 13 B.L.R. 135 (Que. S.C.); aff'd138 D.L.R.(3d) 521

[67] (1980) 13 B.L.R. 135 (Que. S.C.); aff'd138 D.L.R.(3d) 521

[68] Ziegel, supra f.n. 3 at 1290

claim has been met, where unanimous shareholder agreements provide the shareholder with rights to make an application and, perhaps most importantly, where it is "just and equitable for some reason, other than the bankruptcy or insolvency of the corporation, that it should be wound up."[69] The court may make any order it thinks fit in connection with an application for winding-up.[70]

The courts have, in the exercise of their powers under the "just and equitable" doctrine, made it abundantly clear that each case must be determined on its own facts. There emerge from the cases four situations in which the "just and equitable" rule will be applied:[71]

- disappearance of substratum: this involves a failure of the fundamental objectives of the corporation. The cases fall into three categories:
  - the subject matter of the company is gone,
  - the object for which it was incorporated has substantially failed, or
  - it is impossible to carry on the business of the corporation except for at a loss;[72]
- justifiable lack of confidence in the management of the corporation;
- deadlock; and
- the partnership analogy.[73]

---

[69] OBCA s.207(1)

[70] OBCA s.207(b)(iv)

[71] OBCA s.207(2)

[72] Peterson, supra note 4 at 20.36. See also *Giannotti v. Wellington Enterprises Ltd.* [1997] O.J. No. 574 (Ont. Gen. Div.) (QL), where the corporation was wound up because the company had no reason to exist once its assets were distributed.

[73] *Ebrahimi v. Westbourne Galleries Ltd.* [1972] 2 All E.R. 492 (H.L.)

## Conclusion

As noted in the introduction, a fundamental point in corporate law is the struggle to balance the protection of corporate stakeholders and the ability of management to conduct the affairs of the company in an efficient manner without undue interference. Shareholders and other interested or affected parties are therefore provided with certain rights and remedies under corporate law, all of which attempt to foster this balance.

Toronto, March, 2005.

Igor Ellyn, QC, FCIArb.

Digitally signed by Igor Ellyn, QC, FCIArb.
DN: CN = Igor Ellyn, QC, FCIArb., C = CA, O = ELLYN-BARRISTERS
Reason: I am the author of this document
Date: 2005.03.28 10:16:59 -05'00'

# Tab 11

# CANADIAN BUSINESS CORPORATIONS LAW

## SECOND EDITION

**Kevin Patrick McGuinness**

**LL.B., LL.M., S.J.D.**
**Barrister, Solicitor and Notary Public (Ontario)**
**Solicitor (England and Wales)**

**Counsel**
**Crown Law Office—Civil**
**Ministry of the Attorney General of Ontario**

LexisNexis®

**Canadian Business Corporations Law**

August 2007



**Members of the LexisNexis Group worldwide**

| | |
|---|---|
| **Canada** | LexisNexis Canada Inc, 123 Commerce Valley Dr. E. Suite 700, MARKHAM, Ontario |
| **Argentina** | Abeledo Perrot, Jurisprudencia Argentina and Depalma, BUENOS AIRES |
| **Australia** | Butterworths, a Division of Reed International Books Australia Pty Ltd, CHATSWOOD, New South Wales |
| **Austria** | ARD Betriebsdienst and Verlag Orac, VIENNA |
| **Chile** | Publitecsa and Conosur Ltda, SANTIAGO DE CHILE |
| **Czech Republic** | Orac, sro, PRAGUE |
| **France** | Éditions du Juris-Classeur SA, PARIS |
| **Hong Kong** | Butterworths Asia (Hong Kong), HONG KONG |
| **Hungary** | Hvg Orac, BUDAPEST |
| **India** | Butterworths India, NEW DELHI |
| **Ireland** | Butterworths (Ireland) Ltd, DUBLIN |
| **Italy** | Giuffré, MILAN |
| **Malaysia** | Malayan Law Journal Sdn Bhd, KUALA LUMPUR |
| **New Zealand** | Butterworths of New Zealand, WELLINGTON |
| **Poland** | Wydawnictwa Prawnicze PWN, WARSAW |
| **Singapore** | Butterworths Asia, SINGAPORE |
| **South Africa** | Butterworth Publishers (Pty) Ltd, DURBAN |
| **Switzerland** | Stämpfli Verlag AG, BERNE |
| **United Kingdom** | Butterworths Tolley, a Division of Reed Elsevier (UK), LONDON, WC2A |
| **USA** | LexisNexis, DAYTON, Ohio |

**Library and Archives Canada Cataloguing in Publication**

McGuinness, Kevin Patrick
Canadian business corporations law / Kevin McGuinness. — 2nd ed.

Originally publ. under title: The law and practice of Canadian business corporations.
Includes index.
ISBN 978-0-433-44302-5

1. Corporation law—Canada. I. Title.

KE1389.M33 2007 346.71'066 C2007-903881-6
KF1415.ZA2M33 2007

Printed and bound in Canada.

misconduct of the liquidator. Generally, if the liquidator has done anything which the liquidator ought not to have done, the remedy is to pursue the matter in the accounting.[246]

# E. PROVISIONS OF GENERAL APPLICATION RELATING TO LIQUIDATION

## (i) Administration of the Corporate Estate

**§15.103** So far we have considered only the special rules that apply to voluntary liquidation (in contrast to liquidation under court order). As a general rule, however, the rules and procedures applicable to both classes of wind-up are the same. More specifically, sections 220 to 236 of the OBCA set out a number of rules of general application which apply to both voluntary and court ordered wind-ups. Before looking at those provisions in detail, it is worth noting that the winding-up provisions of the OBCA (and also those of the CBCA and other corporate law statutes, for that matter) are directed toward a number of consistent objectives. These include:[247]

- the equitable treatment of all creditors and other claimants against the corporation;
- the avoidance of preferences;
- the disposition of the assets of the corporation on the most favourable terms, to the betterment of all persons who are interested in the corporation;
- to provide a single procedure and process for marshalling the assets of the corporation and applying them to the payment of its liabilities;
- the avoidance of the flood of claims that might otherwise arise upon the decision to wind up the corporation, as every person with a claim or potential claim against the corporation seeks to make sure that its claim will be properly paid;[248]
- the minimization of the administrative and professional costs associated with resolving all outstanding issues relating to the business and affairs of the corporation (in particular discouraging any race to the courthouse and the institution of numerous lawsuits both by and against the corporation); and

---

246 *Commonwealth Investors Syndicate Ltd. v. KPMG Inc.*, [2005] B.C.J. No. 18, 7 C.B.R. (5th) 90 at para. 22.

247 See, generally, *F.D.I.C. as receiver for Buena Vista Bank & Trust Company v. American Casualty Co. of Reading*, 843 P.2d 1285 (S.C. Colo. 1992) — although this decision was with respect to the liquidator of an insolvent bank, much of the discussion is equally applicable in all liquidation contexts.

248 *Stewart v. LePage*, [1916] S.C.J. No. 29, 53 S.C.R. 337 at para. 62, *per* Brodeur J.: "The object of this legislation is to prevent litigation being carried on by anyone prejudicial to the estate, to prevent the assets being dissipated by law suits, and to have all such matters decided promptly by a summary petition."

corporation is being liquidated under the *Bankruptcy and Insolvency Act* does not destroy the corporate entity or fully restrict its ability to function as a corporation. It continues to exist as a corporation, and to possess certain rights and capacities, such as the power to waive its solicitor-client privilege. The exercise of these residual capacities will usually be complicated by the fact that the corporation will have no officers or directors and so no present means to exercise them, but in such cases a shareholders' meeting may be held for the election of directors.[264]

**§15.110** There is an implicit intent in any liquidation proceeding that it be concluded as quickly as the circumstances will allow — ideally with the minimum of expense consistent with prudent administration of the corporation and the closure of its estate. The phrase "as quickly as the circumstances will allow" should not be mistaken to mean that a winding-up should (much less, will) necessarily conclude quickly. Large, complex enterprises can take a very lengthy time to close down, particularly where the business and affairs of the enterprise are in disarray. Since the liquidation of a business is to a very large extent the creditors' last real shot at recovering what is owed to them, in certain cases the final resolution of a corporate estate may need to be deferred until such time as the ultimate damages resulting from a wrong can be estimated with reasonable accuracy.[265] Claims brought by the corporation against others may need to proceed through trial and appeal. The prudent disposition of corporate property may also take time. Each possibility can lead to a lengthy liquidation. In *Commonwealth Investors Syndicate Ltd. v. KPMG Inc.*,[266] counsel for the appellant remarked that the winding-up of that company began when he was in high school. Counsel for the respondent topped that claim by remarking that the proceedings began before he was born.

## (iii) Absence of a Liquidator

**§15.111** Clause 220(*a*) of the OBCA makes clear that where at any time during the course of either a voluntary or court-ordered winding-up there is no liquidator, the court may appoint a person to act as a liquidator on the application of a shareholder. While this clause makes no reference to an application by anyone other than a shareholder, the power of the court to intervene in a voluntary wind-up under subclause 207(1)(*b*)(ii) and subsections 208(1) and 210(1) would seem to be sufficient authority for the court to appoint a new liquidator on the application of a creditor or contributory. In any event, until such time as a new liquidator is appointed, the estate and effects of the corporation are under the control of the court.[267]

---

[264] *Bre-X Minerals Ltd. (Trustee of) v. Verchere*, [2001] A.J. No. 1264, 293 A.R. 73 (C.A.); *Ciriello v. The Queen*, [2000] T.C.J. No. 829, 21 C.B.R. (4th) 9 at 17; *National Trust Co. v. Ebro Irrigation & Power Co.*, [1954] O.J. No. 545, [1954] 3 D.L.R. 326 (H.C.J.); *Shepherd (Trustee) v. Shepherd*, [1997] O.J. No. 4675, 50 C.B.R. (3d) 115 (Gen. Div. — C.L.).

[265] See, for example, *Re Fund of Funds Ltd.*, [2004] O.J. No. 2580, 2 C.B.R. (5th) 191 (S.C.J.) — claim bar ordered after 30-year liquidation.

[266] [2005] B.C.J. No. 18; 7 C.B.R. (5th) 90 (C.A.).

[267] OBCA, s. 220(*b*).

liquidator where all of the creditors and bond holders of a corporation appeared to wish it.

## (vii) Rights of Shareholders

**§15.134** The two basic rights of the shareholders in a liquidation of a corporation are: (1) to insist upon an accounting by the liquidator of his or her conduct of the liquidation and the property of the corporation disposed of;[338] and (2) after the application of the property of the corporation in satisfaction of all its debts, obligations and other liabilities, to receive a ratable distribution among themselves of the remaining property of the corporation, according to the rights and interests of each shareholder concerned in the corporation. The liquidation of a corporation is a matter in which all shareholders have a common interest, and no one shareholder or group of shareholders may be charged with the costs of the liquidation of the corporation, even where other shareholders or groups of shareholders opposed the liquidation.[339]

**§15.135** The right of the shareholders to receive a distribution constitutes a return of share capital rather than a dividend. In the absence of a contrary provision in the articles, the shares of a corporation are presumed to be equal and all are entitled to share equally in the surplus assets remaining after payment of the creditors and the return of stated capital held in respect of each class of shares to the shareholders of those classes.[340] Clearly where a shareholder purchased shares from a prior shareholder, the amount paid at the time of purchase from that prior shareholder is irrelevant to determine the current shareholder's entitlement. However, all holders of the shares of the same class are entitled to receive an equal share of the amount payable to them, irrespective of the amount originally paid to the corporation in respect of the issue of the shares concerned.[341] The following example illustrates the application of this rule:

---

[338] OBCA, s. 205(1).

[339] *Reader v. Crown Laundry & Dry Cleaning Co.*, [1986] N.J. No. 116, 61 Nfld. & P.E.I.R. 186, 185 A.P.R. 186 (T.D.).

[340] *Re Porto Rico Power Co.*; *International Power Co. v. McMaster University*, [1946] S.C.J. No. 4, [1946] S.C.R. 178.

[341] *Superstein v. Albertawest Forest Products Corp. (Liquidators of)* (1966), 58 W.W.R. 147 at 153-54, 59 D.L.R. (2d) 580 (Alta. C.A.), *per* McDermid J.A.

IN THE MATTER OF THE LIQUIDATION OF LWP CAPITAL INC. PURSUANT TO SECTION 211 OF THE *CANADA BUSINESS CORPORATIONS ACT*, R.S.C. 1985, c. C-44, AS AMENDED
and
KSV ADVISORY INC. IN ITS CAPACITY AS LIQUIDATOR OF LWP CAPITAL INC.

Applicant

Court File No. CV-16-11242-00CL

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**
**COMMERCIAL LIST**

PROCEEDING COMMENCED AT
TORONTO

# BOOK OF AUTHORITIES

**OSLER, HOSKIN & HARCOURT LLP**
Barristers & Solicitors
P. O. Box 50
1 First Canadian Place
Toronto ON M5X 1B8

Marc Wasserman (LSUC#44066M)
Tel: 416.862.4908

Sonja Pavic (LSUC# 64558U)
Tel: 416.862.5661
Fax: 416.862.6666

Lawyers for the Applicant

Matter No. 1168637