Alberta Rules of Court

COURT FILE NO.	**1601-14180**
COURT	**COURT OF QUEEN'S BENCH OF ALBERTA**
JUDICIAL CENTRE	**CALGARY**
PLAINTIFF	**HILLSBORO PROPERTIES INC.**
DEFENDANTS	**HALF MOON LAKE RESORT LTD. and ARMAC INVESTMENTS LTD.**
DOCUMENT	**Brief of Argument and Authorities**

Clerk's Stamp

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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BRIEF OF ARGUMENT OF HALF MOON LAKE RESORT LTD. AND ARMAC INVESTMENTS LTD.

For an application scheduled to be heard on May 12, 2017 at 10:00 a.m.

Prepared by:

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1. INTRODUCTION

a) This Brief of Argument of Half Moon Lake Resort Ltd. and Armac Investments Ltd. ("Armac") is both in support of Armac's application to have Dentons Canada LLP disqualified to act as counsel for the Plaintiff and in opposition to the application made by Hillsboro to have KPMG appointed as receiver and manager of certain assets, undertakings and properties of Armac.

2. ISSUES RELATING TO DISQUALIFICATION OF DENTONS CANADA LLP

a) Dentons Canada LLP acted as legal counsel to the receiver and Monitor Alvarez & Marsal Canada Inc. in action number 1103-18646.

b) That action was an action under CCAA and was complex and involved numerous applications and orders and numerous reports of the Monitor and numerous meetings during which confidential information was discussed and representatives of Dentons were present, at such meetings, (Affidavit of Conan Taylor paragraphs 3 and 4)

c) Pursuant to the Law Society of Alberta Code of Conduct **[Tab 1]**

    1. 3.4-1 Lawyer has a duty to avoid conflicts of interest and a lawyer must not act or continue to act for a client where there is a conflict of interest, except as permitted under this code.

d) It is to be noted in said Code of Conduct that the lawyer client relationship is a relationship where a lawyer has a duty to avoid conflicting interests [Code of Conduct 3.4(5).]

e) While Dentons Canada LLP did not directly act for the Defendants herein, it is possessed of confidential information that should not be used in relation to acting against one of the parties involved in the action that they previously acted in.

f) The Courts have set out the various tests as to the duties of law firms with respect to conflict of interest and disqualification of law firms and these are set out in according to two cases Wallace v. Canadian Pacific Railway (2013) SCC 39 **[TAB 2]** and Dreco

Energy Services Ltd. v. Wenzel Downhole Tools Ltd. (2006) ABCA 39 **[TAB 3]**. Although the facts in this case are somewhat different from the cases referred to as Dentons did not directly act for the Defendants, it is submitted that is abundantly clear that Dentons was very significantly involved in the previous litigation and has extensive knowledge of the matter and much private and confidential information which the Plaintiff in these proceedings is not entitled to have the benefit of.

3. ARGUMENT RELATING TO RECEIVERSHIP

a) While the facts set out in paragraph A.2 of the Plaintiffs argument are substantially correct, they omit the very material fact being that all of these transactions and arrangements as well as the security was all a part of the CCAA proceedings referred to above.

b) It is submitted that the action commenced by the Plaintiff is essentially a foreclosure action which the Plaintiff is perfectly entitled to proceed with but the appointment of a receiver is totally unnecessary and only serves to substantially increase the costs of operating the Resort.

c) As set out in the Plaintiff's brief the resort is a multifaceted operation and as set out in the Affidavit of Conan Taylor it is being operated and managed by the managers who were appointed in the CCAA proceedings, who are very familiar with the operation and who are operating same in a diligent and professional matter. No funds are being paid to the Defendants from the operation of the resort. (Affidavit of Conan Taylor paragraph 10.)

d) In Paragon Capital Corp v Merchants & Traders Assurance Co referred to in the Plaintiffs brief the Plaintiff has set out the tests The Court set for the appointment of a receiver. It is respectively submitted that the Plaintiff does not meet any of the tests set out in that decision. Specifically as set out in the Affidavit of Conan Taylor (paragraphs 14-16) and specifically Exhibit "E" there is significant equity in this property over and above the Plaintiff's mortgage and therefore there is no irreparable harm that would be

caused if no order were made and further there is no risk to the security holder taking into consideration the size of the debtors equity.

e) Further, taking into account the nature of the property and the test of, "apprehended waste and preservation and protection of property", it is clear from the facts that there are no issues in this regard as the resort is being managed and operated in a business like manner by an entity who is in essence a "quasi receiver" put in place by the CCAA orders.

f) Further, applying the other tests in the Paragon case there is no issue of the Plaintiff encountering difficulty with the debtor, or others, and the appointment of a receiver would increase the costs to the parities and not maximize the return to the parties, and in all likelihood detrimentally effect the equity in the property and subsequent encumbrancers.

g) It is further submitted that there are two other cases that are instructive with regard to the issue of the appointment of receivers, namely BG International Ltd. v. Canadian Superior Energy Inc (2009) ABCA 127 being a decision of the Court of Appeal of Alberta **[TAB 4]** and Murphy v. Cahill (2013) ABQB 335 **[TAB 5]** a decision of the Alberta Court of Queen's Bench.

h) It is to be noted that in the BG International Ltd. case the Justices of the Court of Appeal state at paragraph 16 "We agree that the appointment of a receiver is a remedy that should not be lightly granted. The chambers judge on such application should carefully explore whether there are other remedies, short of a receivership, that could serve to protect the interests of the applicant." and paragraph 17 "In particular, the chambers judge must carefully balance the rights of both the applicant and the respondent. The mere appointment of a receiver can have devastating effects."

i) In Murphy v. Cahill, Justice Veit refers to the Paragon case referred to above and refers to "Bennett on Receiverships 2nd ed" and states that "in relation to the second factor, the risk to the security holder, that "the court may not consider this factor to be important if

there is no danger or jeopardy to the security holder or in other words, there is a substantial equity that will protect the security holder". From that perspective, the factor appears to be an example of what might not constitute irreparable damage. One factor which is not mentioned in the Paragon list is "the rights of the parties [to the property]". Similarly, in relation to the factor of the effect of the order on the parties, the current edition of Bennett adds "If a receiver is appointed, its effect may be devastating upon the parties and their business and, where the business has to be sold, the appointment of a receiver may have detrimental effect upon the price"." This would follow and be in accordance with the conclusion set out above in paragraph 16 of the BG International Ltd case, being another remedy short of receivership that could serve to protect the interest of the Plaintiff.

j) In the matter before this court, it is respectfully submitted that the Plaintiff does not meet any of the tests referred to in these cases and particularly does not meet the tripartite test referred to in the Murphy case.

k) The Plaintiff in its argument discusses and argues matters and cases that relate to profits from the resort going to the Plaintiff. It is to be noted from the Affidavit of Conan Taylor paragraph 10 and exhibit "D" being the financial statements that there is a loss being sustained and there are funds being paid to the Defendant. All a receiver will do is increase costs and the losses.

l) It is further submitted that the Defendants are taking all available steps to payout and discharge the Plaintiff's mortgage including but not limited to listing the property for sale, which is noted in the Affidavit of Conan Taylor paragraph 17 and the listing agreement with Cushman & Wakefield is evidence of such efforts (exhibit F).

m) It is submitted that a receivership order would have an extremely detrimental effect on the Defendants ability to sell the property for a fair and reasonable price, as set out in the Murphy case.

n) In addition, the Defendants are attempting to obtain alternative financing, and as set out in Conan Taylor's Affidavit paragraphs 18 and 19 an expression of interest has been obtained from ATB (exhibit G) and those funds coupled with funds that the Defendants have access to would be sufficient to pay out the Plaintiff's mortgage, and it is submitted that there is no prejudice whatsoever to the Plaintiff if a receiver is not appointed as the Plaintiff is well secured with its mortgage security and can proceed with its foreclosure action and obtain a redemption order under the foreclosure proceedings and rules.

4. CONCLUSION

a) In summary, it is respectfully submitted that the proposed receivership would be an inefficient costly and unreasonable means of realization by the Plaintiff upon its security and could have devastating and irreparable effects upon the parties and their business and a detrimental effect upon the price for which the business is offered for sale.

b) The relief being sought by the Plaintiff is unreasonable and unnecessary in the circumstances and the Plaintiff has other remedies as set out above that would be much more cost effective and go to the benefit of all stakeholders involved with the resort.

c) In our respectful submission it is not just convenient or equitable to appoint a receiver manager of the property in the circumstances herein as it serves no useful purpose whatsoever and only will increase the costs of operating the resort and thus increase the losses and the ability of the resort to even operate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS _____ DAY OF MAY, 2017

FRIC LOWENSTEIN & CO. LLP, Solicitors for
Half Moon Lake Resort Ltd. and
Armac Investments Ltd.

Per: _____
Howard M. Lowenstein

TAB 1

3.4 Conflicts

Duty to Avoid Conflicts of Interest

3.4-1 A lawyer must not act or continue to act for a client where there is a conflict of interest, except as permitted under this Code.

Commentary

[1] A conflict of interest exists when there is a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person. A substantial risk is one that is significant and, while not certain or probable, is more than a mere possibility. A client's interests may be prejudiced unless the lawyer's advice, judgment and action on the client's behalf are free from conflicts of interest.

[2] A lawyer must examine whether a conflict of interest exists not only from the inception of the retainer but throughout its duration, as new circumstances or information may establish or reveal a conflict of interest.

[3] The disqualification of a lawyer may mean the disqualification of all lawyers in the law firm, due to the definition of "law firm" and "lawyer" in this Code. The definition of a law firm also includes practitioners who practise with other lawyers in space-sharing or other arrangements.

The Fiduciary Relationship, the Duty of Loyalty and Conflicting Interests

[4] Lawyers' duties to former clients are primarily concerned with protecting confidential information. Duties to current clients are more extensive, and are based on a broad fiduciary duty, which prevails regardless of whether there is a risk of disclosure of confidential information.

[5] The lawyer-client relationship is a fiduciary relationship. Lawyers accordingly owe a duty of loyalty to current clients, which includes the following:

- the duty not to disclose confidential information;
- the duty to avoid conflicting interests;
- the duty of commitment to the client's cause; and
- the duty of candour with a client on matters relevant to the retainer.

The Role of the Court and Law Societies

[6] These rules set out ethical standards to which all members of the profession must adhere. The courts have a separate supervisory role over court proceedings. In that role, the courts apply fiduciary principles developed by the courts to govern lawyers' relationships with their clients, to ensure the proper administration of justice. A breach of the rules on conflicts of interest may lead to sanction by a law society even where a court may decline to order disqualification as a remedy.

Consent and Disclosure

[7] Except for representing opposing parties in a dispute (see Rule 3.4-2), these rules allow a lawyer to continue to act in a matter even when in a conflict of interest, if the clients consent. The lawyer must also be satisfied that the lawyer is able to proceed without a material and adverse effect on the client.

[8] As defined in these rules, "consent" means fully informed and voluntary consent after disclosure. Disclosure may be made orally or in writing, and the consent should be confirmed in writing.

[9] "Disclosure" means full and fair disclosure of all information relevant to a person's decision, in sufficient time for the person to make a genuine and independent decision, and the taking of reasonable steps to ensure understanding of the matters disclosed. A lawyer therefore should inform the client of the relevant circumstances and the reasonably foreseeable ways that a conflict of interest could adversely affect the client interests. This would include the lawyer's relations to the parties and any interest in connection with the matter.

[10] This rule does not require that a lawyer advise a client to obtain independent legal advice about the conflict of interest. In some cases, however, the lawyer should recommend such advice, especially if the client is vulnerable or not sophisticated.

Express Consent

[11] Express consent is required in the case of conflicts involving multiple retainers, former clients, and transferring lawyers, and in the case of lawyers' personal interests or relationships coming into conflict with the interests of clients. Disclosure is an essential requirement to obtaining a client's consent. The lawyer must inform the client about all matters relevant to evaluating the conflict. Where it is not possible to provide the client with disclosure because of the confidentiality of the information of another client, the lawyer must decline to act.

Implied Consent

[12] In cases involving the simultaneous representation of current clients, consent may either be express or implied. Implied consent is applicable in only exceptional cases. It may be appropriate to imply consent when acting for government agencies, chartered banks and other entities that might be considered sophisticated and frequent consumers of legal services from a variety of law firms. The matters must be unrelated, and the lawyer must not possess confidential information from one client that could affect the other client.

[13] The nature of the client is not a sufficient basis upon which to imply consent. The terms of the retainer, the relationship between the lawyer and client, and the unrelated matters involved must be considered. There must be a reasonable basis upon which a lawyer may objectively conclude that the client commonly accepts that its lawyers may act against it.

[14] Where legal services are either highly specialized or are scarce, consent to act for another current client may be implied, depending on the circumstances.

Advance Consent

[15] Consent may be obtained in advance of a conflict of interest arising, provided the consent is sufficiently comprehensive to contemplate the subsequent conflict, and there has been no change of circumstances that would render the initial consent invalid. The client must be able to understand the risks and consequences of providing the advance consent.

[16] While not required, in some circumstances it may be advisable to recommend that the client obtain independent legal advice before deciding whether to provide advance consent. Advance consent must be recorded in writing or contained in the retainer agreement.

Disputes

3.4-2 A lawyer must not represent opposing parties in a dispute.

Commentary

[1] The existence of a dispute precludes joint representation, not only because it is impossible to properly advocate more than one side of a matter, but because the administration of justice would be brought into disrepute.

[2] It is sometimes difficult to determine whether a dispute exists. While a litigation matter qualifies as a dispute from the outset, parties who appear to have differing interests or who disagree are not necessarily engaged in a dispute. The parties may wish to resolve the disagreement by consent, in which case a lawyer may be requested to act as a facilitator in providing information for their consideration. At some point, however, a conflict or potential conflict may develop into a dispute. At that time, the lawyer would be compelled by Rule 3.4-1 to cease acting for more than one party and perhaps to withdraw altogether.

[3] In determining whether a dispute exists, a lawyer should have regard for the following factors:

- the degree of hostility, aggression and "posturing";
- the importance of the matters not yet resolved;
- the intransigence of one or more of the parties; and
- whether one or more of the parties wishes the lawyer to assume the role of advocate for that party's position.

[4] If clients have consented to a joint retainer, a lawyer is not necessarily precluded from advising clients on non-contentious matters, even if a dispute has arisen between them. When in doubt, a lawyer should cease acting.

Mediation or Arbitration

[5] This rule does not prevent a lawyer from mediating or arbitrating a dispute between clients or former clients where:

(a) the parties consent;

(b) it is in the parties' best interests that the lawyer act as mediator or arbitrator; and

(c) the parties acknowledge that the lawyer will not be representing either party and that no confidentiality will apply to material information in the lawyer's possession.

Current Clients

3.4-3 A lawyer must not represent one client whose legal interests are directly adverse to the immediate legal interests of another client, even if the matters are unrelated, unless both clients consent.

Commentary

[1] This rule mirrors the bright line rule articulated by the Supreme Court of Canada.

[2] The lawyer-client relationship may be irreparably damaged where the lawyer's representation of one client is directly adverse to another client's immediate interests. For example, one client may legitimately fear that the lawyer will not pursue the representation out of deference to the other client, and an existing client may legitimately feel betrayed by the lawyer's representation of a client with adverse legal interests.

[3] A client is a current client if the lawyer is currently acting for the client, and may be a current client despite there being no matters on which the lawyer is currently acting. In determining whether a client is a current client, notwithstanding that the lawyer has no current files, the lawyer must take into consideration all the circumstances of the lawyer-client relationship, including, where relevant:

- the duration of the relationship;
- the terms of the past retainer or retainers;
- the length of time since the last representation was completed or the last representation assigned; and
- whether the client uses other lawyers for the same type of work.

[4] When determining if one client's legal interests are directly adverse to the immediate legal interests of another current client, a lawyer must consider the following factors:

- the immediacy of the legal interests;
- whether the legal interests are directly adverse;
- whether the issue is substantive or procedural;

- the temporal relationship between the matters;
- the significance of the issue to the immediate and long-term interests of the clients involved; and
- the clients' reasonable expectations in retaining the lawyer for the particular matter or representation.

[5] The bright line rule cannot be used to support tactical abuses. For example, it is inappropriate for a lawyer to raise a conflict of interest in order to disqualify an opposing lawyer for an improper purpose, or to inconvenience an opposing client.

[6] This rule will not apply in circumstances where it is unreasonable for a client to expect that its law firm will not act against it in unrelated matters. In exceptional cases, a client's consent that a lawyer may act against it may be implied. (See commentary to Rule 3.4-1)

[7] A lawyer's duty of candour requires that a lawyer inform a client about any factors relevant to the lawyer's ability to provide effective representation. If the lawyer is accepting a retainer that requires the lawyer to act against an existing client, the lawyer should disclose this information to the client even if the lawyer believes there is no conflict of interest.

[8] A lawyer's duty of commitment to the client's cause prevents the lawyer from summarily and unexpectedly dropping that client to circumvent conflict of interest rules. The client may legitimately feel betrayed if the lawyer ceases to act for the client in order to avoid a conflict of interest with another more lucrative or attractive client.

Concurrent Clients

3.4-4 (a) An individual lawyer or a law firm may act for concurrent clients with competing business or economic interests, provided that the lawyer or law firm treats information received from each client as confidential and does not disclose it to other clients;

(b) Where concurrent clients wish to retain a law firm in respect of the same business opportunity, the law firm must:

(i) disclose that it is acting for other business competitors and the risks associated with concurrent representation;

(ii) provide the client with the opportunity to seek independent legal advice;

(iii) ensure that each client is represented by different lawyers in the law firm;

(iv) implement measures to protect confidential information;

(v) withdraw from the representation of all clients in the event a dispute arises that cannot be resolved, in relation to the subject matter of the concurrent representation.

Commentary

[1] Concurrent retainers are distinct from joint retainers, which are the subject of Rule 3.4-5. For the purposes of these rules, concurrent retainers arise when a lawyer or firm simultaneously represents different clients in separate matters. There is no sharing of confidential information, and the concurrent clients are not associated. In contrast, joint representation involves simultaneous representation of multiple clients in the same matter, and involves sharing of confidential information and shared instructions from the clients.

[2] Conflict of interest rules do not preclude law firms and individual lawyers from concurrently representing different clients who are economic or business competitors and whose legal interests are not directly adverse. Lawyers are obliged at all times to ensure that they maintain confidentiality regarding the information of each client. Competing commercial interests of clients will not present a conflict when they do not impair a lawyer's ability to properly represent the legal interests of each client. Whether or not a real risk of impairment exists will be a question of fact.

[3] In a litigation practice, competing commercial interests become relevant when there is a legal dispute between clients, in which case Rules 3.4-2 and 3.4-3 will apply.

[4] In corporate and commercial practice, a conflict of interest will arise when commercial competitors simultaneously seek to retain the same lawyer or law firm with regard to the same corporate or business opportunity. Where the subject matter of each independent retainer is the same, the same lawyer may not act for each concurrent client. A law firm may, however, represent concurrent clients in this situation if each client is represented by different lawyers and the existence of concurrent retainers is disclosed to the clients. Lawyers are not required to disclose the identities of other concurrent clients. Reasonable measures will be required to protect confidential client information and the details of the implementation of the measures should be disclosed to the clients (See commentary to Rule 3.4-10).

[5] Concurrent clients must be fully informed of the risks and understand that, if a dispute arises between them which cannot be resolved, the lawyers must withdraw, resulting in potential additional costs. Clients should be given the opportunity to seek independent legal advice regarding the advisability of the concurrent retainer, and whether the concurrent representation is in the best interests of the clients. The law firm should assess whether there is a real risk that the firm will not be able to properly represent the legal interests of each client.

Joint Retainer for Drafting Wills

[16] A lawyer who receives instructions from spouses or domestic partners (including, in Alberta, adult interdependent partners) to prepare one or more wills for them based on their shared understanding of what is to be in each will should comply with this rule. It is important for the lawyer to ensure that the spouses or domestic partners understand the consequences of giving conflicting instructions during the course of the joint retainer for the preparation of the wills, and that any information or instructions provided to counsel by one client will be shared with the other spouse or domestic partner.

[17] If subsequently only one spouse or domestic partner communicates new instructions, such as instructions to change or revoke a will:

a) the subsequent communication must be treated as a request for a new retainer and not as part of the joint retainer;

b) in accordance with Rule 3.3, the lawyer is obliged to hold all information related to the subsequent communication in strict confidence and not disclose it to the other spouse or domestic partner;

c) the lawyer has a duty to decline the new retainer, unless:

(i) the spouses or domestic partners have annulled their marriage, divorced, permanently ended their conjugal relationship or permanently ended their close personal relationship, as the case may be;

(ii) the other spouse or domestic partner has died; or

(iii) the other spouse or domestic partner has been informed of the subsequent communication and agreed to the lawyer acting on the new instructions.

Single Client in Multiple Roles

[18] Special considerations apply when a lawyer is representing one client acting in two possibly conflicting roles. For example, a lawyer acting for an estate when the executor is also a beneficiary must be sensitive to divergence of the obligations and interests of the executor in those two capacities. Such divergence could occur if the executor is a surviving spouse who is the beneficiary of only part of the estate. The individual may wish to apply to the court to receive a greater share of the estate. This course of action is, however, contrary to the interests of other beneficiaries and inconsistent with the neutral role of executor. The lawyer would accordingly be obliged to refer the executor elsewhere with respect to the application for relief which the individual is pursuing in a personal capacity.

Acting Against Former Clients

3.4-6 Unless the former client consents, a lawyer must not act against a former client:

(a) in the same matter,

(b) in any related matter, or

(c) except as provided by Rule 3.4-7, in any other matter if the lawyer has relevant confidential information arising from the representation of the former client that may prejudice that client.

Commentary

[1] This rule protects clients from the misuse of confidential information and prohibits a lawyer from attacking the legal work done during the retainer, or from undermining the client's position on a matter that was central to the retainer. It is not improper for a lawyer to act against a former client in a fresh and independent matter wholly unrelated to any work the lawyer has previously done for that client. A new matter is wholly unrelated if no confidential information from the prior retainer is relevant to the new matter and the new matter will not undermine the work done by the lawyer for the client in the prior retainer.

[2] A person who has consulted a lawyer in the lawyer's professional capacity may be considered a former client for the purposes of this rule even though the lawyer did not agree to represent that person or did not render an account to that person (see commentary below regarding "Prospective Client").

Confidential Information

[3] "Confidential information" means all information concerning a client's business, interests and affairs acquired in the course of the lawyer-client relationship. A lawyer's knowledge of personal characteristics or corporate policies that are notably unusual or unique to a client may bar an adverse representation if such knowledge could potentially be used to the client's disadvantage. For example, a lawyer might know that a former client will not under any circumstances proceed to trial or appear as a witness. However, a lawyer's awareness that a client has a characteristic common to many people (such as a general aversion to testifying) or a fairly typical corporate policy (such as a propensity to settle rather than proceed to litigation) will not generally preclude the lawyer from acting against that client.

[4] A lawyer's duty not to use confidential information to the disadvantage of a former client continues indefinitely. However, the passage of time may mitigate the effect of a lawyer's possession of particular confidential information, and may permit the lawyer to act against a former client when the information no longer has the potential to prejudice the former client.

Prospective Client

[5] A prospective client is a person who discloses confidential information to a lawyer for the purpose of retaining the lawyer. A lawyer must maintain the confidentiality of information received from a prospective client.

[6] Before performing a conflict check, a lawyer should endeavour not to receive more information than is necessary to carry out the conflict check. As soon as a conflict becomes evident the lawyer must decline the representation and refuse to receive further information, unless the conflict is resolved by the consent of the existing client and the prospective client or the approval of a tribunal. If the lawyer declines the representation, the information disclosed by the prospective client, including the fact that the client approached the firm, must not be disclosed to those who may act against the prospective client. The firm may act or continue to act contrary to the interests of the prospective client in relation to the proposed retainer if the lawyer takes adequate steps to ensure that:

(a) the confidential information is not disclosed to other firm members representing clients adverse to the prospective client, and

(b) firm members who have the confidential information will not be involved in any retainer that is related to the matter for which the prospective client sought to retain the firm.

[7] The adequacy of the measures taken to prevent disclosure of the information will depend on the circumstances of the case, and may include destroying, sealing or returning to the prospective client notes and correspondence and deleting or password protecting computer files on which any such information may be recorded.

3.4-7 When a lawyer has acted for a former client and obtained confidential information relevant to a new matter, another lawyer in the lawyer's law firm ("the other lawyer") may act in the new matter against the former client if:

(a) the former client consents to the other lawyer acting; or

(b) the law firm establishes that it is in the interests of justice that the other lawyer act in the new matter, having regard to all relevant circumstances, including:

(i) the adequacy and timing of the measures taken to ensure that there has been, and will be, no disclosure of the former client's confidential information to any other member or employee of the law firm, or any person whose services the lawyer or law firm has retained in the new matter;

(ii) the extent of prejudice to any party;

(iii) the good faith of the parties; and

(iv) the availability of suitable alternative counsel.

TAB 2

2013 SCC 39
Supreme Court of Canada

Wallace v. Canadian Pacific Railway

2013 CarswellSask 432, 2013 CarswellSask 433, 2013 SCC 39, [2013] 10 W.W.R. 629, [2013] 2 S.C.R. 649, [2013] A.C.S. No. 39, [2013] S.C.J. No. 39, 228 A.C.W.S. (3d) 1166, 360 D.L.R. (4th) 389, 423 Sask. R. 1, 42 C.P.C. (7th) 1, 446 N.R. 1, 588 W.A.C. 1, EYB 2013-223917

Canadian National Railway Company, Appellant and McKercher LLP and Gordon Wallace, Respondents and Canadian Bar Association and Federation of Law Societies of Canada, Interveners

McLachlin C.J.C., LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner JJ.

Heard: January 24, 2013
Judgment: July 5, 2013
Docket: 34545

Proceedings: reversing *Wallace v. Canadian Pacific Railway* (2009), [2009] 12 W.W.R. 157, 344 Sask. R. 3, 2009 CarswellSask 610, 2009 SKQB 369, 77 C.P.C. (6th) 24 (Sask. Q.B.); reversing *Wallace v. Canadian Pacific Railway* (2011), 9 C.P.C. (7th) 292, [2012] 1 W.W.R. 251, 2011 CarswellSask 625, 2011 SKCA 108, 375 Sask. R. 218, 525 W.A.C. 218, 340 D.L.R. (4th) 402 (Sask. C.A.)

Counsel: Douglas C. Hodson, Q.C., Vanessa Monar Enweani, C. Ryan Lepage, for Appellant
Gavin MacKenzie, Lauren Wihak, for Respondents
Malcolm M. Mercer, Eric S. Block, Brendan Brammall, for Intervener, Canadian Bar Association
John J.L. Hunter, Q.C., Stanley Martin, for Intervener, Federation of Law Societies of Canada

Subject: Public; Torts; Civil Practice and Procedure

Headnote

Professions and occupations --- Barristers and solicitors — Relationship with client — Conflict of interest — Miscellaneous

Respondent was large law firm who acted for appellant railway company on several matters — While being retained on three matters, law firm accepted retainer from representative plaintiff in class-action matter, concerning alleged overcharging by company towards farmers — Class sought $1.75 billion in damages from company — Firm did not advise company of their plans to act for class — However, firm terminated two retainers on other matters before statement of claim was issued, with company terminating remaining retainer — Company only found out about firm's acting for class upon receipt of statement of claim — Company applied for order removing firm as solicitor of record in class action, on basis that firm breached duty of loyalty, improperly terminated other retainers and could use confidential information against company — Initial application by company was successful — Firm successfully appealed from application — Appeal court found that there was no risk of use of confidential information, and that as large client there was implied consent that firm may act against company in unrelated matters — Breach of duty of loyalty was found, but as solicitor-client relationship had been terminated, this was not grounds for disqualification — Company appealed to Supreme Court of Canada, from judgment of appeals court — Appeal allowed — General rule was that firms could not act for and against same party at same time, except where consent was obtained — Actions of firm fell within general rule, as there was adverse interest between company and class, company had not tried to abuse rule and there was no reasonable expectation by company that firm would act against them in major litigation — Firm breached its duty of candour to client, by failing to advise them of class retainer — Conflict of

interest existed, but this was not necessarily grounds for disqualification — As disqualification was not needed to protect company's interests, issue was whether remedy was needed to protect public confidence in justice system — This factor had not been weighed previously in application or reversal on appeal — Appropriate action was to allow appeal, for purpose of referring matter back to provincial court for determination of public confidence issue.

Civil practice and procedure --- Costs — Costs in Supreme Court of Canada — General principles

Respondent was large law firm who acted for appellant railway company on several matters — While being retained on three matters, law firm accepted retainer from representative plaintiff in class-action matter, concerning alleged overcharging by company towards farmers — Class sought $1.75 billion in damages from company — Firm did not advise company of their plans to act for class — However, firm terminated two retainers on other matters before statement of claim was issued, with company terminating remaining retainer — Company only found out about firm's acting for class upon receipt of statement of claim — Company applied for order removing firm as solicitor of record in class action, on basis that firm breached duty of loyalty, improperly terminated other retainers and could use confidential information against company — Initial application by company was successful — Firm successfully appealed from application — Appeal court found that there was no risk of use of confidential information, and that as large client there was implied consent that firm may act against company in unrelated matters — Breach of duty of loyalty was found, but as solicitor-client relationship had been terminated this was not grounds for disqualification — Company appealed to Supreme Court of Canada, from judgment of appeals court — Appeal allowed — Costs of appeal were awarded to company.

Professions and occupations --- Barristers and solicitors — Relationship with client — Conflict of interest — Duty to former client — Possession of confidential information

Respondent was large law firm who acted for appellant railway company on several matters — While being retained on three matters, law firm accepted retainer from representative plaintiff in class-action matter, concerning alleged overcharging by company towards farmers — Class sought $1.75 billion in damages from company — Firm did not advise company of their plans to act for class — However, firm terminated two retainers on other matters before statement of claim was issued, with company terminating remaining retainer — Company only found out about firm's acting for class upon receipt of statement of claim — Company applied for order removing firm as solicitor of record in class action, on basis that firm breached duty of loyalty, improperly terminated other retainers and could use confidential information against company — Initial application by company was successful — Firm successfully appealed from application — Appeal court found that there was no risk of use of confidential information, and that as large client there was implied consent that firm may act against company in unrelated matters — Breach of duty of loyalty was found, but as solicitor-client relationship had been terminated, this was not grounds for disqualification — Company appealed to Supreme Court of Canada from judgment of appeals court — Appeal allowed — However, firm possessed no confidential information to use against company — Actions were unrelated, and general knowledge of company and litigation strategy was not enough to find confidential information existed.

Professions et métiers --- Avocats — Relation avec le client — Conflit d'intérêts — Divers

Intimé était un grand cabinet d'avocats qui représentait la compagnie de chemin de fer appelante dans différents dossiers — Alors qu'il était mandaté dans trois dossiers, le cabinet d'avocats a accepté le mandat d'un représentant dans le cadre d'une requête en recours collectif faisant valoir que la compagnie aurait surfacturé des fermiers — Recours collectif réclamait de la compagnie 1,75 milliard $ — Cabinet n'a pas informé la compagnie qu'il entendait représenter la partie demanderesse dans le cadre du recours collectif — Toutefois, le cabinet a mis fin à deux mandats portant sur d'autres questions, et la compagnie a mis fin au troisième avant que la déclaration ne soit déposée — Ce n'était que lorsque la déclaration lui a été signifiée que la compagnie a appris que le cabinet représentait la partie ayant entamé le recours collectif — Compagnie a déposé une requête visant à écarter le cabinet en tant que procureur au dossier dans le recours collectif au motif que le cabinet avait manqué à son devoir de loyauté, avait irrégulièrement abandonné les autres mandats et risquait d'utiliser des renseignements confidentiels à l'encontre de la compagnie — Requête de la compagnie a été accueillie — Cabinet a interjeté appel à l'encontre de la requête

avec succès — Cour d'appel a conclu qu'il n'y avait aucun risque que les renseignements confidentiels ne soient utilisés et que l'on pouvait inférer que la compagnie, une société d'envergure, consentait implicitement à ce que le cabinet représente une partie opposée dans d'autres affaires juridiques n'ayant aucun lien avec ses dossiers en cours — Cour a conclu que le cabinet avait manqué à son devoir de loyauté, mais qu'il n'y avait aucun motif de déclarer le cabinet inhabile puisque la relation avocat-client était terminée — Compagnie a formé un pourvoi devant la Cour suprême du Canada à l'encontre du jugement de la Cour d'appel — Pourvoi accueilli — Selon la règle générale, les cabinets ne peuvent pas représenter une partie et agir à son encontre en même temps, à moins d'avoir obtenu un consentement — Règle générale s'appliquait à la conduite du cabinet puisqu'il y avait des intérêts contraires entre la compagnie et la partie demanderesse dans le recours collectif, la compagnie n'avait pas abusé de la règle et la compagnie n'avait aucune attente raisonnable que le cabinet risquait d'agir à son encontre dans le cadre d'un litige important — Cabinet a manqué à son devoir de franchise envers sa cliente en ne l'informant pas qu'il avait obtenu le mandat de représenter la partie demanderesse dans le cadre du recours collectif — Il y avait bien un conflit d'intérêts, mais cela ne constituait pas nécessairement un motif pour écarter le cabinet — Comme il n'était pas nécessaire d'écarter le cabinet pour protéger les intérêts de la compagnie, la question était de savoir si le recours était nécessaire afin de préserver la confiance du public à l'égard du système de justice — On n'avait pas accordé d'importance à cet élément précédemment en première instance ou lors de l'appel — Il était approprié d'accueillir l'appel aux fins de renvoyer le dossier en cour provinciale afin que la question de la confiance du public soit examinée.

Procédure civile — Frais — Frais en Cour suprême du Canada — Principes généraux

Intimé était un grand cabinet d'avocats qui représentait la compagnie de chemin de fer appelante dans différents dossiers — Alors qu'il était mandaté dans trois dossiers, le cabinet d'avocats a accepté le mandat d'un représentant dans le cadre d'une requête en recours collectif faisant valoir que la compagnie aurait surfacturé des fermiers — Recours collectif réclamait de la compagnie 1,75 milliard $ — Cabinet n'a pas informé la compagnie qu'il entendait représenter la partie demanderesse dans le cadre du recours collectif — Toutefois, le cabinet a mis fin à deux mandats portant sur d'autres questions, et la compagnie a mis fin au troisième avant que la déclaration ne soit déposée — Ce n'était que lorsque la déclaration lui a été signifiée que la compagnie a appris que le cabinet représentait la partie ayant entamé le recours collectif — Compagnie a déposé une requête visant à écarter le cabinet en tant que procureur au dossier dans le recours collectif au motif que le cabinet avait manqué à son devoir de loyauté, avait irrégulièrement abandonné les autres mandats et risquait d'utiliser des renseignements confidentiels à l'encontre de la compagnie — Requête de la compagnie a été accueillie — Cabinet a interjeté appel à l'encontre de la requête avec succès — Cour d'appel a conclu qu'il n'y avait aucun risque que les renseignements confidentiels ne soient utilisés et que l'on pouvait inférer que la compagnie, une société d'envergure, consentait implicitement à ce que le cabinet représente une partie opposée dans d'autres affaires juridiques n'ayant aucun lien avec ses dossiers en cours — Cour a conclu que le cabinet avait manqué à son devoir de loyauté, mais qu'il n'y avait aucun motif de déclarer le cabinet inhabile puisque la relation avocat-client était terminée — Compagnie a formé un pourvoi devant la Cour suprême du Canada à l'encontre du jugement de la Cour d'appel — Pourvoi accueilli — Frais du pourvoi ont été accordés à la compagnie.

Professions et métiers — Avocats — Relation avec le client — Conflit d'intérêts — Devoir envers un ancien client — Possession de renseignements confidentiels

Intimé était un grand cabinet d'avocats qui représentait la compagnie de chemin de fer appelante dans différents dossiers — Alors qu'il était mandaté dans trois dossiers, le cabinet d'avocats a accepté le mandat d'un représentant dans le cadre d'une requête en recours collectif faisant valoir que la compagnie aurait surfacturé des fermiers — Recours collectif réclamait de la compagnie 1,75 milliard $ — Cabinet n'a pas informé la compagnie qu'il entendait représenter la partie demanderesse dans le cadre du recours collectif — Toutefois, le cabinet a mis fin à deux mandats portant sur d'autres questions, et la compagnie a mis fin au troisième, avant que la déclaration ne soit déposée — Ce n'était que lorsque la déclaration lui a été signifiée que la compagnie a appris que le cabinet représentait la partie ayant entamé le recours collectif — Compagnie a déposé une requête visant à écarter le cabinet en tant que procureur au dossier dans le recours collectif au motif que le cabinet avait manqué à son devoir de loyauté, avait

irrégulièrement abandonné les autres mandats et risquait d'utiliser des renseignements confidentiels à l'encontre de la compagnie — Requête de la compagnie a été accueillie — Cabinet a interjeté appel à l'encontre de la requête avec succès — Cour d'appel a conclu qu'il n'y avait aucun risque que les renseignements confidentiels ne soient utilisés et que l'on pouvait inférer que la compagnie, une société d'envergure, consentait implicitement à ce que le cabinet représente une partie opposée dans d'autres affaires juridiques n'ayant aucun lien avec ses dossiers en cours — Cour a conclu que le cabinet avait manqué à son devoir de loyauté, mais qu'il n'y avait aucun motif de déclarer le cabinet inhabile puisque la relation avocat-client était terminée — Compagnie a formé un pourvoi devant la Cour suprême du Canada à l'encontre du jugement de la Cour d'appel — Pourvoi accueilli — Aucun des renseignements confidentiels que le cabinet possédait ne risquait d'être utilisé contre la compagnie — Actions n'avaient aucun lien entre elles et il ne suffisait pas d'avoir une connaissance générale de la compagnie ou d'élaborer une stratégie de procès pour conclure à l'existence de renseignements confidentiels.

The respondent was a large law firm that acted for the appellant railway company on three separate matters. While these retainers were still intact, the firm accepted a retainer on behalf of a representative plaintiff, in which the class was seeking 1.75 billion dollars in damages from the company. The firm took steps to discontinue the active retainers, without informing the company of their involvement in the class action. The company only found out about the firm's acting against them on receipt of the statement of claim.

The company discontinued the remaining active retainer, and brought an application to have the firm removed as solicitor of record in the class action. The company's application was successful, as the motions court found that the firm was in a conflict of interest and had violated their duty of candour and loyalty to the client.

The company appealed to the Supreme Court of Canada.

Held: The appeal was allowed for the purpose of remitting the matter to the provincial court.

Per McLachlin C.J.C. (LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner JJ. concurring): The firm was in a conflict of interest as its actions fell within the general rule, that a firm may not act against its own client without obtaining consent. The firm did not obtain consent, and failed in its duty of candour to the client by not informing them of their involvement with the class action. However, as the company was no longer a client of the firm, it was not clear that disqualification was an appropriate remedy in the circumstances. There was no opportunity for the firm to use confidential information against the company in this action, as it was unrelated to other actions in which the firm acted for the company. The issue to be determined was whether public confidence in the justice system would be undermined by the conflict of interest. That issue had not been adequately dealt with at lower levels. Therefore, it was appropriate to allow the appeal for the purpose of referring the matter back to the provincial court, for determination on this issue.

L'intimé était un grand cabinet d'avocats qui représentait la compagnie de chemin de fer appelante dans trois différents dossiers. Alors qu'il était toujours ainsi mandaté, le cabinet d'avocats a accepté le mandat d'un représentant dans le cadre d'une requête en recours collectif réclamant de la compagnie 1,75 milliard $ en dommages-intérêts. Le cabinet d'avocats a entrepris des démarches pour mettre fin aux trois mandats sans informer la compagnie de son implication dans le recours collectif. Ce n'était que lorsque la déclaration lui a été signifiée que la compagnie a appris que le cabinet représentait une partie ayant entamé des procédures contre elle.

La compagnie a mis fin au dernier mandat et déposé une requête visant à écarter le cabinet en tant que procureur au dossier dans le recours collectif. Le juge saisi de la requête a accueilli la requête de la compagnie et déclaré que le cabinet se trouvait en position de conflit d'intérêts et avait manqué à son devoir de franchise et de loyauté envers sa cliente.

La compagnie a formé un pourvoi devant la Cour suprême du Canada.

Arrêt: Le pourvoi a été accueilli aux fins de renvoyer le dossier en cour provinciale.

McLachlin, J.C.C. (LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner, JJ., souscrivant à son opinion) : Le cabinet se trouvait en conflit d'intérêts puisque sa conduite était visée par les règles générales selon lesquelles un cabinet ne doit pas agir contre son propre client à moins d'obtenir son consentement. Le cabinet n'a pas obtenu de consentement et a manqué à son devoir de franchise envers sa cliente en ne l'informant pas de son implication dans le recours collectif. Toutefois, comme la compagnie n'était plus une cliente du cabinet, il n'était pas évident que l'inhabilité à occuper constituait une réparation appropriée dans les circonstances. Il n'y avait aucun risque que le cabinet n'utilise des renseignements confidentiels à l'encontre de la compagnie dans le cadre du présent recours puisqu'il n'avait aucun lien avec les autres actions dans lesquelles le cabinet représentait la compagnie. La question faisant l'objet du litige était de déterminer si le conflit d'intérêts était susceptible de miner la confiance du public à l'égard du système de justice. Les instances inférieures n'avaient pas répondu de manière adéquate à cette question. Par conséquent, il était de mise d'accueillir le pourvoi aux fins de renvoyer le dossier en cour provinciale pour que cette question fasse l'objet d'un examen.

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APPEAL by railway company from judgment reported at *Wallace v. Canadian Pacific Railway* (2011), 9 C.P.C. (7th) 292, [2012] 1 W.W.R. 251, 2011 CarswellSask 625, 2011 SKCA 108, 375 Sask. R. 218, 525 W.A.C. 218, 340 D.L.R. (4th) 402 (Sask. C.A.), finding that respondent law firm was in conflict of interest for acting against company in unrelated matter.

POURVOI formé par une compagnie de chemin de fer à l'encontre d'un jugement publié à *Wallace v. Canadian Pacific Railway* (2011), 9 C.P.C. (7th) 292, [2012] 1 W.W.R. 251, 2011 CarswellSask 625, 2011 SKCA 108, 375 Sask. R. 218, 525 W.A.C. 218, 340 D.L.R. (4th) 402 (Sask. C.A.), ayant conclu que le cabinet d'avocats intimé était en conflit d'intérêts après avoir fait des représentations à l'encontre de la compagnie dans un autre dossier.

McLachlin C.J.C. **(LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ. concurring):**

1 Can a law firm accept a retainer to act against a current client on a matter unrelated to the client's existing files? More specifically, can a firm bring a lawsuit against a current client on behalf of another client? If not, what remedies are available to the client whose lawyer has brought suit against it? These are the questions raised by this appeal.

I. Background

2 McKercher LLP ("McKercher") is a large law firm in Saskatchewan. The Canadian National Railway Company ("CN") retained McKercher to act for it on a variety of matters. In late 2008, McKercher was acting for CN on three ongoing matters: a personal injury claim concerning a rail yard incident in which children had been injured; the purchase of real estate; and the representation of CN's interests as a creditor in a receivership. As well, two of its partners held power of attorney from CN for service of process in Saskatchewan.

3 At the same time, the McKercher firm accepted a retainer from Gordon Wallace ("Wallace") to act against CN in a $1.75 billion class action based on allegations that CN had illegally overcharged Western Canadian farmers for grain transportation. It is not contested on appeal that the Wallace action was legally and factually unrelated to the ongoing CN retainers.

4 The McKercher firm did not advise CN that it intended to accept the Wallace retainer. CN learned this only when it was served with the statement of claim on January 9, 2009. Between December 5, 2008, and January 15, 2009, various McKercher partners hastily terminated their retainers with CN, except on the real estate file, which was terminated by CN.

5 Following receipt of the statement of claim, CN applied for an order removing McKercher as solicitor of record for Wallace in the class action against it, on the grounds that the McKercher firm had breached its duty of loyalty to CN by placing itself in a conflict of interest, had improperly terminated its existing CN retainers, and might misuse confidential information gained in the course of the solicitor-client relationship.

6 The motion judge granted the application, and disqualified McKercher from acting on the Wallace litigation: 2009 SKQB 369, 344 Sask. R. 3 (Sask. Q.B.). He found that the firm had breached the duty of loyalty it owed CN, placing itself in a conflict of interest by accepting the Wallace retainer while acting for CN on other matters. In his view, CN felt an understandable sense of betrayal, which substantially impaired the McKercher firm's ability to represent CN in the ongoing retainers. Moreover, McKercher had received a unique understanding of the litigation strengths, weaknesses and attitudes of CN; this understanding constituted relevant confidential information. The motion judge concluded that McKercher's violation of the duty of loyalty, in addition to the possession of relevant confidential information, made disqualification of McKercher as counsel on the Wallace action an appropriate remedy.

7 The Court of Appeal overturned the motion judge's order disqualifying McKercher: 2011 SKCA 108, 375 Sask. R. 218 (Sask. C.A.). The Court of Appeal found that a general understanding of CN's litigation strengths and weaknesses did not constitute relevant confidential information warranting disqualification. Moreover, it found that McKercher had not breached its duty of loyalty by accepting to act concurrently for Wallace. CN was a large corporate client that was not in a position of vulnerability or dependency with respect to McKercher. As such, its implied consent to McKercher acting for an opposing party in unrelated legal matters could be inferred. However, the Court of Appeal found that McKercher had breached its duty of loyalty towards CN by peremptorily terminating the solicitor-client relationship on its existing files for CN. Nevertheless, disqualification was not an appropriate remedy in this case, since McKercher's continued representation of Wallace created no risk of prejudice to CN. Indeed, the termination of the lawyer-client relationship had effectively put an end to any possibility of prejudice.

8 The case at hand requires this Court to examine the lawyer's duty of loyalty to his client, and in particular the requirement that a lawyer avoid conflicts of interest. As we held in *R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631 (S.C.C.), the general "bright line" rule is that a lawyer, and by extension a law firm, may not concurrently represent clients adverse in interest without obtaining their consent — regardless of whether the client matters are related or unrelated: para. 29.

However, when the bright line rule is inapplicable, the question becomes whether the concurrent representation of clients creates a "substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person": *Neil*, at para. 31. This appeal turns on the scope of the bright line rule: Did it apply to McKercher's concurrent representation of CN and Wallace? Or is the applicable test instead whether the concurrent representation of CN and Wallace created a substantial risk of impaired representation?

9 In these reasons, I conclude that McKercher's concurrent representation of CN and Wallace fell squarely within the scope of the bright line rule. The bright line rule was engaged by the facts of this case: CN and Wallace were adverse in legal interests; CN has not attempted to tactically abuse the bright line rule; and it was reasonable in the circumstances for CN to expect that McKercher would not concurrently represent a party suing it for $1.75 billion. McKercher failed to obtain CN's consent to the concurrent representation of Wallace, and consequently breached the bright line rule when it accepted the Wallace retainer.

10 In addition to its duty to avoid conflicts of interest, a law firm is under a duty of commitment to the client's cause which prevents it from summarily and unexpectedly dropping a client in order to circumvent conflict of interest rules, and a duty of candour which requires the law firm to advise its existing client of all matters relevant to the retainer. I conclude that McKercher's termination of its existing retainers with CN breached its duty of commitment to its client's cause, and its failure to advise CN of its intention to accept the Wallace retainer breached its duty of candour to its client. However, McKercher possessed no relevant confidential information that could be used to prejudice CN.

11 As regards the appropriate remedy to McKercher's breaches, I conclude that the only concern that would warrant disqualification in this case is the protection of the repute of the administration of justice. A breach of the bright line rule normally attracts the remedy of disqualification. This remains true even if the lawyer-client relationship is terminated subsequent to the breach. However, certain factors may militate against disqualification, and they must be taken into consideration. As the motion judge did not have the benefit of these reasons, I would remit the matter to the Queen's Bench for redetermination in accordance with them.

II. Issues

12 The appeal raises the following issues:

A. The Role of the Courts in Resolving Conflicts Issues

B. The Governing Principles

C. Application of the Principles

D. The Appropriate Remedy

III. Analysis

A. The Role of the Courts in Resolving Conflicts Issues

13 Courts of inherent jurisdiction have supervisory power over litigation brought before them. Lawyers are officers of the court and are bound to conduct their business as the court directs. When issues arise as to whether a lawyer may act for a particular client in litigation, it falls to the court to resolve those issues. The courts' purpose in exercising their supervisory powers over lawyers has traditionally been to protect clients from prejudice and to preserve the repute of the administration of justice, not to discipline or punish lawyers.

14 In addition to their supervisory role over court proceedings, courts develop the fiduciary principles that govern lawyers in their duties to clients. Solicitor-client privilege has been a frequent subject of court consideration, for example.

15 The inherent power of courts to resolve issues of conflicts in cases that may come before them is not to be confused with the powers that the legislatures confer on law societies to establish regulations for their members, who form a self-governing profession: *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235 (S.C.C.), at p. 1244. The purpose of law society regulation is to establish general rules applicable to all members to ensure ethical conduct, protect the public and discipline lawyers who breach the rules — in short, the good governance of the profession.

16 Both the courts and law societies are involved in resolving issues relating to conflicts of interest — the courts from the perspective of the proper administration of justice, the law societies from the perspective of good governance of the profession: see *Cunningham v. Lilles*, 2010 SCC 10, [2010] 1 S.C.R. 331 (S.C.C.). In exercising their respective powers, each may properly have regard for the other's views. Yet each must discharge its unique role. Law societies are not prevented from adopting stricter rules than those applied by the courts in their supervisory role. Nor are courts in their supervisory role bound by the letter of law society rules, although "an expression of a professional standard in a code of ethics ... should be considered an important statement of public policy": *Martin*, at p. 1246.

17 In recent years the Canadian Bar Association and the Federation of Law Societies of Canada have worked toward common conflict rules applicable across Canada. However, they have been unable to agree on their precise form: see, for example, A. Dodek, "Conflicted Identities: The Battle over the Duty of Loyalty in Canada" (2011), 14 *Legal Ethics* 193. That debate was transported into the proceedings before us, each of these interveners asking this Court to endorse their approach. While the court is properly informed by views put forward, the role of this Court is not to mediate the debate. Ours is the more modest task of determining which principles should apply in a case such as this, from the perspective of what is required for the proper administration of justice.

18 Against this backdrop, I now turn to examine the principles that govern this Appeal.

B. The Governing Principles

19 A lawyer, and by extension a law firm, owes a duty of loyalty to clients. This duty has three salient dimensions: (1) a duty to avoid conflicting interests; (2) a duty of commitment to the client's cause; and (3) a duty of candour: *Neil*, at para. 19. I will consider each in turn.

1. Avoiding Conflicts of Interest

(a) English Origins

20 Canada's law of conflicts as administered by the courts is based on precedents rooted in the English jurisprudence. Traditionally, the main concern was that clients not suffer prejudice from a lawyer's representation — at the same time or sequentially — of parties adverse in interest. Disqualification of a lawyer from a case was reserved for situations where there was a real risk of harm to the client, as opposed to a theoretical possibility of harm: see for example, *Earl Cholmondeley v. Lord Clinton* (1815), 19 Ves. Jun. 261, 34 E.R. 515 (Eng. Ch.); *Bricheno v. Thorp* (1821), Jac. 300, 37 E.R. 864 (Eng. Ch.); *Taylor v. Blacklow* (1836), 3 Bing. N.C. 235, 132 E.R. 401 (Eng. C.P.). The rule was not absolute or "bright line", but pragmatic. Courts looked to the circumstances of each case and sought to determine whether it was realistic to conclude that the client would suffer some form of harm. Fletcher Moulton L.J.'s statement in *Rakusen v. Ellis*, [1912] 1 Ch. 831 (Eng. C.A.), catches the flavour of the English common law approach:

> As a general rule the Court will not interfere unless there be a case where mischief is rightly anticipated....[W]here there is such a probability of mischief that the Court feels that, in its duty as holding the balance between the high standard of behaviour which it requires of its officers and the practical necessities of life, it ought to interfere and say that a solicitor shall not act. Now in the present case there is an absolute absence of any reasonable probability of any mischief whatever. [p.841]

(b) The Martin Test: A Focus on Risk of Prejudice and Balancing of Values

21 In the *Martin* case, this Court (*per* Sopinka J.) adopted the English common law's focus on protecting the client from real risks of harm, although it diverged from some of the English case law with respect to the exact level of risk that should attract the conflicts rule. The issue in *Martin* was whether a law firm should be disqualified from acting against a party because a lawyer in the firm had received relevant confidential information in the course of her prior work for that party. As will be discussed further below, the Court held that a firm cannot be disqualified unless there is a risk of prejudice to the client, although in some cases the client benefits from a presumption of risk of prejudice: pp. 1260-61.

22 In addition to retaining an emphasis on risk of prejudice to the client, the Court concluded in *Martin* that an effective and fair conflicts rule must strike an appropriate balance between conflicting values. On the one hand stands the high repute of the legal profession and the administration of justice. On the other hand stand the values of allowing the client's choice of counsel and permitting reasonable mobility in the legal profession. The realities of large law firms and litigants who pick and choose between them must be factored into the balance. As was the case in the English common law, the Court declined to endorse broad rules that are not context-sensitive.

(c) Types of Prejudice Addressed by Conflict of Interest Rules

23 The law of conflicts is mainly concerned with two types of prejudice: prejudice as a result of the lawyer's misuse of confidential information obtained from a client; and prejudice arising where the lawyer "soft peddles" his representation of a client in order to serve his own interests, those of another client, or those of a third person. As regards these concerns, the law distinguishes between former clients and current clients. The lawyer's main duty to a former client is to refrain from misusing confidential information. With respect to a current client, for whom representation is ongoing, the lawyer must neither misuse confidential information, nor place himself in a situation that jeopardizes effective representation. I will examine each of these aspects of the conflicts rule in turn.

(d) Confidential Information

24 The first major concern addressed by the duty to avoid conflicting interests is the misuse of confidential information. The duty to avoid conflicts reinforces the lawyer's duty of confidentiality — which is a distinct duty — by preventing situations that carry a heightened risk of a breach of confidentiality. A lawyer cannot act in a matter where he may use confidential information obtained from a former or current client to the detriment of that client. A two-part test is applied to determine whether the new matter will place the lawyer in a conflict of interest: (1) Did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand? (2) Is there a risk that it will be used to the prejudice of that client?: *Martin*, at p. 1260. If the lawyer's new retainer is "sufficiently related" to the matters on which he or she worked for the former client, a rebuttable presumption arises that the lawyer possesses confidential information that raises a risk of prejudice: p. 1260.

(e) Effective Representation

25 The second main concern, which arises with respect to current clients, is that the lawyer be an effective representative — that he serve as a zealous advocate for the interests of his client. The lawyer must refrain "from being in a position where it will be systematically unclear whether he performed his fiduciary duty to act in what he perceived to be the best interests" of his client: D. W.M. Waters, M.R. Gillen and L.D. Smith, eds., *Waters' Law of Trusts in Canada* (4th ed. 2012), at p. 968. As the oft-cited Lord Brougham said, "an advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client": *Trial of Queen Caroline* (1821), by J. Nightingale, vol. II, The Defence, Part I, at p. 8.

26 Effective representation may be threatened in situations where the lawyer is tempted to prefer other interests over those of his client: the lawyer's own interests, those of a current client, of a former client, or of a third person: *Neil*, at para. 31. This appeal concerns the risk to effective representation that arises when a lawyer acts concurrently in different matters for clients whose immediate interests in those matters are directly adverse. This Court has held that concurrent representation of clients directly adverse in interest attracts a clear prohibition: the bright line rule.

(f) The Bright Line Rule

27 In *Neil*, this Court (*per* Binnie J.) stated that a lawyer may not represent a client in one matter while representing that client's adversary in another matter, unless both clients provide their informed consent. Binnie J. articulated the rule thus:

> The bright line is provided by the general rule that a lawyer may not represent one client whose interests are directly adverse to the immediate interests of another current client — *even if the two mandates are unrelated* — unless both clients consent after receiving full disclosure (and preferably independent legal advice), and the lawyer reasonably believes that he or she is able to represent each client without adversely affecting the other.
>
> [Emphasis in original.]
>
> (*Neil*, at para. 29)

28 The rule expressly applies to both related *and* unrelated matters. It is possible to argue that a blanket prohibition against concurrent representation is not warranted with respect to unrelated matters, where the concrete duties owed by the lawyer to each client may not actually enter into conflict. However, the rule provides a number of advantages. It is clear. It recognizes that it is difficult — often impossible — for a lawyer or law firm to neatly compartmentalize the interests of different clients when those interests are fundamentally adverse. Finally, it reflects the fact that the lawyer-client relationship is a relationship based on trust. The reality is that "the client's faith in the lawyer's loyalty to the client's interests will be severely tried whenever the lawyer must be loyal to another client whose interests are materially adverse": *Restatement of the Law Third: The Law Governing Lawyers* (2000), vol. 2, §. 128(2), at p. 339.

29 The parties and interveners to this appeal disagreed over the substance of the bright line rule. It was variously suggested that the bright line rule is only a rebuttable presumption of conflict, that it does not apply to unrelated matters, and that it attracts a balancing of various circumstantial factors that may give rise to a conflict. These suggestions must be rejected. Where applicable, the bright line rule prohibits concurrent representation. It does not invite further considerations. As Binnie J. stated in *3464920 Canada Inc. v. Strother*, 2007 SCC 24, [2007] 2 S.C.R. 177 (S.C.C.), "[t]he 'bright line' rule is the product of the balancing of interests not the gateway to further internal balancing": para. 51. To turn the rule into a rebuttable presumption or a balancing exercise would be tantamount to overruling *Neil* and *Strother*. I am not persuaded that it would be appropriate here to depart from the rule of precedent.

30 However, the bright line rule is not a rule of unlimited application. The real issue raised by this appeal is the scope of the rule. I now turn to this issue.

(g) The Scope of the Bright Line Rule

31 The bright line rule holds that a law firm cannot act for a client whose interests are adverse to those of another existing client, unless both clients consent. It applies regardless of whether the client matters are related or unrelated. The rule is based on "the inescapable conflict of interest which is inherent" in some situations of concurrent representation: *Bolkiah v. KPMG* (1998), [1999] 2 A.C. 222 (U.K. H.L.), at p. 235, cited in *Neil*, at para. 27. It reflects the essence of the fiduciary's duty of loyalty: "... a fiduciary cannot act at the same time both for and against the same client, and his firm is in no better position": *Bolkiah*, at p. 234.

32 However, *Neil* and *Strother* make it clear that the scope of the rule is not unlimited. The rule applies where the *immediate legal* interests of clients are *directly* adverse. It does not apply to condone tactical abuses. And it does not apply in circumstances where it is unreasonable to expect that the lawyer will not concurrently represent adverse parties in unrelated legal matters. The limited scope of application of the rule is illustrated by *Neil* and *Strother*. This Court found the bright line rule to be inapplicable to the facts of both of those cases, and instead examined whether there was a substantial risk of impaired representation: *Neil*, at para. 31; *Strother*, at para. 54.

33 First, the bright line rule applies only where the *immediate* interests of clients are *directly* adverse in the matters on which the lawyer is acting. In *Neil*, a law firm was concurrently representing Mr. Neil in criminal proceedings and Ms. Lambert in divorce proceedings, when it was foreseeable that Lambert would eventually become Neil's co-accused in the criminal proceedings. The lawyer representing Lambert in the divorce proceedings began to gather information that he could eventually use against Neil. The law firm also encouraged another one of its clients, Mr. Doblanko, to report criminal actions by Neil to the police. The goal was to mount a "cut-throat" defence for Lambert in the criminal case, painting her as an innocent dupe who had been manipulated by Neil.

34 This Court did not apply the bright line rule to the facts in *Neil*, because of the nature of the conflict. Neither Neil and Lambert, nor Neil and Doblanko, were *directly* adverse to one another in the legal matters on which the law firm represented them. Neil was not a party to Lambert's divorce, nor to any action in which Doblanko was involved. The adversity of interests was *indirect*: it stemmed from the strategic linkage between the matters, rather than from Neil being directly pitted against Lambert or Doblanko in either of the matters.

35 Second, the bright line rule applies only when clients are adverse in *legal* interest. The main area of application of the bright line rule is in civil and criminal proceedings. *Neil* and *Strother* illustrate this limitation. The interests in *Neil* were not legal, but rather strategic. In *Strother*, they were commercial:

> ... the conflict of interest principles do not generally preclude a law firm or lawyer from acting concurrently for different clients who are in the same line of business, or who compete with each other for business....
>
> The clients' respective "interests" that require the protection of the duty of loyalty have to do with the practice of law, not commercial prosperity. Here the alleged "adversity" between concurrent clients related to business matters. [paras. 54-55, *per* Binnie J.]

36 Third, the bright line rule cannot be successfully raised by a party who seeks to abuse it. In some circumstances, a party may seek to rely on the bright line rule in a manner that is "tactical rather than principled": *Neil*, at para. 28. The possibility of tactical abuse is especially high in the case of institutional clients dealing with large national law firms. Indeed, institutional clients have the resources to retain a significant number of firms, and the retention of a single partner in any Canadian city can disqualify all other lawyers within the firm nation-wide from acting against that client. As Binnie J. remarked,

> In an era of national firms and a rising turnover of lawyers, especially at the less senior levels, the imposition of exaggerated and unnecessary client loyalty demands, spread across many offices and lawyers who in fact have no knowledge whatsoever of the client or its particular affairs, may promote form at the expense of substance, and tactical advantage instead of legitimate protection.
>
> [Emphasis added]
>
> (*Neil*, at para. 15)

Thus, clients who intentionally create situations that will engage the bright line rule, as a means of depriving adversaries of their choice of counsel, forfeit the benefit of the rule. Indeed, institutional clients should not spread their retainers among scores of leading law firms in a purposeful attempt to create potential conflicts.

37 Finally, the bright line rule does not apply in circumstances where it is unreasonable for a client to expect that its law firm will not act against it in unrelated matters. In *Neil*, Binnie J. gave the example of "professional litigants" whose consent to concurrent representation of adverse legal interests can be inferred:

> In exceptional cases, consent of the client may be inferred. For example, governments generally accept that private practitioners who do their civil or criminal work will act against them in unrelated matters, and a contrary position in a particular case may, depending on the circumstances, be seen as tactical rather than principled. Chartered banks

> and entities that could be described as professional litigants may have a similarly broad-minded attitude where the matters are sufficiently unrelated that there is no danger of confidential information being abused. These exceptional cases are explained by the notion of informed consent, express or implied. [para. 28]

In some cases, it is simply not reasonable for a client to claim that it expected a law firm to owe it exclusive loyalty and to refrain from acting against it in unrelated matters. As Binnie J. stated in *Neil*, these cases are the exception, rather than the norm. Factors such as the nature of the relationship between the law firm and the client, the terms of the retainer, as well as the types of matters involved, may be relevant to consider when determining whether there was a reasonable expectation that the law firm would not act against the client in unrelated matters. Ultimately, courts must conduct a case-by-case assessment, and set aside the bright line rule when it appears that a client could not reasonably expect its application.

(h) The Substantial Risk Principle

38 When a situation falls outside the scope of the bright line rule for any of the reasons discussed above, the question becomes whether the concurrent representation of clients creates a substantial risk that the lawyer's representation of the client would be materially and adversely affected. The determination of whether there exists a conflict becomes more contextual, and looks to whether the situation is "liable to create conflicting pressures on judgment" as a result of "the presence of factors which may reasonably be perceived as affecting judgment": Waters, Gillen and Smith, at p. 968. In addition, the onus falls upon the client to establish, on a balance of probabilities, the existence of a conflict — there is only a deemed conflict of interest if the bright line rule applies.

(i) Practical Implications

39 When a law firm is asked to act against an existing client on an unrelated matter, it must determine whether accepting the retainer will breach the bright line rule. It must ask itself whether (i) the immediate *legal* interests of the new client are directly adverse to those of the existing client, (ii) the existing client has sought to exploit the bright line rule in a tactical manner; and (iii) the existing client can reasonably expect that the law firm will not act against it in unrelated matters. In most cases, simultaneously acting for and against a client in legal matters will result in a breach of the bright line rule, with the result that the law firm cannot accept the new retainer unless the clients involved grant their informed consent.

40 If the law firm concludes that the bright line rule is inapplicable, it must then ask itself whether accepting the new retainer will create a substantial risk of impaired representation. If the answer is no, then the law firm may accept the retainer. In the event that the existing client disagrees with the law firm's assessment, the client may bring a motion before the courts to prevent the firm from continuing to represent the adverse party. In this manner, the courts will be called upon to further develop the contours of the bright line rule, and to ensure that lawyers do not act in matters where they cannot exercise their professional judgment free of conflicting pressures.

(j) Summary

41 The bright line rule is precisely what its name implies: a bright line rule. It cannot be rebutted or otherwise attenuated. It applies to concurrent representation in both related *and* unrelated matters. However, the rule is limited in scope. It applies only where the *immediate* interests of clients are *directly* adverse in the matters on which the lawyer is acting. It applies only to legal — as opposed to commercial or strategic — interests. It cannot be raised tactically. And it does not apply in circumstances where it is unreasonable for a client to expect that a law firm will not act against it in unrelated matters. If a situation falls outside the scope of the rule, the applicable test is whether there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected.

42 I now turn to the other dimensions of the duty of loyalty which are relevant to the present appeal.

2. The Duty of Commitment to the Client's Cause

43 The duty of commitment is closely related to the duty to avoid conflicting interests. In fact, the lawyer must avoid conflicting interests precisely so that he can remain committed to the client. Together, these duties ensure that "a divided loyalty does not cause the lawyer to "'soft peddle'" his or her representation "of a client out of concern for another client": *Neil*, at para. 19.

44 The duty of commitment prevents the lawyer from undermining the lawyer-client relationship. As a general rule, a lawyer or law firm should not summarily and unexpectedly drop a client simply in order to avoid conflicts of interest with existing or future clients. This is subject to law society rules, which may, for example, allow law firms to end their involvement in a case under the terms of a limited scope retainer: see, for example, Law Society of Upper Canada, *Rules of Professional Conduct (online)*, r. 2.02(6.1) and (6.2); Law Society of Alberta, *Code of Conduct (online)*, Commentary to r. 2.01(2); Nova Scotia Barristers' Society, *Code of Professional Conduct (online)*, rr. 3.2-1A and 7.2-6A.

3. The Duty of Candour

45 A lawyer or law firm owes a duty of candour to the client. This requires the law firm to disclose any factors relevant to the lawyer's ability to provide effective representation. As Binnie J. stated in *Strother*, at para. 55: "The thing the lawyer must not do is keep the client in the dark about matters he or she knows to be relevant to the retainer (emphasis deleted)."

46 It follows that as a general rule a lawyer should advise an existing client before accepting a retainer that will require him to act against the client, even if he considers the situation to fall outside the scope of the bright line rule. At the very least, the existing client may feel that the personal relationship with the lawyer has been damaged and may wish to take its business elsewhere.

47 I add this. The lawyer's duty of candour towards the existing client must be reconciled with the lawyer's obligation of confidentiality towards his new client. In order to provide full disclosure to the existing client, the lawyer must first obtain the consent of the new client to disclose the existence, nature and scope of the new retainer. If the new client refuses to grant this consent, the lawyer will be unable to fulfill his duty of candour and, consequently, must decline to act for the new client.

C. Application of the Principles

48 All three of the duties that flow from the lawyer's duty of loyalty are engaged in this case: the duty to avoid conflicting interests; the duty of commitment to the client's cause; and the duty of candour to the client. I will deal with each in turn.

1. Duty to Avoid Conflicting Interests

49 The question here is whether McKercher's concurrent representation of CN and Wallace fell within the scope of the bright line rule. I conclude that it did.

50 The bright line rule prevents the concurrent representation of clients whose immediate legal interests are directly adverse, subject to the limitations discussed in these reasons. The fact that the Wallace and CN retainers were legally and factually unrelated does not prevent the application of the bright line rule.

51 Here, the bright line rule is applicable. The immediate interests of CN and Wallace were directly adverse, and those interests were legal in nature. Indeed, McKercher helped Wallace bring a class action directly against CN. In addition, there is no evidence on the record that CN is seeking to use the bright line rule tactically. Nothing suggests that CN has been purposefully spreading out its legal work across Saskatchewan law firms in an attempt to prevent Wallace or other litigants from retaining effective legal counsel. The motion judge accepted the testimony of CN's general counsel and concluded that CN was acting "on a principled basis, and not merely for tactical reasons": para. 62. I find no palpable and overriding error in this conclusion.

52 Finally, it was reasonable in these circumstances for CN to expect that McKercher would not act for Wallace. I agree with the motion judge's findings on this point:

> The solicitor and client had a longstanding relationship. CN used the McKercher Firm as the "go to" firm. Although there were at least two other firms in Saskatchewan that also did CN's legal work, I accept the testimony of Mr. Chouc, that the McKercher Firm was its primary firm within this province.... The lawsuit commenced seeks huge damages against CN and alleges both aggravated and punitive damages, which connote a degree of moral turpitude on the part of CN. Simply put, it is hard to imagine a situation that would strike more deeply at the loyalty component of the solicitor-client relationship. [para. 56]

In other words, it was reasonable for CN to be surprised and dismayed when its primary legal counsel in the province of Saskatchewan sued it for $1.75 billion.

53 Consequently, the facts of this appeal fall within the scope of the bright line rule. McKercher breached the rule, and by extension its duty to avoid conflicting interests, when it accepted to represent Wallace without first obtaining CN's informed consent.

54 However, I cannot agree that this is a situation where there also exists a risk of misuse of confidential information. CN's contention that McKercher obtained confidential information that might assist it on the Wallace matter — namely, a general understanding of CN's litigation philosophy — does not withstand scrutiny. "[M]erely ... making a bald assertion that the past relationship has provided the solicitor with access to ... litigation philosophy" does not suffice: *Moffat v. Wetstein* (1996), 29 O.R. (3d) 371 (Ont. Gen. Div.), at p. 401. "There is a distinction between possessing information that is relevant to the matter at issue and having an understanding of the corporate philosophy" of a previous client: *Canadian Pacific Railway v. Aikins, MacAulay & Thorvaldson* (1998), 23 C.P.C. (4th) 55 (Man. C.A.), at para. 26. The information must be capable of being used against the client in some tangible manner. In the present case, the real estate, insolvency, and personal injury files on which McKercher worked were entirely unrelated to the Wallace action, and CN has failed to show how they or other matters on which McKercher acted could have yielded *relevant* confidential information that could be used against it.

2. The Duty of Commitment to the Client's Cause

55 The duty of commitment to the client's cause suggests that a law firm should not summarily and unexpectedly terminate a retainer as a means of circumventing conflict of interest rules. The McKercher firm had committed itself to act loyally for CN on the personal injury, real estate and receivership matters. McKercher was bound to complete those retainers, unless the client discharged it or acted in a way that gave McKercher cause to terminate the retainers. McKercher breached its duty of commitment to CN's causes when it terminated its retainer with CN on two of these files. It is clear that a law firm cannot terminate a client relationship purely in an attempt to circumvent its duty of loyalty to that client: *De Beers Canada Inc. v. Shore Gold Inc.*, 2006 SKQB 101, 278 Sask. R. 171 (Sask. Q.B.), at para. 17; *Toddglen Construction Ltd. v. Concord Adex Developments Corp.* (2004), 34 C.L.R. (3d) 111 (Ont. Master), *per* Master Sandler).

56 The conclusion on this point is supported by the obligation imposed on McKercher by its Law Society that it not withdraw its services from a client without good cause and appropriate notice: see the ethical rules applicable at the relevant time, Law Society of Saskatchewan *Code of Professional Conduct* (1991), chapter XII, at p. 47. The desire to accept a new, potentially lucrative client did not provide good cause to withdraw services from CN.

3. The Duty of Candour

57 The McKercher firm breached its duty of candour to CN by failing to disclose to CN its intention to accept the Wallace retainer.

58 It bears repeating: a lawyer must not "keep the client in the dark about matters he or she knows to be relevant to the retainer": *Strother*, at para. 55. As discussed, this rule must be broadly construed to give the client an opportunity to judge for itself whether the proposed concurrent representation risks prejudicing its interests and if so, to take appropriate action.

59 CN should have been given the opportunity to assess McKercher's intention to represent Wallace and to make an appropriate decision in response — whether to terminate its existing retainers, continue those retainers, or take other action. Instead, CN only learned that it was being sued by its own lawyer when it received a statement of claim. This is precisely the type of situation that the duty of candour is meant to prevent.

D. The Remedy

60 I have concluded that accepting the Wallace retainer placed McKercher in a conflict of interest, and that McKercher breached its duties of commitment and candour to CN. The question is whether McKercher should be disqualified from representing the Wallace plaintiffs because its acceptance of the Wallace retainer breached the duty of loyalty it owed CN.

61 As discussed, the courts in the exercise of their supervisory jurisdiction over the administration of justice in the courts have inherent jurisdiction to remove law firms from pending litigation. Disqualification may be required: (1) to avoid the risk of improper use of confidential information; (2) to avoid the risk of impaired representation; and/or (3) to maintain the repute of the administration of justice.

62 Where there is a need to prevent misuse of confidential information, as set out in *Martin*, disqualification is generally the only appropriate remedy, subject to the use of mechanisms that alleviate this risk as permitted by law society rules. Similarly, where the concern is risk of impaired representation as set out in these reasons, disqualification will normally be required if the law firm continues to concurrently act for both clients.

63 The third purpose that may be served by disqualification is to protect the integrity and repute of the administration of justice. Disqualification may be required to send a message that the disloyal conduct involved in the law firm's breach is not condoned by the courts, thereby protecting public confidence in lawyers and deterring other law firms from similar practices.

64 In assessing whether disqualification is required on this ground alone, all relevant circumstances should be considered. On the one hand, acting for a client in breach of the bright line rule is always a serious matter that on its face supports disqualification. The termination of the client retainers — whether through lawyer withdrawal or through a client firing his lawyer after learning of a breach — does not necessarily suffice to remove all concerns that the lawyer's conduct has harmed the repute of the administration of justice.

65 On the other hand, it must be acknowledged that in circumstances where the lawyer-client relationship has been terminated and there is no risk of misuse of confidential information, there is generally no longer a concern of ongoing prejudice to the complaining party. In light of this reality, courts faced with a motion for disqualification on this third ground should consider certain factors that may point the other way. Such factors may include: (i) behaviour disentitling the complaining party from seeking the removal of counsel, such as delay in bringing the motion for disqualification; (ii) significant prejudice to the new client's interest in retaining its counsel of choice, and that party's ability to retain new counsel; and (iii) the fact that the law firm accepted the conflicting retainer in good faith, reasonably believing that the concurrent representation fell beyond the scope of the bright line rule and applicable law society restrictions.

66 Against this background, I return to this appeal. The motion judge concluded that the appropriate remedy was to disqualify McKercher from the Wallace action. He based this conclusion on a variety of factors — in particular, he focused on what he perceived to be CN's justified sense of betrayal, the impairment of McKercher's ability to continue to represent CN on the ongoing retainers, and the risk of misuse of confidential information. Some of these considerations were not relevant. Here, disqualification is not required to prevent the misuse of confidential information. Nor is it

required to avoid the risk of impaired representation. Indeed, the termination of the CN retainers that McKercher was working on ended the representation. The only question, therefore, is whether disqualification is required to maintain public confidence in the justice system.

67 As discussed, a violation of the bright line rule on its face supports disqualification, even where the lawyer-client relationship has been terminated as a result of the breach. However, it is also necessary to weigh the factors identified above, which may suggest that disqualification is inappropriate in the circumstances. The motion judge did not have the benefit of these reasons, and obviously could not consider all of the factors just discussed that are relevant to the issue of disqualification. These reasons recast the legal framework for judging McKercher's conduct and determining the appropriate remedy. Fairness suggests that the issue of remedy should be remitted to the court for consideration in accordance with them.

IV. Conclusion

68 I would allow the appeal and remit the matter to the Queen's Bench to be decided in accordance with these reasons. I would award costs to the appellant, CN.

Appeal allowed; matter remitted to lower court.

Pourvoi accueilli; dossier renvoyé au tribunal de première instance.

TAB 3

Case Name:

Dreco Energy Services Ltd. v. Wenzel Downhole Tools Ltd.

Between
Dreco Energy Services Ltd. and Vector Oil Tool Ltd., respondents, plaintiffs/respondents, and Wenzel Downhole Tools Ltd., appellant, defendant/applicant

[2006] A.J. No. 85

2006 ABCA 39

56 Alta. L.R. (4th) 234

380 A.R. 109

29 C.P.C. (6th) 142

148 A.C.W.S. (3d) 1007

2006 CarswellAlta 101

Docket No.: 0503-0138-AC

Alberta Court of Appeal
Edmonton, Alberta

Cote and O'Brien JJ.A. and Slatter J. (ad hoc)

Heard: January 13, 2006.
Judgment: February 1, 2006.

(74 paras.)

Civil procedure -- Appeals -- Evidence -- Admission of fresh evidence-New evidence which is irrelevant to the issues raised on appeal is inadmissible.

Professional responsibility -- Professional duties -- Particular duties -- Confidentiality-A lawyer who once acted for a bank in a transaction with the defendant cannot be disqualified from acting for the plaintiff if he did not receive confidential information about the defendant while representing the bank.

Appeal from a chambers judge's decision dismissing Wenzel's application to disqualify the lawyer representing Dreco. Wenzel alleged that lawyer had a conflict of interest, because he had previously acted for Wenzel's bank, to which Wenzel had entrusted confidential information that the bank had then passed on to the lawyer. Wenzel also sought to introduce new evidence on the appeal. Dreco countered that his lawyer did not receive any confidential information about Wenzel.

HELD: Appeal dismissed. If it had been proved that the bank had passed confidential information on to Dreco's lawyer, then it might hold that the lawyer owed a duty of confidentiality to Wenzel. However, the evidence that Dreco's lawyer had not received confidential information was clear and full, whereas the evidence presented by Wenzel was pure supposition. There was therefore no reason to bar the lawyer from acting for Dreco. Wenzel's application to admit new evidence on appeal was also denied. It was irrelevant to the appeal, and is therefore inadmissible.

Appeal From:

Appeal from the Order by The Honourable Mr. Justice S. Sanderman Dated the 13th day of April, 2005, Filed the 14th day of April, 2005 (2005 ABQB 279, Docket: 0403-11683)

Counsel:

J.E. Redmond, Q.C., T.J. Williams, for the Respondents (Plaintiffs/Respondents)

H.W. Veale, Q.C., R.J. Wasylyshyn, for the Appellant (Defendant/Applicant)

REASONS FOR JUDGMENT

THE COURT:--

A. Introduction

1 This is an appeal from a written decision on a chambers motion: see 48 Alta. L.R. (4th) 240, 2005 ABQB 279. The chambers judge found that the respondents' lawyers were not disqualified from continuing to act for the respondents.

2 A fairly full chronology is an Appendix to these reasons. The main facts relating to the appeal itself are as follows. The respondents sued companies allegedly related to the appellant, alleging breach of various noncompetition and similar covenants given on a sale of a very valuable business. After a year and a half of litigation, the Court of Appeal pronounced an interlocutory injunction against that competition. Within a few days, the same business appeared to be carried on in the same premises, but now it was the appellant carrying it on. The respondents then commenced the

present suit against the appellant. Latterly, the first suit had been conducted by the law firm of Fraser Milner Casgrain on behalf of the respondents, and so was the new lawsuit.

3 Nine or so months into the new suit, the appellant moved to remove Fraser Milner from acting in the new suit. They alleged a conflict of interest because Fraser Milner had also acted for the appellant's new bank when it replaced their former bank by making them a large new loan. A fuller analysis of the facts is in Parts D and H below.

4 The chambers judge dismissed the motion and let Fraser Milner keep acting, so the appellant appealed. About the time that the appeal was to come on for hearing, the appellant filed a motion seeking to adduce new evidence on appeal, and both sides filed bulky new evidence, which is described in Part L of this Memorandum. The appeal and motion for new evidence were adjourned, and then argued before us. We declined to admit the new evidence, so we will begin by discussing the original motion to disqualify without the new evidence.

B. The Presumption in Martin v. MacDonald

5 The appellant relies upon Martin v. MacDonald Est. (Gray) [1990] 3 S.C.R. 1235, [1991] 1 W.W.R. 705. Its counsel also says that a number of courts in Canada have extended that doctrine beyond the situation of a former strict solicitor-client relationship, and that our court did so in Gainers v. Pocklington (1995) 165 A.R. 274, 125 D.L.R. (4th) 50 (C.A.), leave den. [1995] S.C.C.A. No. 353, (1996) 199 N.R. 160 (S.C.C.). That may possibly be true of some decisions in Canada, but Gainers v. Pocklington is at pains to point out that often the precise Martin v. MacDonald doctrine and its strong presumption is not what the courts then apply: see pp. 277-78 (A.R.) of Gainers. Indeed the appellant here invokes (at least part of the time) the different doctrine of receipt of confidential information discussed in Part C below. They say that the appellant entrusted its bank with confidential information, that the bank passed it on to Fraser Milner as the bank's solicitors, and so the doctrine of confidentiality binds that law firm too.

6 Martin v. MacDonald says that where a client hires a lawyer, many duties and disabilities immediately attach to the lawyer, and therefore it is necessary to impose at once and automatically very strong presumptions about the lawyer's receipt and use of information from that client. Those presumptions are hard to rebut.

C. The Equitable Duty of Confidentiality

7 Though a lawyer (like anyone else) may owe duties of confidentiality to non-clients, that is not the ordinary situation. Lawyers daily or hourly receive information which they are not obliged to keep confidential, on behalf of the person giving the information. Whether they are so obliged depends upon where the information comes from, and under what circumstances. One of those circumstances is the relationship between the parties. Usually a lawyer has but one client, and information which the lawyer gathers from non-clients is held for the lawyer's client alone, not for the informants. As noted in Part B, the presumptions in Martin v. MacDonald apply only to information from the lawyer's client.

8 Where someone who is not the client gives the lawyer information and expects the lawyer to hold it in confidence, more analysis is necessary. Martin v. MacDonald is not a rubber stamp to apply to non-client situations. The result in law or equity may be the same, or may differ, but more evidence and more legal analysis is needed to reach the result.

9 Nor are duties of confidentiality confined to certain relationships. Such a duty can arise even if there are no presumptions. For example, a lawyer or anyone else may expressly agree to receive and keep confidential, information from someone who is in no sense a client. That may well explain Almecon Ind. v. Nutron Mfg. (1994) 172 N.R. 140 (F.C.A.).

10 We agree with counsel for the appellant that a duty of confidentiality need not be based on a previous or existing relationship. The chambers judge said much the same thing. The duty can exist outside the Martin v. MacDonald principle. For example, entrusting someone with information which is then expressly stated to be confidential might suffice. But the duty would be confined to that information. And the confiding and passage of that information would have to be proved. It could not be presumed. It might well be that harm from possessing or using the information could not be presumed either, and would have to be proved.

11 The appellant borrower gave the bank confidential information. If it had also been proved here that the bank passed it on to Mr. Cochrane in confidence, then it might well be that Mr. Cochrane could have been restrained from passing it on further. Whether his firm could also be restrained from acting in this suit is less clear.

12 But one cannot get that far without undoing the chambers' judge's fact findings. He found that no such confidential information had been passed on to Mr. Cochrane, and Mr. Cochrane needed none, as we discuss in Part D below.

13 If it stands, anything beyond that fact finding is academic. What a court of equity would have done had Mr. Cochrane received such secrets would not arise in this motion.

14 Indeed counsel for the appellant here was careful not to suggest a wide inflexible legal rule which would immunize a law firm which acted once briefly on a financing for a bank, from ever acting adversely to the borrower thereafter. He volunteered that the precise fact situation must be looked at. We agree with his concerns to avoid an overbroad rule about bank solicitors' conflicts.

15 For those and other reasons, we agree with the chambers judge that one must see what the precise evidence is here.

D. Factual Examination

16 Mr. Cochrane was a commercial solicitor with Fraser Milner. After the bank had approved a loan, it hired him to act for it to get formal loan agreements and security from the appellant, and thereafter or concurrently to advance this new loan. The bank retained Mr. Cochrane only after it had made the decision to make the loan, and settled its conditions. He did so act, and the loan was thus advanced.

17 The proposed loan being large, the bank had earlier demanded and got a great deal of information from the appellant before it decided to make the loan. Doubtless much of that was confidential. In the event of litigation with strangers, probably much of it would be producible through discovery, but for the sake of argument we will assume that some of it might be privileged.

18 However, Mr. Cochrane had no involvement with the bank's earlier decision to lend to the appellant, and was neither consulted nor retained in such matters. He was retained only after that to close the deal, including drafting precise wording of loan agreements and security documents. Mr. Cochrane says that he had no need to see the confidential information which had been got for credit purposes, never asked for it, and never got it.

19 Nothing in the usual retainer of a solicitor by a lender to put on security, settle a loan contract, and advance the loan, would involve information about litigation, so the court could not simply infer receipt of such confidential information. It would need evidence to that effect.

20 During this transaction the appellant had its own solicitors, a different law firm, with whom Mr. Cochrane negotiated.

21 We have carefully reviewed the affidavits and cross-examination on them, and they fully support the statements above. Counsel for the appellant submits that Mr. Cochrane's denials of receipt of confidential information are narrower than the appellant's evidence that he got it. We cannot agree with either half of that proposition. Mr. Cochrane's evidence is clear and full, and demonstrates fully why he neither got nor needed any of the information which the appellant's witnesses suggest that he got. The "evidence" of the appellant's witnesses is admittedly pure supposition that the bank passed on the information to Mr. Cochrane, and supposition that Mr. Cochrane would need that information to draft the loan agreements.

22 We repeat that he never acted for the appellant, only for the bank which dealt with the appellant at arm's length. The fact that the lender (as lenders always do) made the appellant borrowers pay his account does not change that.

23 In fact Mr. Cochrane got no confidential information from the appellant, whether directly or indirectly. He did not need such information, and there is no reason to infer otherwise. The chambers judge so finds. There was overwhelming evidence to support that fact finding. Palpable and overriding error in that fact finding cannot be shown here, and is not suggested by the appellant's factum (p. 9). The appellant merely alleges selection of the wrong legal tests, which we discuss in Part J. We cannot retry those facts, despite the invitation to do so (e.g. appellant's pp. 8, 9).

24 Equity will not restrain use of information by someone who has no information. Nor is there any reason in law or equity to impose a legal fiction and to deem Mr. Cochrane to have got some confidential information when he really did not.

25 Nor is there any reason to put an onus on Mr. Cochrane or his firm to adduce strong evidence to prove that he got no confidential information. There is no analogy with the presumption in Martin v. MacDonald. Mr. Cochrane was never the appellant's lawyer, and owed duties only to the bank, which acted adversely to the appellant. The bank and the appellant were not cooperating in a decision as to creditworthiness. The bank and Mr. Cochrane were ensuring that the bank got security from the appellant on a loan with terms already fixed. So they acted adversely to the appellant's interests.

26 And since Mr. Cochrane got no confidential information emanating from the appellant, there is no reason to bar him or his partners from acting against the appellant, especially as his retainer for the bank is over.

E. Other Authorities

27 The appellant relies heavily upon Atco Gas & Pipelines v. Sheard [2003] 6 W.W.R. 219, 2003 ABCA 61, especially para. 11. It says that the Martin v. MacDonald strong presumptions are raised merely by showing that "it is 'reasonably possible' the lawyer acquired confidential information that 'could be relevant to the current matter'." In that case, a chambers judge erred by holding that actual relevance must be proved (paras. 15-16). Context is useful.

28 In that case, the lawyer was previously retained, indeed employed, by the parent of the utility company now complaining. And he was counsel of record for its utility company subsidiaries in a number of their rate hearings. And he was president of one of those companies. Two years later, the utility company's opponent hired him for an upcoming rate hearing. So his previous retainer was formal and direct, and the connection between the two retainers was clear. A rate hearing is the life-line of a utility, and ranges over all of a utility's whole operations, assets, expenses and income. Those normally would change little in two years. That lawyer had acted for Atco and its subsidiary, and now wanted to act against them in an update of the same matter. Martin v. MacDonald and its presumptions plainly applied. None of that is so here.

29 The other two Alberta decisions cited are Gainers v. Pocklington, supra, Part B, and Michel v. Lafrentz (1992) 120 A.R. 355 (C.A.). Their facts bear no resemblance to the present case. Mr. Cochrane was never the litigation counsel for the appellant or anyone allied in litigation, and never was a director or shareholder of the appellant or any related company.

30 The appellant relies upon authority from other provinces, especially Dobbin v. Acrohelipro Global Services (2005) 246 N. & P.E.I.R. 177, 2005 NLCA 22. It lays down a rebuttable presumption, not a rule of law (para. 51). And it bases its conclusion upon a factual inference (that that bank would pass on to its lawyer all the confidential information which it got from the borrower). There is no such evidence here, and no factual basis for making such an inference here, and so we decline to draw such an inference. The chambers judge here did not, and was not required to.

31 Here, the retainer was to close a loan transaction and put on new security. Not so in the Dobbin case. There, it was to advise the bank on whether to keep a credit arrangement open for a longer time, and if so to negotiate it. The significance of that fact was that that decision expressly involved considering the merits of the suit against the borrower in which the law firm was acting on the other side, and that bank passed on confidential information from the borrower to the law firm.

32 The Dobbin judgment is clearly distinguishable, and largely factual.

33 The appellant also cites Métro v. Regroupement des marchands actionnaires [2004] R.J.Q. 2665 (C.A.), leave den. [2004] S.C.C.A. No. 560, (2005) 341 N.R. 397 (S.C.C.). There a merged law firm was disqualified. The current and now forbidden retainer was acting for an association of dissident retailers who are also shareholders in the opposing wholesale company. This current dispute was all about oppression and classes of shares and breach of supply contracts. The disqualifying former retainer was helping two different brokerage firms make three different public offerings of shares by the wholesale company. In particular, that old retainer was to comply with securities laws, which required the fullest disclosure to the public of everything material about the wholesale company's business and finances. It is clear that both retainers were extremely broad, and both required knowing all about the company complaining. The facts are readily distinguishable here.

F. Views of the Public

34 When asked to identify the conflict or danger, counsel for the appellant suggested that the test is what reasonable lay people would think. We respectfully disagree. That may be part of the rationale for the rule in Martin v. MacDonald. (See pp. 724, 726 W.W.R. under the heading "The Appropriate Test"). But a partial rationale for the rule is not the test. The test is a related retainer (see pp. 713-14, 725 W.W.R.). But as explained above in Parts C and D, there is no retainer by or for the appellant here, and that rule or presumption does not apply here.

35 The public may reasonably think that a client tells its lawyer confidences, and that the lawyer shares them around his or her office. But the public cannot reasonably suppose that banks tell their lawyers unnecessary and irrelevant information. Besides, we can only postulate a well-informed member of the public. An uninformed one would be of no use.

36 It is one thing to presume (as Martin v. MacDonald does) that a client tells his lawyer his own secrets about the matter for which he retains the lawyer. And then to stop the lawyer acting against his or her former client on a related matter. It is quite another thing to presume that a client tells his lawyer other people's secrets unrelated to the retainer. And then to stop the lawyer acting against those other people. Does a lawyer acting for and advising a psychiatrist or a geologist on contract wording become incapable of ever acting against any patient or client of the psychiatrist or geologist? Surely not. Does a newspaper retaining a lawyer to advise it about what advertisements are defamatory or a breach of copyright, become a deemed recipient of the secrets of advertising rate negotiations and deals, and incapable of acting against all the newspaper's advertisers? Surely not.

37 The Supreme Court of Canada says that the aim of Martin v. MacDonald is to craft a rule which lets a member of the public retain a law firm without fearing that the firm will use the client's secret against him or her. It does not say that the aim is to let the public hire a bank, broker, insurance agent, physician, accountant, draftsman, or geologist without fearing that the client's secret will leak out. There are a host of circumstances in which the bank, broker, etc. may consult a lawyer for its own purposes. Such problems must be handled on a case-by-case basis with more precision, not by transplanting the blunt Martin v. MacDonald presumption. See Gainers v. Pocklington, supra, Part B.

G. Covenants to Inform

38 The appellant has a supplementary argument. It points to several covenants in the loan agreements which tell the appellant borrower to notify the bank from time to time of certain changes of circumstances.

39 We feel some discomfort in discussing this topic in the absence of any participation by the lender bank. But we cannot ignore this part of the appellant's argument. What we say below does not (of course) bind the bank nor any court hearing a dispute with the bank.

40 There is no evidence that any such further information of the type contemplated ever arose or was ever passed on to anyone, still less to Mr. Cochrane or to Fraser Milner. If more assets were acquired, there would be no reason for the bank to involve Mr. Cochrane, and there is no evidence that they did. A covenant by the borrower to reveal any litigation against the appellant (including the present lawsuit) does not mean that the bank would consult Mr. Cochrane, and there is no evidence that he received any such information. Indeed there is no evidence that the bank got any information later about litigation.

41 Counsel for the appellant also points out that one covenant in one contract says to disclose "details" of any litigation to the bank. We do not interpret that word as referring to strategy, nor an opinion as to the odds. In our view, "details" would mean time, place and amount, and maybe a few highlights of the statement of claim.

42 The appellant's counsel also points out that the usual boilerplate notice clause at the end of another loan agreement says that where notices must be given to the bank under the contract, a copy is to go to Fraser Milner. Maybe the original motivation was the time period before the loan was ad-

vanced (which happened long ago). That contract does not require revelation of details of litigation, only notifying the fact of litigation. (The other contract which calls for "details" does not require sending anything to Fraser Milner.) The attempt to import one notice clause into the other contract by the boilerplate whole-agreement clause at present appears to us as far-fetched.

43 In any event, the appellant stretches this clause to the point of extreme technicality. What if a year after the loan transaction had closed, the borrower were to write the bank and say "here are details of a new suit against us, which we send to you now pursuant to the loan agreement, but we do not want to send a copy of this to your former solicitors because they now act for our new opponents"? The chance that the bank would insist that they send such a copy to the opposing lawyers seems very remote. What good would that do the bank? There is no evidence that this bank (or any bank) has taken that position here or elsewhere.

44 And the chance that a court would force the borrower to reveal the information to the bank's former and now hostile lawyers similarly seems low. It is sufficient if the bank already has the information. The underlying law is equitable, and the ordinary remedy for protection of confidences is an injunction. The law about foreclosing on mortgages or appointing receivers is also equitable. So is the law of specific performance. So equitable defences would apply. The suggestion that a court of equity would then compel revealing confidences to the opposing law firm is one which we cannot accept.

45 All this topic seems to us somewhat beside the point. The key is actually imparting confidential information (or not imparting it), not whether any agreement might or might not call for it.

H. Postponement of Security

46 The bank later retained Mr. Cochrane briefly for a second matter. The appellant had bought some new assets, and their vendor extended credit for part of the price, on the security of the assets thus sold. To give the vendor that security, it was desirable that the bank exempt it from the bank's existing mortgage securing the loan. The bank agreed to postpone its charge, and retained Mr. Cochrane to see to the wording. There is no reason to get confidential information to implement such a mechanical transaction, and the evidence is that none was given.

47 It is alleged that this purchase of assets is the transaction which the respondents' new statement of claim calls a "sham". Assuming that it is, we cannot see that anything flows from that. The bank was neither vendor nor purchaser, and did not finance any aspect of that purchase. Mr. Cochrane acted only for the bank. There is no evidence that any background information about the purchase, still less confidential information, went to the bank, less still to Mr. Cochrane or his law firm. The appellant's factum disagrees (para. 34), but the cross-examination cited does not support the appellant's suggestion.

I. Preserving Evidence

48 We heard some suggestion that there is a link with the present lawsuit because almost three years later, Fraser Milner asked the RCMP and the Securities Commission to preserve evidence on computers seized from the appellant. However, that suggestion is not in the appellant's factum, and was argued only on the motion to adduce new evidence. Indeed, that evidence is not in the record here, only in the proposed new evidence.

49 This topic is an alleged link of subject matter with another law firm's retainer which was the subject of the new evidence motion. There was no allegation of a link with the bank financing or Mr. Cochrane's retainers, and there is no need to consider it on this appeal.

J. Legal Errors

50 It may be that the reasons of the chambers judge do not quite state the Martin v. MacDonald tests accurately in two or so places, as the appellant's counsel alleges. In particular, he says that the reasons suggest that

(a) the relationship between the past and the present retainers must be incontrovertible, and
(b) the person complaining must show that information was got in the first retainer which is truly harmful to the first client in the second retainer.

51 If that is what the chambers judge meant, those statements may not correspond with Martin v. MacDonald or later Alberta Court of Appeal decisions interpreting Martin v. MacDonald. However, we cannot see that that affects the result here. We have shown above in Part D that Mr. Cochrane's client was the bank and not the appellant. The bank's and Mr. Cochrane's relationship to the appellant was more or less adversarial, and they dealt at arm's length. So the Martin v. MacDonald tests have no role to play here anyway, as discussed in Part C above.

52 As for complaint (a), requiring or not requiring that there be incontrovertible evidence of the link between the old and new retainers would make no difference here. This is not a case where the chambers judge excluded or refused to weigh any evidence. Nor is there any indication that he used anything other than the usual civil standard of a preponderance of evidence. This is not a case where he said that the two retainers were probably linked, but a reasonable doubt (still less an unreasonable doubt) remained and barred the finding of a link.

53 As for complaint (b), such a requirement would be too strict if Martin v. MacDonald and its presumptions applied. But if they do not, then such a requirement may not be too strong at all, for reasons explained above in Part C.

54 The appellant also complains that the chambers judge said that Fraser Milner could be disqualified only if they had owed a fiduciary duty to the appellant. But the chambers judge did not say that. He did say that here the relationship was neither that of solicitor and client, nor near it, and that it was not fiduciary. He concludes that Martin v. MacDonald does not apply (para. 25; cf. para. 33).

55 This complaint by the appellant somewhat misses the point. Before one can impose upon a lawyer the strict duties and presumptions of fact found in Martin v. MacDonald, one must first find a solicitor-client relationship, or at the very least something very similar. Otherwise the duties and presumptions have no logical or policy basis. Conversely, if one does not use any such presumption, then one has to show that the facts give the lawyer some duty of confidentiality or loyalty to the person complaining. A duty of loyalty would be very like a fiduciary duty. See Part C above.

K. Conclusion on Appeal

56 Those are the reasons why we dismissed the appeal.

L. Motion for New Evidence

57 We based our decision on the existing evidence heard in Court of Queen's Bench, and not on the new evidence. We declined to admit the new evidence, for the following reasons.

58 At the opening of oral argument, we suggested to counsel for the respondents that it might be more practical to hear both matters now, and admit the new evidence. If it were excluded, the appellant might then move afresh in Court of Queen's Bench to disqualify Fraser Milner because of the quite separate and distinct facts alleged in the motion for new evidence. So both matters would have to be decided ultimately anyway.

59 But counsel for the respondents said that he was willing to run that gauntlet later. He felt strongly that he would want further evidence (and further argument) were that to occur. He therefore declined to waive his objections to the new evidence motion.

60 His written memorandum opposing that new evidence motion argued that at least one of the usual three tests for admitting new evidence was not met.

61 A motion to admit new evidence on appeal is not something to be lightly undertaken or entertained. It is not a way for the appellant to go back and scrape the bottom of the evidentiary barrel, seeking a few more shreds of evidence.

62 Therefore, one of the recognized tests for new evidence on appeal requires that the new evidence have a very strong effect, especially in a civil case. Many cases even state the test as whether the proffered new evidence would be "practically conclusive": Stringham v. Dubois [1993] 3 W.W.R. 273, 135 A.R. 64, 72 (para. 45) (C.A.). The precise standard of proof is not important in this case.

63 What was the appeal about? The notice of motion filed by the defendant appellant (amended only as to return date) states the issue. It alleges that Fraser Milner are disqualified because they got confidential information "having directly or indirectly represented the Defendant in a major financing". The details given, and the supporting affidavit, are all about Mr. Cochrane and the bank financing described above in Part D.

64 But the new evidence proffered has nothing to do with that retainer or transaction. It is not about Mr. Cochrane or the bank. It is all about a completely different retainer. The appellant directly hired a completely different law firm, on a completely different transaction and topic, at a completely different time. That other law firm had acted for the appellant in a securities law (cease-trading) matter. Then at least 7 months after the chambers decision in issue here, that other law firm later merged to some degree with Fraser Milner. In our respectful view, there is no connection between the appeal and the new matter. At best, there might be mere similarity of result.

65 Therefore, the new evidence is completely irrelevant to the motion and appeal before the Court, and so is the opposite of practically conclusive. It is inadmissible on appeal.

66 The appellant meets a bigger hurdle to raising this topic. What it really seeks to do is to raise a new issue, indeed a new motion. The new motion would be to disqualify Fraser Milner for having "merged" with another law firm. To do that in the Court of Appeal, the appellant would have to amend its 2004 Queen's Bench notice of motion, though it has never asked to do that. Courts of appeal will sometimes allow amendment of pleadings, or hear new issues, for the first time on appeal.

67 But it is vital that there be no irreparable prejudice to the respondent. One of the major tests for such prejudice is whether it is clear that all the evidence which might be relevant is already in the record. The rule is well settled. See Calmonton Inv. v. Tangye (1988) 87 A.R. 22, 27 (para. 16)

(C.A.), and cases cited. Other cases are cited in 4 Stevenson and Côté, Civil Procedure Encyclopedia, p. 75-33 (2003).

68 Therefore, to raise a new issue and also seek to adduce the evidence for it on appeal is novel, and to a degree a contradiction in principle. Counsel for the appellant could offer no authority for doing such a thing. Great caution is obviously necessary in the face of such a dual request.

69 This is a topic never broached in the Court of Queen's Bench. The new evidence motion here led to a blizzard of competing affidavits, and new cross-examinations, all crammed into the short vacation. The range of facts kept expanding. The panel read the new evidence. But there was not time to let both sides file new written argument, and to have the court consider such argument.

70 Under all these circumstances, we cannot know whether there would be prejudice to the respondents, but their experienced counsel asserts that there would be, and in particular that he wishes to adduce yet more evidence. There is no evidence denying prejudice.

71 For those reasons, we declined to admit the new evidence on appeal, and decided the appeal without it. As said when we dismissed the motion for new evidence, our decision does not preclude the appellant from raising the firm "merger" and securities law retainer in a fresh application in the Court of Queen's Bench.

M. Costs

72 Clearly the respondents should get one set of costs of the appeal, payable on taxation. Since they had to file a memorandum in response to the motion to adduce new evidence, they should get a fee for a second factum. Since the new evidence on both sides was so bulky, they should also get a second fee for preparation for appeal.

73 The various cross-examinations on affidavit during the pendency of the motion to adduce new evidence on appeal raise a somewhat more complex matter. If the matter is never heard again, in principle the respondents should get costs for that. They won the motion. The complexity is that that new matter may later be recycled as a Queen's Bench motion whose victor cannot now be reliably predicted. The result may be either duplication of effort, or effort saved. The only practical solution which we can see is as follows.

74 If before or within 60 days after the date of these Reasons the appellant files in the Court of Queen's Bench a motion to disqualify the Fraser Milner firm on the grounds of the alleged merger with the Rooney Prentice firm and because of the latter firm's representation of the appellant on securities law matters, then the costs of the cross-examination described will be awarded by the Court of Queen's Bench at the end of that new motion. If no such motion is filed within that time, the respondents may tax in the Court of Appeal the costs of conducting and attending on such cross- examinations.

CÔTÉ J.A.
O'BRIEN J.A.
SLATTER J.

* * * * *

Appendix - Dreco v. Wenzel Chronology

1996		Wenzel sells business to Dreco with non competition covenant.
1997	April 4	Wenzel buys a company.
2002	February	Wenzel allegedly starts to compete with Dreco.
	July 3	Dreco begins first suit against Wenzel.
	August	HSBC Bank retains Fraser Milner re taking over Wenzel's financing.
	October 26	HSBC loan is advanced.
	November	HSBC financing is completed.
2003		
2004		
	February 26	Court of Appeal gives interlocutory injunction against Wenzel in first suit.

February	Wenzel allegedly transfers business to a new company.
June 11	Dreco brings present suit (by Fraser Milner) against Wenzel.
July 13	Present statement of claim amended.
July 26	Amended statement of claim served on Wenzel.
July 27	Wenzel cross sues Dreco in Court of Queen's Bench.
July 28	Wenzel sues Dreco in Federal Court.
Late 2004?	Wenzel agrees to buy on credit some assets of another company, KW.
Fall/late 2004	HSBC Bank retains Fraser Milner to advise on postponing loan security to KW vendor's security.
December 1	Wenzel moves to disqualify Fraser Milner from acting in the suit.
2005	
February 11	Judge orders inspection of Wenzel's computers.

March 10	Argument of motion by Wenzel in Court of Queen's Bench to disqualify Fraser Milner from acting.
March 25	Present appeal is filed.
April 13/14	Chambers judge filed written reasons.
May 11	Formal order of chambers judge is entered.
June 16	RCMP seizes Wenzel records.
October 27	New Wenzel company moves to set aside computer inspection order and alleges Fraser Milner have conflict of interest.
December 8	Wenzel motion to adduce new evidence on appeal.

cp/e/qw/qlpha/qljxl

TAB 4

Case Name:

BG International Ltd. v. Canadian Superior Energy Inc.

Between
BG International Limited, Respondent, (Plaintiff), and
Canadian Superior Energy Inc., Appellant, (Defendant)

[2009] A.J. No. 358

2009 ABCA 127

71 C.P.C. (6th) 156

53 C.B.R. (5th) 161

457 A.R. 38

2009 CarswellAlta 469

Docket: 0901-0048-AC

Registry: Calgary

Alberta Court of Appeal
Calgary, Alberta

R.L. Berger, F.F. Slatter and P.A. Rowbotham JJ.A.

Heard: March 10, 2009.
Judgment: April 7, 2009.

(20 paras.)

Creditors and debtors law -- Receivers -- Court appointed receivers -- Order -- Appointment of receiver -- Appeal by oil well operator from order appointing receiver over well dismissed -- Another party with interest in well brought application when operator failed to pay owner of rig working on well out of fear rig would be removed -- Rig operator had taken steps to terminate contract -- Subsequent creditor protection granted to operator showed it could not pay obligation to rig operator -- Receivership not unreasonable.

Natural resources law -- Oil and gas -- Offshore -- Appeal by oil well operator from order appointing receiver over well dismissed -- Another party with interest in well brought application when operator failed to pay owner of rig working on well out of fear rig would be removed -- Rig operator had taken steps to terminate contract -- Subsequent creditor protection granted to operator showed it could not pay obligation to rig operator -- Receivership not unreasonable.

Appeal by Canadian Superior Energy from an order appointing an interim receiver to take control of the Endeavour oil well. Canadian and BG International both had an interest in the well. Canadian was the operator of the well, and BG was to take over in April 2009. Canadian had failed to pay the owner of the rig operating at the well and the rig owner had taken some steps toward terminating its contract and removing the rig from the well. BG had the receiver appointed in February 2009, and agreed to advance $47 million through the receiver to the rig owner to complete work on the well. Shortly after the receivership order was made, Canadian was granted creditor protection.

HELD: Appeal dismissed. The evidence showed there was a real risk the rig owner would remove the well, so the appointment of the receiver was necessary. Canadian's subsequent application for protection from its creditors demonstrated it was still in no position to pay the rig owner. There was no significant prejudice to Canadian worked by the order, which merely speeded up the process by way of which BG took over the well's operations. The receivership order did not reflect an unreasonable balancing of the parties' respective rights and interests.

Statutes, Regulations and Rules Cited:

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

Judicature Act, RSA 2000, c. J-2,

Appeal From:

Appeal from the Whole of the Interim Orders by The Honourable Madam Justice B.E.C. Romaine Dated the 11th day of February, 2009 Filed on the 11th day of February, 2009 (Docket: 0901-02012).

Counsel:

V.P. Lalonde and M.A. Thackray, Q.C., for the Appellant.

C.L. Nicholson and M.E. Killoran, for the Respondent.

T.S. Ellam, for interested/affected party Challenger Energy Corp.

H.A. Gorman, for the interested/affected party Canadian Western Bank.

L.B. Robinson, Q.C., for the receiver Deloitte & Touche Inc.

Memorandum of Judgment

The following judgment was delivered by

1 THE COURT:-- This is an appeal of a decision appointing an interim receiver to take control of the Endeavour oil well located off the coast of Trinidad and Tobago. The appeal was dismissed following oral argument, with reasons to follow.

Facts

2 The appellant and the respondent both have an interest in the well. The appellant is the operator of the Endeavour well under the standard form joint operating agreement approved by the Association of International Petroleum Negotiators. While Challenger Energy Corp. is a party to the joint operating agreement, there is some dispute as to whether Challenger has effectively acquired a part of the appellant's interest, which would trigger its obligations.

3 There is at present a semi-submersible rig working on the well. The rig is operated by Maersk Contractors Services on behalf of the owners of the rig. All the parties agree that it is extremely important that the rig is not removed from the well, and that the well be flow tested. Maersk sent its invoice for its November operations. The respondent paid its share of the invoice to the appellant, but those funds were not forwarded to Maersk. Once the invoice became overdue, Maersk commenced the process under the drilling contract that would allow it to terminate the contract.

4 When the respondent found out that Maersk had not been paid, it became very concerned. It deposes that operating funds were not being kept in a segregated account as covenanted. It deposes that the appellant is in default of its obligations by not paying Maersk. The appellant does not dispute that Maersk has not been paid. It proposed a payment schedule to Maersk (which Maersk rejected), which is essentially an acknowledgment that payments are overdue.

5 The respondent commenced arbitration proceedings in accordance with the joint operating agreement. It then immediately applied to the Court of Queen's Bench for interim relief pending the hearing of the arbitration, as contemplated by Article 18.2 (C)(9) of the arbitration clause. The application for an interim receiver was brought on very quickly. The Canadian Western Bank, which held security over the appellant's assets, was given notice and appeared. While the appellant was also given notice of and appeared at the application, it did not have time to file an affidavit in response nor to cross examine on the respondent's affidavit. An adjournment to do that was denied, and the interim receiver was appointed on February 11th, 2009. The order protected the priority of the Canadian Western Bank, and gave second priority to the respondent's advances. This appeal was promptly launched and expedited.

Standard of Review

6 Granting a receivership order under the *Judicature Act*, R.S.A. 2000, c. J-2, involves the exercise of a discretion. The granting of the order will not be interfered with on appeal unless it is based on an error of law, or the granting of the remedy is wholly unreasonable in the circumstances: ***Wewaykum Indian Band v. Canada***, 2002 SCC 79, [2002] 4 S.C.R. 245 at para. 107; ***Medical Laboratory Consultants Inc. v. Calgary Health Region***, 2005 ABCA 97, 43 Alta. L.R. (4th) 5 at para. 3.

Appointment of the Receiver

7 The chambers judge was motivated to appoint the interim receiver without any delay because she perceived a real risk that Maersk would remove the rig, thereby causing irreparable harm to all concerned. The respondent was prepared to advance $47 million through the receiver to complete the work on the well. The appellant argues, first, that there was no real prospect of Maersk removing the rig, and that Maersk was merely taking steps to preserve its legal rights. It is argued the

chambers judge committed a palpable and overriding error in finding a real risk the rig would be removed.

8 The record shows, however, that Maersk was taking the formal steps under the drilling contract that were conditions precedent to the termination of that contract. While Maersk wrote that it would show "flexibility", that was premised on the appellant proposing an "acceptable" solution. Maersk had already rejected the appellant's payment schedule, and was resisting attempts to postpone the dispute resolution meeting that was a precondition to termination. The respondent's witness deposed that Maersk did not propose to test the well unless paid, and that Maersk preferred to move the rig to another well in Australia. He also deposed that if the rig was removed, it would take approximately one year and cost $35 million to bring in a replacement. The finding of a risk of removal of the rig made by the trial judge is supported by the record, and does not warrant appellate interference.

9 Next the appellant argues that it was denied its basic rights because it was not granted an adjournment, it was not allowed to cross examine on the respondent's affidavit, and it was not given time to file its own affidavit. Despite the presence of the appellant, the application proceeded almost as if it was an *ex parte* application. While there is substance to this complaint, it is not uncommon for interim receivers to be appointed on an *ex parte* basis, and there were remedies available to review or withdraw the order granted. Given the urgency found by the chambers judge, the method of proceeding was not, in this case, fatal. We do not find that Article 18.2 (C)(9) of the arbitration provisions, which enables electronic hearings, effectively prohibits *ex parte* procedures.

10 The appellant was asked to suggest terms on which an adjournment might be granted, but persisted in its request for an adjournment that did not address the respondent's legitimate concerns. The chambers judge was entitled to conclude that the requested adjournment could itself have led to irreparable damage to all parties.

11 We note that in the weeks that have followed since the granting of the order, the appellant has still not cross examined on the respondent's affidavit, nor has it filed an affidavit in reply. Any such evidence could have been used in an application to set aside or vary what was similar to an *ex parte* order, it could have been used on the stay application, and it would likely have been admitted on this appeal. We conclude that the appellant's objections are to some extent tactical. Even though the record may be incomplete, many of the key facts are not in dispute, and the key documents are included. A fair picture of the situation can be obtained from this record, supplemented as it has been by counsels' submissions.

12 The appellant notes that under Article 18.3 (A) of the joint operating agreement, when one party gives notice of default it is required by the contract to pay the amounts owed by the defaulting party. The appellant points out that this is a contractual obligation, and that the respondent was required to pay all outstanding amounts without seeking any more security or protection than that provided by the operating agreement. By advancing the $47 million by way of receiver's certificates, the respondent has in effect managed to enhance its position under the contract. The respondent replies that it had already paid its share of the Maersk invoice, and the clause cannot mean that it has to pay twice the amount misapplied by the appellant. It also argues that the security provided by Article 18.4 (E) of the joint operating agreement may not cover all of the money the respondent proposes to advance.

13 The default clause in the joint operating agreement provides in Article 18.4 (H) that it is not intended to exclude any other remedies available to the parties. The enhanced security collaterally obtained by the respondent through the use of receiver's certificates has not been shown on this record to create any serious prejudice to the appellant. After all, it is the appellant that is in default, and the respondent is prepared to advance significant sums to cure that default, even if it is required to do so by the contract. The chambers judge found that the appellant had been commingling joint venture funds, and that the respondent had a reasonable concern about the protection of future advances. Unlike in most receivership cases, the funds advanced under this enhanced security are to be used to pay other creditors, and would not further subordinate their interests. The security of the receiver's certificates may merely be parallel to that already provided for in the operating agreement. While the appointment of the receiver does arguably have the effect identified by the appellant, that does not make the receivership order unreasonable in the circumstances.

14 The appellant also points out that the appointment of the interim receiver has had the effect of displacing it as the operator. While the respondent has initiated the procedure under Article 4 of the joint operating agreement to replace the appellant as operator because of its default, the mechanism provided for in the agreement would take at least 30 days. By applying for an interim receiver, the respondent has essentially accelerated that period of time during which the appellant could cure its default, and maintain its status as operator. Again, this submission of the appellant is not without substance. We note, firstly, that the appellant has not offered to cure its default, and indeed it appears it is unable to do so. We are advised by counsel that last Thursday the appellant was granted protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36. If the appellant was now in a position to cure its defaults, this point might be determinative of the appeal. Secondly, the parties had already agreed that the respondent should become the operator in April of this year. There is no significant prejudice to the appellant by the brief acceleration.

15 The appellant complains that the respondent was not required to post an undertaking to pay damages if it turns out its allegations are unfounded. Filing an undertaking in these circumstances is not the usual practice in Alberta. Damages for wrongful appointment of a receiver were granted in ***Royal Bank of Canada v. W. Got & Associates Electric Ltd.,*** [1999] 3 S.C.R. 408 without the presence of an undertaking. We note that the respondent has paid significant sums of money on behalf of the appellant, and that the appellant would likely have a right of set-off if it obtains an award of damages against the respondent. An undertaking would add little.

Conclusion

16 We agree that the appointment of a receiver is a remedy that should not be lightly granted. The chambers judge on such an application should carefully explore whether there are other remedies, short of a receivership, that could serve to protect the interests of the applicant. For example, the order might be granted but stayed for, say, 48 hours to allow the company to cure deficiencies, propose alternatives, or clarify the record.

17 In particular, the chambers judge must carefully balance the rights of both the applicant and the respondent. The mere appointment of a receiver can have devastating effects. The respondent referred us to the statement in ***Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.*** (1995), 30 C.B.R. (3d) 49 (Ont. C.J. G.D.) at para. 31:

> [31] With respect to the hardship to Odyssey and Weston should a receiver be appointed, I am unable to find any evidence of undue or extreme hardship. Obvi-

> ously the appointment of a receiver always causes hardship to the debtor in that the debtor loses control of its assets and business and may risk having its assets and business sold. The situation in this case is no different.

This quotation does not reflect the law of Alberta. Under the *Judicature Act*, it must be "just and convenient" to grant a receivership order. Justice and convenience can only be established by considering and balancing the position of both parties. The onus is on the applicant. The respondent does not have to prove any special hardship, much less "undue hardship" to resist such an application. The effect of the mere granting of the receivership order must always be considered, and if possible a remedy short of receivership should be used.

18 The chambers judge was aware of all of the points now raised by the appellant. She had a difficult job balancing the rights and interests of the parties. It is in the interests of all parties that the rig stay on the well, and that the well be flow tested. The appellant is in default. The respondent has not disputed its obligation to pay the appellant's share of operating expenses, and is quite willing to pay the $47 million required to do that. In all the circumstances it was not an unreasonable exercise of her discretion for the chambers judge to extend to the respondent the protection of receiver's certificates. The practical effect of accelerating the removal of the appellant as the operator was apparent to her. If the appellant does not have the necessary funds to cure its defaults, then its removal as operator merely accelerated the inevitable.

19 The chambers judge had to make a difficult decision in a very short period of time based on limited materials. Deference is owed to her discretionary decision to appoint a receiver. While an order short of a receivership might have been crafted, we have not been satisfied that her eventual balancing of the various rights and interests involved was unreasonable. She was primarily motivated by preserving the value of the well for the benefit of all concerned. We cannot see any error that warrants appellate interference, and the appeal is dismissed.

20 The dismissal of the appeal is not intended to limit the powers of the chambers judge or the CCAA case management judge. The receivership was to be "interim" only, and it has an internal mechanism for review. The Queen's Bench retains the ability to revoke or amend the order as circumstances dictate.

R.L. BERGER J.A.
F.F. SLATTER J.A.
P.A. ROWBOTHAM J.A.

TAB 5

Case Name:

Murphy v. Cahill

Between
Gerald Murphy and Gerald Murphy, in his capacity as Trustee of the Gerald Murphy's Children's, Parallel Life Interest Settlement Trust, Applicant, and Margaret Cahill, Christopher Cahill, 1248429 Alberta Ltd., 554168 Alberta Ltd., 1247738 Alberta Ltd., and Canadian, Consolidated Salvage Ltd., Respondents

[2013] A.J. No. 854

2013 ABQB 335

568 A.R. 80

231 A.C.W.S. (3d) 960

88 Alta. L.R. (5th) 69

2013 CarswellAlta 1490

Docket: 1203 04666

Registry: Edmonton

Alberta Court of Queen's Bench
Judicial District of Edmonton

J.B. Veit J.

Heard: June 4-6, July 22 and August 6, 2013.
Judgment: August 15, 2013.
Released: August 16, 2013.

(103 paras.)

Civil litigation -- Civil procedure -- Contempt of court -- What constitutes -- Court proceedings -- Breach of publication ban or confidentiality order -- Application by trustee for appointment of in-

terim receiver-manager and for contempt dismissed -- Applicant was trustee of trust that invested in group of companies manages by respondent -- Trust owned 80 per cent of equity shares and 50 per cent of voting shares -- Applicant cited respondent in contempt for disclosing sealed inspector's report -- Hearsay allegations in inspector's report were given no weight -- Sealing order was not sufficiently clear to constitute basis for contempt -- Dictates of fairness did not justify appointment of interim receiver-manager. Civil litigation -- Civil evidence -- Weight -- Hearsay evidence -- Application by trustee for appointment of interim receiver-manager and for contempt dismissed -- Applicant was trustee of trust that invested in group of companies manages by respondent -- Trust owned 80 per cent of equity shares and 50 per cent of voting shares -- Applicant cited respondent in contempt for disclosing sealed inspector's report -- Hearsay allegations in inspector's report were given no weight -- Sealing order was not sufficiently clear to constitute basis for contempt -- Dictates of fairness did not justify appointment of interim receiver-manager.

Corporations, Partnerships and Associations Law -- Corporations -- Unanimous shareholder agreement -- Liability of shareholders -- Duties of shareholders -- Oppression of the minority -- Share capital -- Rights attached to shares -- voting rights -- Receivers and receiver managers -- Appointment -- Investigation -- Court order -- Oppression remedy -- Rectification of records -- Application by trustee for appointment of interim receiver-manager dismissed -- Applicant was trustee of trust that invested in group of companies manages by respondent -- Trust owned 80 per cent of equity shares and 50 per cent of voting shares -- Respondent alleged USA required arbitration of dispute -- Applicant's complaints raised serious issues to be tried -- Respondent would not suffer irreparable harm -- Balance of convenience did not favour appointment -- There could be no justification for proceeding with interlocutory remedy when there could be hearing on merits within months.

Wills, Estates and Trusts Law -- Trusts -- The trustee -- Actions by -- Application by trustee for appointment of interim receiver-manager dismissed -- Applicant was trustee of trust that invested in group of companies manages by respondent -- Trust owned 80 per cent of equity shares and 50 per cent of voting shares -- Respondent alleged USA required arbitration of dispute -- Applicant's complaints raised serious issues to be tried -- Respondent would not suffer irreparable harm -- Balance of convenience did not favour appointment -- There could be no justification for proceeding with interlocutory remedy when there could be hearing on merits within months.

Application by trustee for appointment of interim receiver-manager and for contempt. The applicant was trustee and sole funder of a trust that invested several million dollars in a group of companies. He alleged mismanagement of the companies by his sister, the respondent. In the underlying action, the applicant applied in his personal capacity and his capacity as trustee to appoint a receiver manager for the group, for rectification of the share register and corporate documents and related relief, and for compensation for loss caused by oppressive conduct. The applicant executed documents under which the trust owned 80 per cent of the equity shares, but only 50 per cent of the voting shares. The applicant executed a Unanimous Shareholder Agreement requiring the parties to arbitrate disputes. The applicant claimed that he did not read the documents and they were not explained to him before he signed. An inspector was appointed to review the group's financial position. The inspector produced three sealed reports, the third of which was based on untested allegations made by the group's former bookkeeper. The applicant cited the respondent in contempt for have provided a copy of the inspector's third report to a non-party, her son, in the face of the sealing order. The re-

spondent alleged that the applicant failed to recognize her equity interest in the companies, and she alleged that the Unanimous Shareholders' Agreement required that the dispute be arbitrated. The respondent asked the court to consider the inspector's third report to be mere hearsay and to give it no weight.

HELD: Application dismissed. The court was entitled to consider the hearsay information contained in the inspector's third report. However, no weight was given to the allegations made by the former bookkeeper because they were not sworn or subject to cross-examination. The source of the information was not disinterested, and the bookkeeper acknowledged that she had not be forthright in the past. The sealing order was not sufficiently clear and unequivocal so as to constitute an adequate basis for a finding of contempt. The applicant's complaints about management raised serious issues to be tried. However the respondent would not suffer irreparable harm if the relief was not granted. There was no need for immediate corporate action. If the respondent's equity interest would be adequate to compensate the trust. The balance of convenience did not favour the appointment of an interim-receiver manager. The granting of interim relief would cut off the financial ability of the respondents to advance their legitimate interests. The dictates of fairness were not so overwhelming that they justified the appointment of an interim receiver-manager. The reasonable expectations of the parties would not be served by the appointment of an interim receiver-manager. Deadlock could be resolved by arbitration. It would be unfair for the applicant to both refuse to comply with executed documents which provide a mechanism for dealing with deadlock and at the same time to insist on receiving the benefit of a court order based on deadlock which he created. The appointment of an interim receiver-manager would presume that the applicant's position with respect to the corporate structure was correct and that he was entitled to present the application. As the applicant indicated he would be prepared for a final hearing on the merits within months, there could be no justification for proceeding with an interlocutory remedy without a full hearing.

Statutes, Regulations and Rules Cited:

Business Corporations Act, RSA 2000, c. B-9, s. 234, s. 242, s. 242(3), s. 243, s. 244

Judicature Act, RSA 2000, c. J-2, s. 13, s. 13(2)

Law Society of Alberta's Code of Conduct, Rule 4.03

Counsel:

Sandeep K. Dhir, and Lindsey E. Miller, for the Applicants, Gerald Murphy and, Gerald Murphy's Children's Parallel Life Interest Settlement Trust.

Rostyk Sadownik, for the Respondent, Margaret Cahill.

Terrence Warner, and Lesley M. Akst, for the Respondent, Christopher Cahill, Sr.

M.T. Coombs, and D.R. Peskett, for the Inspector, BDO Canada Ltd.

Memorandum of Decision

J.B. VEIT J.:--

Summary

1 Since 2006, Gerald Murphy has provided all of the capital funding, amounting to millions of dollars, for the CCS group of companies. In this interlocutory application, relying on s. 242(3) of Alberta's *Business Corporations Act* and on s. 13(2) of the *Judicature Act*, Mr. Murphy asks for the appointment of a receiver-manager on an interim basis based on evidence of what he describes as mismanagement of the companies by the respondent Margaret Cahill, Mr. Murphy's sister. The mismanagement complained of is extensive, relating both to relatively large matters - such as the funding by the companies of residences that were then put into Ms. Cahill's name - and to small ones - such as Ms. Cahill's authorization of the purchase of baby clothes for the new-born children of two employees. There is abundant evidence that Mr. Murphy's serious complaints about management raise serious issues to be tried.

2 In the originating application which commenced these proceedings, in addition to the appointment of a receiver-manager, Mr. Murphy also asks for rectification of the share register and corporate documents and for related relief.

3 The respondent Cahills have complaints relating to Mr. Murphy: they assert that Mr. Murphy has failed to recognize their equity interest in the companies and Ms. Cahill's right to manage the companies, including her right to authorize payment to others, including her adult son, for work done on behalf of the companies. The evidence on which the Cahills rely consists of corporate documents which appear to have been executed by Mr. Murphy, and which state on their face that, despite his sole funding of the companies, Mr. Murphy only has a 50% voting position with respect to the operation of, and an 80% equity stake in, the companies. In addition, according to the Unanimous Shareholders' Agreement, also apparently executed by Mr. Murphy, internecine corporate disputes must be arbitrated. There is abundant evidence that the Cahills' complaints raise serious issues to be tried.

4 The application for an interim receiver-manager is denied.

5 The court is entitled, in assessing the application, to consider the hearsay information contained in the Inspector's Third Report. However, in the circumstances of this case, the court does not attach any weight to that hearsay evidence.

6 The applicants cite Margaret Cahill in contempt for having, in the face of the court's sealing order, provided a copy of the Inspector's Third Report to a non-party, Chris Cahill Jr., who was the focus of much of the information contained in the Third Report. In the circumstances here, the sealing order was not sufficiently clear and unequivocal so as to constitute an adequate basis for contempt proceedings.

7 An interlocutory application for the appointment of a receiver-manager of a corporation pursuant either to the oppression provisions of business corporations legislation, such as Alberta's *Business Corporations Act*, or to the general equitable jurisdiction of a court, such as under Alberta's *Judicature Act,* (brought by a person other than a security holder who is the beneficiary of an instrument which authorizes the appointment of a receiver on the default of the creditor company), is an application for an extraordinary remedy which should only be granted cautiously and sparingly. Generally, the applicant for such a remedy must satisfy the so-called "tripartite test" for obtaining an interlocutory injunction: the applicant must establish that there is a serious issue to be tried, that it

will suffer irreparable damage if the relief is not granted, and that the balance of convenience favours the granting of the relief.

8 Moreover, the test itself must be interpreted within the court's equitable jurisdiction. One effect of the equitable character of the relief is that the granting of this exceptional relief is discretionary. Another is that general equitable principles infuse the court's assessment of the positions of the parties on such an application, especially with respect to the balancing of convenience; as one example of the overarching effect of equitable principles in this context, the dictates of fairness may exceptionally be so overwhelming that interim relief is justified even where one or more branches of the tripartite test have not been met.

9 It can be misleading to express the appropriate test as consisting merely of a requirement that the applicant has established a strong *prima facie* case of oppression. In any event, even if the test could be formulated in that way, the applicant has not satisfied that test.

10 Dealing then with the test as elaborated in the case law, as is agreed by the parties, the first branch of the tripartite test has been met: clearly there are serious issues to be tried.

11 However, in relation to the second branch of the test, Gerald Murphy has not established that he, or the Trust, will suffer irreparable harm if the relief is not granted. There is no need for immediate corporate action; as the Inspector observes, nothing much will change in the companies' outlook within the next several months. There is no important corporate issue that must be addressed in the near future. Also, the lowest appraisal of the current market value of the real property owned by the CCS companies establishes that the current value of those properties significantly exceeds the original investment. If Ms. Cahill has been responsible for financial losses suffered by the companies, her apparent equity interest in the companies appears to be adequate to compensate the Trust for such losses.

12 Nor, with respect to the third branch of the test, has Mr. Murphy been able to establish that the balance of convenience favours the appointment of an interim receiver-manager. The evidence on this application is that Mr. Murphy has considerable financial resources whereas the financial resources of the respondent Cahills are tied to their employment at, and apparent equity position in, the companies. The granting of interim relief which deals with Mr. Murphy's concerns but not those of the Cahills and which virtually cuts off the financial ability of the Cahills to advance their apparently legitimate interests would create an inappropriate balance in favour of Mr. Murphy.

13 In considering the equities of the overall application, Mr. Murphy has not established that this is a situation where the dictates of fairness are so overwhelming that they justify the appointment of a receiver-manager. Mr. Murphy's legitimate expectations do not justify the appointment of a receiver-manager on an interim basis: there has been no material change of management style of the CCS group since Mr. Murphy acquired the companies and put Ms. Cahill in charge of the day to day operations of the companies. Furthermore, the appointment of an interim receiver-manager would presume that Mr. Murphy's position with respect to the corporate structure is correct and that he is therefore entitled to present this application. However, the only evidence on this application with respect to the corporate structure consists of documents apparently executed by Mr. Murphy which require him to go to arbitration to solve management disputes rather than to invoke the assistance of courts. Also, in light of the Inspector's opinion about the current status of the companies, it is obvious that the appointment of an interim receiver-manager would not deal effectively with the real problems facing this group of companies. Also, the appointment of an interim receiver-manager

would give Mr. Murphy the relief which he requests without addressing the fundamental issue of corporate structure.

14 Lastly, the biggest hurdle which Mr. Murphy faces in obtaining this relief on an interim basis is his acknowledgement that he would be prepared for a final hearing on the merits of his oppression application within months, a timing estimate with which the respondents agree. In such a situation, especially where the consequences of the appointment of a receiver-manager would be so dire from the respondents' perspective, there can be no justification for proceeding with an interlocutory remedy without a full hearing on contested evidence when a full hearing can finally resolve the crucial factual disputes between the parties.

Cases and authority cited

15 **By the Applicants:** ***Murphy v. Cahill***, 2012 ABQB 220; ***R. v. Canadian Consolidated Salvage Ltd.***, 2012 ABPC 133; ***Murphy v. Cahill***, 2012 ABQB 446; ***Murphy v. Cahill***, 2012 ABQB 530; ***Murphy v. Cahill***, 2012 ABQB 531; ***Murphy v. Cahill***, 2012 ABQB 793; ***Murphy v. Cahill***, 2012 ABQB 754; *Business Corporations Act*, R.S.A. 2000, c. B-7, s. 242(3)(b) and Part 8; ***HSBC Capital Canada Inc. v. First Mortgage Alberta Fund (V) Inc.***, 1999 ABQB 406; ***BCE Inc. v. 1976 Debentureholders***, 2008 SCC 69; ***Seidel v. Kerr***, 2003 ABCA 267; *Judicature Act*, R.S.A. 2000, c. J-2, s. 13(2); ***Paragon Capital Corporation Ltd. v. Merchants & Traders Assurance***, 2002 ABQB 430; ***Kumra v. Luthra***, 2010 ABQB 772; ***Citibank Can. v. Calgary Auto Centre*** (1989), 98 A.R. 250; ***MTM Commercial Trust v. Statesman Riverside Quays Ltd.***, 2010 ABQB 647; ***Chow v. Bresea Resources Ltd.*** (1997), 209 A.R. 284 (C.A.); ***Garratt v. Charlton et al***, 2012 ONSC 1129; ***Fernando v. 2023928 Ontario Inc.***, [2007] O.J. No. 1644, 2007 CarswellOnt 2619; ***781952 Alberta Ltd. v. 781944 Alberta Ltd.***, 2003 ABQB 980; ***Deluce Holdings Inc. v. Air Canada***, 1992 CarswellOnt 154, 98 D.L.R. (4th) 509; ***Simonelli v. Ayron Developments Inc.***, 2010 ABQB 565; ***Connelly v. Connelly-McKinley Limited***, 2010 ABQB 515; ***Seymour Resources Ltd. v. Hofer***, 2004 ABQB 303; ***719946 Alberta Ltd. v. Alberta's B.E.S. T. Inc.***, 2005 ABQB 771; ***Such v. RW-LB Holdings Ltd.***, 15 Alta L.R. (3d) 153; ***Stech v. Davies*** (1987), 80 A.R. 298 (Q.B.); *Excise Tax Act*, R.S.C. 1985, c. E-15, as amended, ss. 96(3), 323(1) and 330; *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp), as amended, s. 227.1; *Workers' Compensation Act*, R.S.A. 2000, c. W-15, s. 128; ***Alpha Investments & Agencies Ltd. v. Maritime Life Assurance*** (1978), 23 N.B.R. (2d) 261 (C.A.); ***J.P. Capital Corp, (Trustee of) v. Perez*** (1996), 38 C.B.R. (3d) 301 (Ont. Gen. Div.); ***Farallon Investments Ltd. v. Bruce Pallett Fruit Farms Ltd.***, [1992] O.J. No. 330, 31 A.C.W.S. (3d) 1283 (Ont. Gen. Div.); ***Weaver v. Cahill***, 2011 ABCA 290; **R. v. Cahill**, 2006 ABCA 119.

16 **By the Respondent, Margaret Cahill:** ***Paragon Capital Corporation Ltd. v. Merchants & Traders Company***, 2002 ABQB 430; *Bennett on Receiverships*, Second Edition, pages 130-132; *Bennett on Receiverships*, Second Edition, pages 138-140; ***MTM Commercial Trust v. Statesman Riverside Quays Ltd.*** 2010 ABQB 647; ***Murphy Oil Co. v. Predator Corp.*** (2003) 7 Alta. L.R. (4th) 369; ***Spartan Drilling Ltd. v. Snowhawk Energy Inc.*** (1986) 46 Alta. L.R. (2d) 67; ***Kumra v. Luthra***, [2010] A.J. No. 1581 (Q.B.); ***Citibank Canada v. Calgary Auto Centre***, [1989] A.J. No. 347 (Q.B.); ***Alberta Health Services v. Networc Health Inc.***, [2010] A.J. No. 627 (Q.B.); ***BG International Ltd. v. Canadian Superior Energy Inc.***, 2009 ABCA 127, 2009 CarswellAlta 469 (para 18); ***MTM Commercial Trust v. Statesman Riverside Quays Ltd.***, [2010] A.J. No. 1189; ***BG International Ltd. v. Canadian Superior Energy Inc.***, [2009] A.J. No. 358, 2009 CarswellAlta 469 (Alta. CA) at paras. 16 & 17; ***BG International Ltd. v. Canadian Superior Energy Inc.***, [unreported, February 9, 2009] (Alta. Q.B.) para 9; ***RJR-MacDonald Inc. v. Canada (Attorney General)***, [1994] 1

S.C.R. 311 at paras. 47-48, 62-64, 111 D.L.R. (4th) 385; ***Goebel v. Edmonton (City)***, [2004] A.J. No. 193 (CA); ***Monco Holdings Ltd. v. B.A.T. Development Ltd.***, [2005] A.J. No. 1218 (Q.B.); ***Lindsay Estate v. Strategic Metals Corp.***, [2008] A.J. No. 1076 (Q.B.); ***Principal Group Ltd. (Trustee of) v. Principal Savings & Trust Co.*** (1993) 11 Alta. L.R. (3d) 222 (Q.B.).

17 By the Respondent, Christopher Cahill (Sr.): ***BG International Ltd. v. Canadian Superior Energy Inc.***, 2009 ABCA 127; ***RJR- MacDonald Inc. v. Canada (Attorney General)***, [1994] 1 S.C.R. 311.

18 By the Inspector: ***Envirodrive Inc. v. 836442 Alberta Ltd.*** 2005 ABQB 446. ***Consolidated Enfield Corp. v. Blair***, [1995] O.J. No. 3888, 1995 CarswellOnt 1067 (Div. Ct.); ***Catalyst Fund General Partner 1 Inc. v. Hollinger Inc.*** 2005 CarswellOnt 2193 (Sup. Ct. of J.)

19 By the court: ***Leggat v. Jennings*** 2013 ONSC 903; ***Nicolas c. Perrier*** 2012 QCCA 99; ***176283 Canada Inc. c. St-Germain*** 2011 QCCA 608; ***Cassels, Brock & Blackwell LLP v. 1578838 Ontario Inc.*** 2013 ONSC 4194; F. Bennett, *Bennett on Receiverships*, 3rd ed., 2011, Carswell

Appendix A: Sections 242 and 243 of Alberta's *Business Corporations Act*

Section 13(2) of Alberta's *Judicature Act*

1. Background

a) Factual

20 In March, 2012, under the authority of ss. 242 and 244 of Alberta's *Business Corporations Act* and s. 13 of Alberta's *Judicature Act*, and claiming oppression, Gerald Murphy brought an originating application in his personal capacity and in his capacity as trustee of the Gerald Murphy's Children's Parallel Life Interest Settlement Trust, hereafter "the Trust", to appoint a receiver-manager of the CCS Group of companies, to rectify the registers and records of the CCS Group to reflect that Murphy is the sole shareholder of the CCS Group, and to compensate himself for loss caused by the oppressive conduct of the respondents. This special chambers application is for the appointment of an interlocutory receiver-manager in these proceedings.

21 Between 2006 and 2008 the Trust invested between $9 and $16 million dollars in an Alberta group of companies, the CCS Group. The exact amount of the investment is known to the parties but is not repeated here because of privacy issues relating to the potential marketing of the properties. The money invested in the CCS Group was part of the proceeds of the sale by Gerald Murphy of his interest in a family-run salvage business in Ireland. Gerald Murphy is the sole funder of the Trust and the Trust is essentially the sole capital funder of the CCS Group.

22 Margaret Cahill, Gerald Murphy's older sister, had emigrated to Canada with her family in the late 1970s. In 2006, she had no experience in the management of a junk yard or a salvage yard, and, indeed, no experience in the management of a large commercial enterprise. She is, nevertheless a woman of ability, having trained as a nurse.

23 Margaret Cahill's husband, Christopher Cahill Sr., read law at Trinity in Dublin. However, there is no evidence that he was ever admitted to the practice of law either in Ireland or in Canada.

24 Although Gerald Murphy, or his representatives and agents, has visited the Edmonton business on a few occasions, Gerald Murphy continues to reside in Ireland.

25 In 2006, Gerald Murphy, an adult person with no disabilities, executed documents which established a share structure in the CCS Group in which Margaret Cahill, Gerald's sister, and Christopher Cahill Sr., Margaret's husband, each owned 10% of the equity shares and the Trust owned the remaining 80% equity shares, but Margaret and Gerald together owned 50% of the voting shares and the Trust owned the remaining 50%. Amongst the various documents Mr. Murphy executed when the company structure was set up was a Unanimous Shareholders Agreement which, among other terms, required the parties to arbitrate disputes:

> 8.02 Arbitration
>
> If at any time during the continuance of the Corporation or after the dissolution or termination thereof, any dispute, difference or question shall arise between the Shareholders touching the Corporation, or the amounts or transactions thereof, or the dissolution or winding up thereof, or the construction, meaning or effect of these presents or anything herein contained, or the rights or liabilities of the parties under this agreement or otherwise in relation to the premises, then every such dispute, difference or disagreement shall be referred to a single arbitrator, if the parties agree upon one, but should the parties be unable to agree upon the identity of such single arbitrator, then each such dispute, difference or disagreement shall be referred to a single arbitrator, to be appointed by a Judge of the Court of Queen's Bench of the Province of Alberta pursuant to *The Arbitration Act* of Alberta and every award or determination thereof shall be final and binding. Any arbitrator under this clause shall not be bound by legal precedent, nor by the rules of evidence or procedure. He shall be bound to impose the solution which is most equitable, having regard to the terms hereof, under the circumstances, and every award or determination so imposed shall be final and binding.

26 Gerald Murphy swears that he did not read any of the documents he signed, that he was not aware of their contents, and that in signing every document that was put before him he was relying on his lawyers and on his brother-in-law, Christopher Cahill Sr. - as a person who had represented to him that he was a practising lawyer, as a fellow trustee of the Trust, and as a member of the family. Mr. Murphy maintains that the documents were not explained to him by his then law firm, that he did not retain copies of the documents that he signed and that he never received the advice of the Trust's Irish lawyers with respect to those documents. Because he asserts that the USA is not binding on him, he has declined to access the arbitration provisions of the USA to resolve any corporate disputes he had with the Cahills.

27 Mr. Murphy swears that he first became aware of the share structure in the CCS Group in 2008. In that year, his relationship with his sister changed from one of trust to one of contestation. For example, in the original corporate records, Mr. Murphy agreed to dispense with an auditor and with an annual meeting and also waived receipt of financial statements; by 2008, Mr. Murphy was demanding financial disclosure. Mr. Murphy initiated proceedings with respect to the share structure of the Group in 2010; he asserts that the period between 2008 and 2010 was taken up with settlement negotiations between himself and the Cahills.

28 After the relationship with his sister became acrimonious, the CCS Group received an unsolicited offer to purchase one of the three groups of real properties owned by them. The amount of the offer was for one property and, had the offer been accepted, it would have equalled more than half

of the total amount of money invested by Mr. Murphy in the companies. Mr. Murphy refused to accept the offer.

29 In 2011, the parties agreed to the appointment of Deloitte, as a consultant to Mr. Murphy, and became vested with the role of making inquiries into various matters relating to the companies. The type of information requested by Deloitte included financial statements, real estate appraisals, corporate income tax returns, general ledgers, HR information about management and employees, inventory, insurance coverage, management fees, etc. From the beginning, there were difficulties in obtaining the requested information. For example, as a result of water damage to the premises in February 2011, it was not possible for Deloitte to actually work at the premises occupied by the companies. Deloitte eventually reported that it had not been able to obtain all of the information which it had requested.

30 In August, 2012, Mr. Murphy asked the court for additional relief, including the appointment of an interim receiver-manager. Although that relief was denied, the court did appoint an Inspector, BDO Canada Ltd., whose task was defined, in general terms, as reviewing and assessing the CCS companies' current and historical financial position and historical operating results; reviewing and assessing the group's accounting and control procedures with respect to accounts receivable, accounts payable, inventory, and in general; and, attempting to address the questions and issues arising from the Deloitte report. One of the terms appointing the Inspector provided that the Inspector's reports would be sealed. The Inspector's First Report was presented to the Court on November 22, 2012. That report stated that, despite often repeated requests for information, the information had "generally been slow in delivery, and a significant amount of information remains outstanding as at the Cut-Off Date": para. 11. The report also continues, in para. 12, however, that "there does appear to be some merit to the concerns raised by the Management of the CCS Group"; those concerns were identified by the management as: shortage of staff, limited knowledge/expertise in the area of accounting; the use of an external accounting firm for some aspects of the information requested, including compilation of financial statements and preparation of tax returns; pressures on existing personnel to comply with information requests in relation to the ongoing legal dispute; a power outage in the week of October 9, 2012 which caused the group's computer network to crash and delayed matters for approximately one week; and, the demands of ongoing management. In addition, the Inspector fairly observed that, despite requests made by it to Deloitte to obtain from Deloitte the information which it had already received from the management of the companies, the Inspector only received the information from Deloitte on October 10, 2012. The Inspector was "hesitant to try and continue the review without first having access to, and reviewing the information previously provided to Deloitte". Nevertheless, the Inspector attempted to retrieve information from the management of the group which it had previously provided to Deloitte; this "required a tremendous amount of time and effort by both the Inspector and the CCS Group": para. 13. Nor surprisingly, the CCS Group was "not pleased with the Inspector's numerous requests to provide information that they indicated had been provided previously.": para. 14. As a result of these experiences, the Inspector instituted a "Cut-Off Date" of October 23, 2012. Its First Report was based on information received from the CCS Group up to and including the Cut-Off Date.

31 On January 31, 2013, this court granted an order that required the Inspector to provide the CCS Group by February 4, 2013 with a comprehensive written list of outstanding issues from the Inspector's own work and from the work undertaken by Deloitte; that authorized the Inspector to attend the Group's premises on February 5, 2012 to attempt completion of the outstanding internal control testing and documentation referred to in the First Report, and that required the CCS Group

to provide responses to the Inspector by February 14, 2013. In the event, the Inspector granted some short extension to the time allowed to the CCS Group to answer the Inspector's queries. In its Second Report, tendered on March 8, 2013, the Inspector commented:

> 20. Generally speaking, despite the efforts of the CCS Group, and the extension of time granted by the Inspector, there still remains a significant amount of information outstanding and questions to be addressed/resolved as of February 19, 2013, (hereinafter referred to as the "Second Cut-Off Date"). Furthermore, the information supplied by the CCS Group up to the Second cut-Off Date as not materially altered the information previously reported to the Court by the Inspector to date.

32 The Second Report states that the bulk of the information requested in the Deloitte Report has been provided: see para. 36.

33 At paras. 22 and 23 of the Second Report, copies of which are in the hands of each of the parties, the Inspector sets out three key facts and an opinion with respect to the issues which it was asked to address. Because of privacy concerns relating to the market position of the companies, the court will not reproduce the Inspector's identification of key facts or its opinion. However, it is crucial to note that the Inspector identifies systemic problems rather than problems attributable solely to Margaret Cahill. Indeed, Margaret Cahill is not in a position to unilaterally remedy the problems identified by the Inspector. On the contrary, one of the main problems identified by the Inspector is a problem to which Margaret Cahill proposed a solution some time ago, but which Gerald Murphy declined to accept.

34 The Inspector's Concluding Comments in the Second Report include the following:

> Notwithstanding the significant volume of information that remains outstanding as at the Second Cut-Off Date, at this stage in the proceedings, the Inspector feels that continued work and expense under its current mandate will not result in any additional benefit to the Court or the Parties as it is clear that ...

35 For the privacy reasons mentioned earlier, the court does not reproduce all of the Inspector's Comments. Nonetheless, it is clear that one of the problems identified by the Inspector is the significant weakness in the Companies' internal controls. The cause of that weakness is not spelled out and is not attributed to delinquency on the part of Margaret Cahill.

36 In addition to the current proceedings, there has been parallel litigation involving the same parties involving, on the one hand, an apartment building in Edmonton, and, on the other, debt actions alleging a failure of the CCS Group to repay a debt owing to the Trust. In July 2012, Mr. Murphy made a first receivership application, which was dismissed: see 2012 ABQB 446. The existence of parallel proceedings can legitimately be taken into account when assessing the ability of the respondents to answer requests for information from Mr. Murphy at the same time as it was defending other lawsuits.

b) Legislative

37 The oppression provisions of the *Business Corporations Act* and the authority under the *Judicature Act* to appoint a receiver or receiver manager are set out in Appendix A.

2. How should the material contained in the Inspector's Third Report be treated?

38 On June 11th, 2013, i.e. 5 days after the conclusion of the three day special chambers application in the month of June, the Inspector was advised by Mr. Murphy that Mr. Murphy had become privy to new information relative to the affairs of the companies which was relevant and material. The Inspector contacted my office stating that the new information raised serious concerns with respect to the information previously provided by the Inspector. Discussions then ensued with all the parties relating to this development.

39 Although there is not yet any evidence before the court with respect to the exact circumstances concerning the tendering of this new information, it appears that the individual who brought the information to Mr. Murphy had been, from some date which is not yet clear on the information before the court up to the time of the special chambers hearing in early June, employed on a contract by the CCS companies to assist in answering various queries from the Inspector, especially with respect to the period during which she had been employed by the companies. It may be that, shortly after the June special chambers meeting, she had had a meeting with the lawyer for Ms. Cahill and that a difference of opinion had arisen between them. In any event, the individual shortly after June 6 attended at the offices of the lawyers for Mr. Murphy.

40 On June 12, 2013, this individual entered into an agreement of indemnity with Gerald Murphy's Children's Parallel Life Interest Settlement Trust pursuant to which the individual requested, and the Trust agreed to provide: the costs of fully furnished accommodation for a period which has been redacted from the agreement included in the Third Report, must which term "may be extended as necessary depending on the status of the lawsuit and upon the request of the Indemnified Party to the Indemnifier; the costs of a rental vehicle for a term similar to the term relating to the accommodation; all costs and damages which may be incurred by the Indemnified party related to any lawsuit commenced by any of the Cahills relating directly to the provision of the information; and, all legal fees and disbursements for the provision of independent legal advice to the Indemnified party. The solicitors for the Trust in these proceedings executed the agreement on behalf of the trust.

41 The solicitors for Mr. Murphy and the Trust have advised this court that they asked the individual to present her information to the Inspector direct, rather than through the law firm representing Mr. Murphy, because they were concerned that Rule 4.03 of the Law Society of Alberta's Code of Conduct may have prevented them from interviewing the witness themselves. In particular, the law firm was concerned about the Commentary to the rule which highlights the fact that, although there is generally no property in a witness, there are certain recognized exceptions to that rule.

Interviewing witnesses

4.03 Subject to the rules respecting communication with a represented party set out in Rule 6.02 (8-10), a lawyer may seek information from any potential witness, whether under subpoena or not, but the lawyer must disclose the lawyer's interest and take care not to subvert or suppress any evidence or advise or encourage a witness or potential witness in a matter to refrain from

communicating with other parties involved in the matter.

Commentary

There is generally no property in a witness. To achieve the truth-seeking goal of the justice system, any person having information relevant to a proceeding must be free to impart it voluntarily and in the absence of improper influence. The rule does not, however, prevent a lawyer from responding in the negative if a witness specifically asks if it is mandatory to talk to opposing parties.

In Alberta, there are certain recognized exceptions to the rule:

....

(b) Decision makers within a corporate client. Since a corporation must act through human agents, it is necessary to identify those within a corporate client having authority to act on its behalf. Generally, all directors and officers, as well as management level personnel with decision-making authority, have sufficient identity with the corporation to be considered equivalent to the client for the purposes of this Rule.

42 In this context, it is potentially useful to note that the person who presented herself to Mr. Murphy's lawyer had been, until 2011, employed as a book-keeper for the companies. She had never been a director or officer of the companies. On the other hand, on an undated letter sent some time after December 3, 2010 but prior to the termination of her initial employment, she had sent a letter on CCS letterhead in which she had signed herself "Executive Assistant". Also in this context, it might be useful to note that the Inspector referred to the management team with whom it met as being composed of Margaret Cahill and Mr. Filipiak who, in August 2011, appears to have assumed the position previously occupied by the individual who went to Mr. Murphy's lawyer. It will be seen, therefore, that the concern expressed by Mr. Murphy's lawyer in dealing with this potential witness was understandable.

43 On July 16th, 2013, the Inspector provided to the court and to the parties a Third Report consisting of allegations made by a former book-keeper of CCS, whose employment with the companies had ceased in 2011. Recently, the individual had been retained by Margaret Cahill, on a contract basis, to answer the various questions put to the management of the CCS companies by the management. That individual told the Inspector that while she had not provided erroneous information to the Inspector in her previous dealings with them, she had deliberately withheld relevant and material information, in part at the request of Margaret Cahill and Chris Cahill Jr.

44 The Inspector prudently advised the court that it had not had either the time or the opportunity to test the allegations made by the former book-keeper. Indeed, in response to the court's questions at the August 6 hearing, the Inspector candidly advised that there was relatively little that it could do in the relatively short term to assess the validity of the allegations made by the former book-keeper.

45 It goes without saying that the Inspector acted in an entirely appropriate fashion in ensuring that the court had access to the hearsay material with a view to determining what use should be made of that material.

46 As to the use which the court should make of the Third Report, Ms. Cahill acknowledged, on the authority of ***Principal Group Ltd.,*** that even though information in an Inspector's report was, typically, hearsay, it was the kind of hearsay which could be tendered in evidence and considered by the court.

47 This raises a procedural issue that is relevant to the issue of contempt which must be addressed by the court. The ***Principal Group Ltd.*** decision emphasizes that an Inspector's report, albeit hearsay, can become evidence. While Canadian case law generally holds that Inspectors, as court officers, are to be shielded from cross-examination on their reports - see, for example, ***Consolidated Enfield Corp.***, that does not mean that the reports should not be filed as court exhibits. Here, because of an earlier decision in these proceedings which provided for the sealing of the Inspector's reports, the Reports have not in fact been introduced as exhibits. The court hereby orders that each of the three reports shall forthwith be entered as exhibits in the proceedings, and, according to the order of Lee J., shall be sealed until further order of the Court.

48 Although the respondents do not object to the Court's consideration of the Inspector's Third Report, they ask the court to consider the content of the report to be mere hearsay, even contested hearsay, and to give it no weight.

49 Mr. Murphy asks the court to give full weight to the hearsay evidence contained in the Inspector's report. He states that the court has not required other individuals to provide sworn evidence before it could be considered by the Inspector.

50 I have concluded that, because they are not sworn and been subject to cross-examination, I should give no weight to the allegations made by the CCS's former book-keeper. Although an Inspector's report is admissible, even if it contains hearsay, the court retains the discretion to give the hearsay content of the report little weight: ***Envirodrive Inc.***, at para. 38.

51 In coming to that conclusion, I have taken the following into account:

- although it is obvious that the Inspector has not required all individuals who have provided information used as the basis for the First and Second Reports to provide that information by way of affidavit or equivalent. However, much information in these proceedings, and certainly most of the information which is contested, has in fact been provided by affidavit or equivalent and there has been the opportunity to cross-examine on that evidence. Both Mr. Murphy and Ms. Cahill have been subject to questioning with respect to the affidavits they have provided;
- the evidence before the court on this application establishes that there was a personal relationship between the former book-keeper and Chris Cahill Jr. which may provide an explanation for the former book-keeper's current information. This is not a situation where the source of the new information is disinterested;
- on the basis of the very information provided by the former book-keeper to the Inspector, that individual has acknowledged that, in the past, she has

> not been forthright with the Inspector. When a witness admits to having deliberately withheld evidence in the past, that individual's current statements must be assessed in light of her acknowledged past lack of candour. It is reasonable to require the new information to be provided under oath and to be subject to questioning.

3. Should Ms. Cahill, or her lawyer, be found in contempt, and sanctioned, for having disclosed to Chris Cahill Jr. the contents of the Inspector's Third Report which dealt principally with allegations against Chris Cahill Jr.?

52 I have concluded that, in the circumstances here, no finding of contempt should be made with respect to the distribution to Chris Cahill Jr. of the Inspector's Third Report.

53 The hearsay information which constitutes the content of the Inspector's Third Report centers on Chris Cahill Jr. It appears that the individual who provided the information to the Inspector had had at the very least an emotional, as opposed to a purely professional, relationship with Chris Cahill Jr. Although the information provided to the Inspector relates in part to Margaret Cahill, the focus of the disclosure is on Chris Cahill Jr. and the allegations against him of assault and of other personal impropriety as well as of business impropriety. Clearly, Margaret Cahill provided her son with a copy of the Third Report; indeed, Chris Cahill Jr. - who is identified in the materials before the court as part of the management team of the CCS Group - has filed affidavits responding to the allegations made in the Third Report. The fact that a person affected by a sealing order would likely have obtained disclosure of the sealed document in the interests of fairness had an application been made to lift the order does not resolve the issue of whether a contempt of the order has occurred, although such a background may affect the sanction imposed for contempt. However, before getting to that issue, the court must begin by determining whether the circumstances here justify a contempt citation.

54 The test for contempt has recently been articulated by Quinn J. in ***Cassels Brock & Blackwell LLP***- a decision chosen only because of its recency - in a format which, in my view, represents the weight of the jurisprudence on the issue:

> 60 In *Prescott-Russell Services for Children and Adults v. G. (N.)* (2006), 82 O.R. (3d) 686 (C.A.), at para. 27, a three-pronged test for contempt was articulated: (1) "the order that was breached must state clearly and unequivocally what should and should not be done"; (2) "the party who disobeys the order must do so deliberately and wilfully"; (3) "the evidence must show contempt beyond a reasonable doubt."
>
> ...
>
> (c) is the Order for Assessment clear and unequivocal?

> 62 The following legal principles are two of the more obvious ones that apply when considering whether an order is clear and unequivocal:
>
> "It must be clear to a party exactly what must be done to be in compliance with the terms of an order": see Bell ExpressVu Limited Partnership v. Torroni (2009), 94 O.R. (3d) 614 (C.A.), at para. 22, citing Hobbs v. Hobbs (2008), 54 R.F.L. (6th) 1 (Ont. C.A.), at paras. 26-28.
>
> "The person who is alleged to be in contempt is entitled to the most favourable interpretation of the order": see Melville v. Beauregard, [1996] O.J. No. 1085 (Gen. Div.), at para. 13.

55 In the circumstances of this case, I have concluded that the sealing order was not sufficiently clear and unequivocal so as to provide a basis for a contempt finding. As I understand it - in the absence of a transcript of the proceedings that led to the making of the sealing order - the sealing clause of the order appointing the Inspector was not the subject of real discussion amongst the parties. No notice of the application to request a sealing order was brought pursuant to the provisions of R. 6.29 for a restricted court access order; therefore, there was no elucidation on the record of the intended objective of the sealing order. In those circumstances, the parties may understandably have been of the view that the obligation to prevent disclosure of the order and its terms rested essentially on the Inspector. Such an interpretation would have been reasonable, given the type of information which the Inspector was to uncover, relating for example to real estate appraisals; such information, if publicly disclosed, might have put the companies at a disadvantage in dealing with the properties and the corporate disadvantage would have had negative consequences for all the shareholders.

56 Incidentally, the existence of the sealing order would also limit the Inspector's ability to approach outside sources for information. That reality is reflected in the Inspector's answer to the court's query about which, if any, of the allegations made in the Third Report could be effectively assessed by the Inspector: the Inspector could not, as suggested by Mr. Murphy, merely go to a lawyer and ask that lawyer if s/he is driving a vehicle leased to the companies, and, if so, under what authority.

4. What test applies to a request for the appointment of an interim receiver-manager?

57 Mr. Murphy asserts that a strong *prima facie* case of oppression constitutes a sufficient basis for the appointment of an interim receiver-manager under the *Business Corporations Act* and that a test comparable to the tripartite test for interlocutory injunctive relief is the test that should be applied in relation to the *Judicature Act* application. Mr. Murphy adds that deadlock is sometimes mentioned as a justification for the appointment of a receiver-manager and that Lee J. has, in these very proceedings, made a finding of deadlock even though that finding did not result in Lee J.'s acquiescence to the request for the appointment of an interim receiver-manager.

58 The respondents assert that the test for the appointment of an interim receiver-manager under the *Business Corporations Act* is akin to the test for the issuance of an interlocutory injunction, i.e. the tripartite test set out in ***RJR-MacDonald Inc.***

59 In essence, the difference between the parties on this issue is whether proof of irreparable harm is a necessary hurdle for an applicant requesting the relief requested here.

60 In my view, the respondents are more nearly correct on this issue than is the applicant: as the applicant himself recognizes, this court has, in ***MTM Commercial Trust***, noted with approval the decision in *Anderson v. Hunking*, [2010] O.J. No. 3042, which stated, among other things, that "the test for the appointment of a receiver is comparable to the test for injunctive relief". Indeed, it may be useful to quote from that decision more extensively:

> 15 Section 101 of the Courts of Justice Act provides that the court may appoint a receiver by interlocutory order "where it appears to a judge of the court to be just or convenient to do so." The following principles govern motions of this kind:
>
> (a) the appointment of a receiver to preserve assets for the purposes of execution is extraordinary relief, which prejudges the conduct of a litigant, and should be granted sparingly: Fisher Investments Ltd. v. Nusbaum (1988), 31 C.P.C. (2d) 158, 71 C.B.R. (N.S.) 185 (Ont. H.C.);
>
> (b) the appointment of a receiver for this purpose is effectively execution before judgment and to justify the appointment there must be strong evidence that the plaintiff's right to recovery is in serious jeopardy: Ryder Truck Rental Canada Ltd. v. 568907 Ontario Ltd. (Trustee of) (1987), 16 C.P.C. (2d) 130, [1987] O.J. No. 2315 (H.C.);
>
> (c) the appointment of a receiver is very intrusive and should only be used sparingly, with due consideration for the effect on the parties as well as consideration of the conduct of the parties: 1468121 Ontario Limited v. 663789 Ontario Ltd., [2008] O.J. No. 5090, 2008 CanLII 66137 (S.C.J.), referring to Royal Bank v. Chongsim Investments Ltd. (1997), 32 O.R. (3d) 565, [1997] O.J. No. 1391 (Gen. Div.);
>
> (d) in deciding whether to appoint a receiver, the court must have regard to all the circumstances, but in particular the nature of the property and the rights and interests of all parties in relation thereto: Bank of Nova Scotia v. Freure Village of Clair Creek (1996), 40 C.B.R. (3d) 274, 1996 CanLII 8258 (Ont. S.C.J.);
>
> (e) the test for the appointment of an interlocutory receiver is comparable to the test for interlocutory injunctive relief, as set out in RJR-MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311 at paras. 47-48, 62-64, 111 D.L.R. (4th) 385:
>
> > (i) a preliminary assessment must be made of the merits of the case to ensure that there is a serious issue to be tried;
> >
> > (ii) it must be determined that the moving party would suffer "irreparable harm" if the motion is refused, and "irreparable" refers to the nature of the harm suffered rather than its magnitude - evidence of irreparable harm must be clear and not speculative: Syntex Inc. v. Novopharm Ltd. (1991), 36 C.P.R. (3d) 129, [1991] F.C.J. No. 424 (C.A.);
> >
> > (iii) an assessment must be made to determine which of the parties would suffer greater harm from the granting or refusal of the remedy pending a

> decision on the merits - that is, the "balance of convenience": See 1754765 Ontario Inc. v. 2069380 Ontario Inc. (2008), 49 C.B.R. (5th) 214 at paras. 7 and 11, [2008] O.J. No. 5172 (S.C.);
>
> (f) where the plaintiff's claim is based in fraud, a strong case of fraud, coupled with evidence that the plaintiff's right of recovery is in serious jeopardy, will support the appointment of a receiver of the defendants' assets: Loblaw Brands Ltd. v. Thornton (2009), 78 C.P.C. (6th) 189, [2009] O.J. No. 1228 (S.C.J.).
>
> (Emphasis added)

61 However, I don't disagree with the applicant's overall position concerning the applicable test, assuming that that position includes acceptance that irreparable harm must usually be established. Nor would I disagree with the applicant's overall position assuming that the position recognized that the test under the *Judicature Act* is not markedly different from that which applies under the *Business Corporations Act*: in my view, since the specific provisions of the *Business Corporations Act* overtake the general provisions of the *Judicature Act* where the request is for the appointment of an interim receiver of a corporation.

62 I have concluded that requiring an applicant for the appointment of a receiver-manager of a business corporation to satisfy each of the requirements the tripartite test may, in some exceptional circumstances, be relaxed. Along with Clackson J., and recognizing that the application in the Ontario case related "only" to an interim order "prohibiting the respondents from proceeding with the proposed purchase transaction with Luna Tech without obtaining shareholder approvals as set out in the USA and an interim order prohibiting the respondents from continuing to operate the business and manufacturing facility of Luna Tech pending the closing of the Luna Tech transaction and requiring them to immediately cease all such activity and to remove any and all of their assets from the Luna Tech facility" rather than to the more comprehensive remedy of appointment of an interim receiver-manager, I endorse the view of Pepall J. in *Le Maitre Ltd. v. Segeren:*

> 30 It seems to me that generally the principles for the granting of interlocutory injunctive relief should be applicable to section 248(3) interim relief that is in the nature of an injunction. This is in the interests of predictability and certainty in the law. As such, typically, a moving party should not expect to obtain interlocutory injunctive relief unless it is able to successfully address the factors to be considered on such a motion. That said, there may be some circumstances where interim relief pursuant to section 248(3) is merited absent all of the traditional considerations associated with an interlocutory injunction. The dictates of fairness may be so overwhelming that it may be appropriate to forego compliance with any one or all of the balance of convenience, irreparable harm or an undertaking as to damages. In my view, such an approach is consistent with the broad nature of the oppression remedy, the language of section 248(3), and with cases such as Deluce Holdings Inc. v. Air Canada,10 M. v. H.,11 UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.,12 Ellins v. Coventree13 and RV&S Ltd. v. Aiolos Inc.14
>
> (Emphasis added)

63 I note that two relatively recent Quebec Court of Appeal decisions, ***Nicolas*** and ***176283 Canada Inc.***, have usefully emphasized that the situations in which the "dictates of fairness are so overwhelming" that the traditional tripartite test can be ignored will be few and far between.

64 In order to provide as straightforward as possible an expression of the legal test applicable here, I would slightly reframe the test in this way: An interlocutory application for the appointment of a receiver-manager of a corporation pursuant either to the oppression provisions of business corporations legislation, such as Alberta's *Business Corporations Act*, or the general equitable jurisdiction of a court, such as under Alberta's *Judicature Act*, brought by a person who is not a security holder who is the beneficiary of an instrument which authorizes the appointment of a receiver on the default of the creditor is an application for an extraordinary remedy which should only be granted cautiously and sparingly. Generally, the applicant for such a remedy must satisfy the tripartite test for obtaining an interlocutory injunction: it must establish that there is a serious issue to be tried, that it will suffer irreparable damage if the relief is not granted, and that the balance of convenience favours the granting of the relief. Exceptionally, the dictates of fairness may be so overwhelming that interim relief is justified even where one or more terms of the tripartite test have not been met.

65 In coming to the above-noted formulation of the test, I begin with the view that the fact that what is requested in interlocutory relief, i.e. relief without hearing the substantive application on the merits, is a key factor which cannot be ignored.

66 Next, I emphasize that the remedy requested by the applicant is an important component of the test which the applicant has to meet: what must be proved in order to obtain the appointment of an inspector can, in my view, differ from what is necessary to obtain the appointment of a receiver-manager. Indeed, because the role of an Inspector is so markedly different from that of a receiver-manager, the evidence required for the appointment of an Inspector can legitimately, as Lee J.'s decision in this very case has already demonstrated, be materially less than the evidence required for the appointment of a receiver-manager.

67 Nor, in my view, should a court generally explore on its own whether a remedy set out in s. 242(3) other than the remedy requested by the applicant should be awarded: the parties opposite only have notice of, and can only be expected to respond to, a specific application. It would be unfair to the respondents to consider granting relief which had not, at least impliedly, been requested. Moreover, if a court were, for example, to appoint a Monitor where an applicant had requested the appointment of a receiver-manager, the court might only be imposing an onerous expense without any commensurate benefit on the applicant.

68 It is true that, in ***HSBC Capital Canada Inc.***, the court described the test under then s. 234 of the Business Corporations Act as "a strong *prima facie* case": para. 44. There was no consideration in that case of irreparable harm or of the balance of convenience. However, to my mind a crucial difference between the situation in that case and the one here is that, in that case, the actual relief requested was "only" the appointment of an Inspector. In other words, the relief that was granted in that case was exactly the relief which has already been granted in this case prior to the bringing of this application. The decision in that case cannot, therefore, serve as justification for the appointment of an interim receiver-manager in this case. The difference is that the applicants now want additional relief - the appointment on an interim basis of a receiver-manager, and the question is whether the same test that applies to the appointment, on an interim basis, of an inspector also governs the appointment of an interim receiver-manager. In my view, the answer is no.

69 In concluding that the nature of the relief requested is a factor in determining the test that must be met, I also take comfort in McDonald J.'s decision in ***Citibank Can.***, where the court again referred to *Bennett* as authoritative, but added the following at para. 31:

> In the present case, I think that, again bearing in mind that the limited order which I intend to make is only to preserve the rents and prevent the sale of the property by Burnco for taxes, the order will not irreparably harm the interests of the defendants.
>
> (Emphasis added)

70 Similarly, in ***Leggat***, a recent Ontario court decision, Coats J.outlined the varying circumstances which must be taken into account in determining what test the applicant must meet to justify the relief:

> 24 The Respondents have filed several cases with respect to the test to be applied for interim relief. In my view, none of these cases are of assistance in the determination of the issues before me. In 1384034 Alberta Ltd. v. 1180263 Alberta Ltd, 2011 ABQB 599, the Court granted some interim relief, including access to financial statements of the corporation consisting of weekly accounting reports and monthly financial statements. No test for interim relief was articulated. In Dee Ferraro Ltd. v. Pellizzari, 2010 ONSC 3013, again no test for interim access to financial records was set out. On a short motion list it was not possible to make such a determination. In Padda v. 2074874 Ontario Inc., 2010 ONSC 2872, the interim relief requested was the appointment of a receiver. This is completely different than a request for a declaration enforcing a statutory right to access to books and records. I do note that in Padda v. 2074874 at para. 20 it is clear that Justice Gray had ordered as a term of the previous adjournment that business records in the possession of either party were to be provided to the other party forthwith. In Le Maitre Ltd. v. Segeren, [2007] O.J. No. 2047 (SCJ) the interim relief sought was to restrain the Respondents from concluding a transaction. The relief sought before me is completely different. The Applicants are not seeking interim relief under the oppression remedy section at this stage of the proceeding. The Applicants are seeking a declaration permitting access to books and records, documents to which Mr. Leggat as a director has a statutory right to access. The relief is available under s. 247 of the CBCA and this issue easily lends itself to summary disposition. The primary issue before me is not in the nature of an injunction. In PADP Holdings Inc. v. Information Balance Inc., [2006] O.J. No. 5518 (O.S.C.), the primary interim relief sought was the reinstatement of employment and the standard test for injunctive relief was applied. Once again, the primary issue before me is not of an injunctive nature.

71 In ***Paragon***, adopting a list established in *Bennett on Receiverships,* 2nd ed., the court approved some factors which a court may consider in determining whether it is appropriate to appoint a receiver. At least three points can be made in relation to that decision: first is that the reference to Bennett, which is undoubtedly useful, should be updated to the 3rd ed, 2011, where the comparable list is found starting at p. 156. There are a few additional comments made in the third edition which

may be of interest here: the current edition of Bennett emphasizes, in relation to the second factor, the risk to the security holder, that "the court may not consider this factor to be important if there is no danger or jeopardy to the security holder or in other words, there is a substantial equity that will protect the security holder". From that perspective, the factor appears to be an example of what might not constitute irreparable damage. One factor which is not mentioned in the *Paragon* list is "the rights of the parties [to the property]". Similarly, in relation to the factor of the effect of the order on the parties, the current edition of Bennett adds "If a receiver is appointed, its effect may be devastating upon the parties and their business and, where the business has to be sold, the appointment of a receiver may have a detrimental effect upon the price". Along the same lines, in relation to the length of the order, the current edition of Bennett adds "... where a claimant moves for an order appointing a receiver for a short period, say six weeks, the court is reluctant to make such an appointment as it has devastating effects on the parties". Finally, the current edition of Bennett adds the following factor: "(18) the secured creditor's good faith, commercial reasonableness of the proposed appointment and any questions of equity". In reviewing the 18 factors currently mentioned in Bennett, I have concluded that each of those factors, other than factor 10 which emphasizes that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly and part of factor 18 which refers to the principles of equity, can be seen as a particularization of one of the three branches of the tripartite test; factor 10 and part of factor 18, while not part of the tripartite test constitute the often only implied basis for granting equitable relief such an the appointment of an interlocutory receiver. As to the remainder of the factors, irreparable harm is not only mentioned as the first factor, but is also explicitly addressed in factors 2 and 5. The balance of convenience is not only an explicit factor on its own, but also constitutes the substance of factors 11, 12, 14, 15, 16 and 17.

72 Second, it must be noted that, in ***Paragon***, the application before Romaine J. was brought by a security holder in reliance on its explicit right in the security documents to have a receiver appointed, a situation which does not apply here. Bennett emphasizes that, where a security holder's instrument provides for the appointment of a receiver, the security holder is *prima facie* entitled to that relief on proof of the required default.

73 Third, Bennett does address the type of situation which has arisen here, i.e. one where the applicant is not a security holder relying on an instrument. At page 159 of the third edition, the learned author states:

> If the creditor who applies for the appointment of a receiver is neither a judgment creditor nor a secured creditor, the court will be more cautious in reviewing the factors listed above as they may not readily apply. As has been pointed out in case law, the appointment of a receiver is intrusive and can have disastrous effects on the debtor. The creditor must show that there is a serious issue to be tried, that irreparable harm will occur if an appointment is not made, and that the balance of convenience must be in the creditor's favour. In effect, the court focuses on the test set out in *RJR-MacDonald Inc. v. Canada (Attorney General).*

74 The reference at p. 159 to "creditor" can, in light of the case law, for example *Segeren* which is discussed herein, apply to a person with Mr. Murphy's status. This conclusion does, however, raise another issue: the reference in the Bennett text at the locations indicated above refer essentially to the appointment of a receiver at the request of a security holder. Indeed, most of that text deals with the security holder situation. However, some comments about the appointment of a receiver

under business corporations legislation can be found commencing at p. 823 of the text. In dealing with the grounds of appointment of a receiver under business corporations legislation, the text states: "The test ... requires the applicant to have a strong *prima facie* case but not to the same degree as in the test for a *Mareva* injunction. Much of the case law relating to situations where a liquidator would be appointed can be considered in an application under section 241 (of the *Canada business Corporations Act*). For example, 'deadlock companies' may be considered unfairly prejudicial to each side, such that a court may appoint a receiver for the protection of all parties." There is no mention at that point in the text of the ***BCE*** oppression decision of the Supreme Court; indeed, it might be fairly said that the Bennett text does not focus on receiverships under business corporations legislation.

75 In ***Kumra***, a similar, albeit shortened, set of Bennett factors is set out at para. 61.

76 The decision of our Court of Appeal in ***Chow*** merely confirms the appointment of a receiver-manager without analysis of the justification for that appointment because justification was not necessary in the appeal decision. Similarly, the decision in ***Alberta's B.E.S.T. Inc.*** is not of assistance in determining the appropriate test because that decision does not deal with the appointment of a receiver-manager and that decision relies on a decision of our court in a case management situation where the case manager ordered 5 representative claims to be tried - a situation which is in no way comparable to the situation here.

77 The legal analysis in the ***Such*** decision on which the applicant relies heavily has been overtaken, so far as the legal content of oppression is concerned, by the Supreme Court of Canada decision in ***BCE***. Insofar as the interlocutory nature of the remedy is concerned, the judge in that case did not analyze the requirements for obtaining an interlocutory remedy; it seems likely, given the analysis that was made, that the judge merely came to the conclusion that, in contemporary terms, the dictates of fairness were overwhelming. In other words, that decision is important insofar as it is fact-driven, not for the legal analysis of the remedies available.

78 In my view, in light of the evidence in this particular case which will be reviewed shortly, it is not necessary to determine whether or not the existence of deadlock is a sufficient basis for the appointment of an interim receiver-manager if the tripartite test cannot be satisfied.

79 Finally, I note that - for reasons that are obvious - an undertaking in damages is typically required on applications for interlocutory injunctions in commercial matters. I agree with Romaine J's approach in ***MTM Commercial Trust*** that it is equally useful to establish such a standard with respect to the interim application for a receiver-manager in a corporate context.

5. How does the test apply in the circumstances here?

80 Before commencing an analysis of each branch of the tripartite test and of the dictates of fairness in the situation here, I remind myself that the remedy requested is equitable relief, in other words that the court has a discretion to grant the relief requested - rather than an obligation to grant the relief upon proof of the underlying requirements - although that discretion must, of course, be exercised judicially. I also remind myself that the relief requested here is interlocutory in nature, i.e. it is requested prior to the trial of highly contested factual issues.

a) The tripartite test

(i) Is there a serious issue to be tried?

81 There are two main issues that must be tried here: has Mr. Murphy been oppressed by the respondents in the way in which they have conducted the CCS business and has he been oppressed by the respondents in the way in which the share register and corporate documents have been executed..

82 All parties agree that there are serious issues to be tried.

83 The point of this branch of the test is to weed out applicants for interlocutory relief who don't have a serious claim to the final relief which they are seeking. This case is somewhat unusual in that, although it is clear that Mr. Murphy has serious grievances which must be explored relating to the way in which his multi-million dollar investment is being managed, it is equally clear that the respondents have serious grievances which must be explored relating to the way in which the corporate structure is being used. The application is ironic: Mr. Murphy complains, essentially, about the lack of record keeping by Margaret Cahill and her management, whereas Margaret Cahill complains that Mr. Murphy refuses to recognize the corporate records which are extant.

84 What is also clear is that this is not a case like ***Seymour Resources Ltd.,*** cited by the applicant, where the court is able to make determinations on the basis of affidavit evidence. On the contrary, the affidavit evidence here is highly contested.

85 As explained above, in my opinion contemporary Canadian corporate law does not suggest that an applicant who establishes a strong *prima facie* case of oppression can expect that a court will grant the request for the appointment of an interim receiver-manager. On the contrary, for the reasons given above, I am of the view that the real test is, on the one hand, a lesser one than the one advanced by the applicant: an applicant need only prove that there is a serious issue to be tried, not that the applicant need prove a strong *prima facie* case of oppression. On the other hand, however, the real test is more onerous than the one advocated by the applicant: in addition to the serious issue branch, an applicant must also prove irreparable harm and the balance of convenience.

86 The applicant has greatly emphasized the evidence which he asserts constitutes a strong *prima facie* case of oppression. Because of the view which I have taken of the applicable law, I will not exhaustively review the applicant's argument in support of his strong *prima facie* case argument. As I have said, Mr. Murphy has amply established that there are serious oppression issues to be tried. Really, no more needs to be said with respect to the first branch of the tripartite test. Nevertheless, I will add that all of the evidence advanced by Mr. Murphy in relation to the establishment of oppression - the failing to hold formal shareholder meetings, the failure to provide information, the loss of money, the misuse of corporate assets, the way in which private residences were acquired, the payment of professional fees which may not relate to corporate business, incurring penalties for late payment of taxes, shoebox accounting generally, etc., etc. - does not constitute in the circumstances here, a strong *prima facie* case of oppression. Rather, in light not only of the affidavit evidence provided by the respondents but also the comments of the Inspector with respect to the Inspector's assessment of the respondents' responses, the court is left with only the realization that the oppression issue must be tried because there are serious credibility issues on both sides. To take one small example: Mr. Murphy complains about his inability to get financial information about the companies. However, he does not acknowledge the fact that he originally was content to receive only the barest possible information about the operation of the companies and that when his change of attitude arose he often made it impossible for the shareholders to act and for there to be effective interaction between the directors. To take another small example: even if it were true that the companies initially paid for some expenses that were later properly characterized as personal rather than corporate

expenses, the initial recording of expenses as corporate does not, by itself, constitute *prima facie* evidence of oppression. It only constitutes evidence of possible oppression which must be tried.

87 In the end, however, having recognized that there are serious issues to be tried, Mr. Murphy cannot expect to receive the relief which he seeks unless he satisfies the remaining two branches of the tripartite test.

(ii) Will Mr. Murphy, or the Trust, suffer irreparable consequences if an interim receiver-manager is not appointed?

88 Mr. Murphy argues that he and the trust are at risk of irreparable harm if an interim receiver-manager is not appointed.

89 I cannot accept that argument.

90 The first aspect of this issue is the risk of need for immediate corporate action. No such need is apparent on this application. The companies have neither initiated actions nor are being compelled to take action in the relatively near future, and certainly not before the triable issues could be fully heard on their merits.

91 In this context, I note that the applicant has complained of the lease proposal authorized by Margaret Cahill in relation to some of the lands owned by the companies. The applicant strongly objected to the leasing initiative, even though he placed Margaret Cahill in charge of the day to day operation of the companies, even though the leasing of the property would presumably conform to the overall objective when the applicant first invested money in the Edmonton properties, and even though the applicant refuses to take the steps set out in the USA to resolve disputes between himself and Margaret because he denies the validity of the USA which he appears to have signed. At his request, this leasing initiative has now been abandoned. Nothing of importance is therefore on the horizon in terms of the need for corporate decision making.

92 The second aspect of this issue is the risk of financial loss if the relief requested is not granted. Mr. Murphy has not established that he or the Trust will suffer irreparable financial harm unless an interim receiver-manager is appointed. In coming to that conclusion, I rely on the following:

- Mr. Murphy's objective in funding the Edmonton investment is disputed. As strange as it may appear, it may be that Mr. Murphy was not concerned with an operating profit from the salvage business but was, instead, intent upon making a profit as a result of the increase in the value of the real property in which he invested. The evidence available on this application is not overwhelming on one side or the other of the objective issue. On the one hand, Mr. Murphy put his older sister who had no experience in the management of an operating salvage business in charge of the day to day operations of the business and invested heavily in land, but did not invest heavily in operating capital. On the other hand, Mr. Murphy did invest in acquiring machinery presumably for the better operation of the business. In any event, however, the opinion of the Inspector is that the business outlook for the companies is at least as dependent on the actions of Mr. Murphy as on the actions of Ms. Cahill. For example, the problem identified at para. 22(b) of the Second Report is, as to the first half of the sentence,

something which may be attributable in part to Ms. Cahill, but, as to the second half of the sentence, is attributable to Mr. Murphy;

- the various real property appraisals provided by the parties establish that, even using the lowest appraisals, the lands have appreciated considerably in value since the date of investment. Indeed, an unsolicited offer for the purchase of one of the three property groups establishes that the appraisals are, generally, reliable; had Mr. Murphy accepted the offer for the one property, the companies would have recovered a little over half of the original investment. There is no suggestion in any of the materials before me that the land values are likely to decrease in the foreseeable future;
- given the increase in the value of the property owned by the companies, and the apparent equity interest of Margaret Cahill as shown on the face of documents apparently executed by Mr. Murphy, Ms. Cahill's equity stake in the companies is high enough that, if it were eventually found that she has caused financial harm to the companies, the damages found against her could be offset from her equity interest. Mr. Murphy suggests that an analysis of this sort is tantamount to condoning theft from the company; with respect, I disagree. I don't disagree with the principle that theft should not be condoned merely because the thief has the financial resources to repay the theft; the whole of the criminal law relating to theft and fraud makes that abundantly clear. The point on which I disagree is whether theft has been proved here. The evidence available on this application does not establish theft by Ms. Cahill from the company. I accept that the salvage business is a cash business and that such a business must, therefore, have adequate cash management systems and that this group of companies did not have such adequate systems. Whether that was due to ineptitude or lack of operating capital is not yet clear. Whether the vulnerability of the system to material misappropriation in fact came to pass is one of the questions of fact which remains to be determined.

93 In summary, therefore, I conclude that Mr. Murphy has not established that he and/or the Trust will suffer irreparable harm if an interim receiver-manager is not appointed.

(iii) Does the balance of convenience favour the appointment of an interim receiver-manager?

94 The balance of convenience does not favour the appointment of an interim receiver-manager. In coming to this conclusion, I rely on the following:

- the appointment of a receiver-manager would deal only with the management concerns raised by Mr. Murphy; it would not deal with the corporate structure concerns of the Cahills. Moreover, the information before the court on this application is that Mr. Murphy has access to considerable financial resources as established not only by the size of his initial investment in the CCS Group, but also by the indemnity agreement which he has made with the former employee of the CCS Group. In comparison, although the evidence on this application is that Ms. Cahill has clear title to

the home in which she resides, she has no source of income other than the full time work she has done for the CCS Group since 2006. If Mr. Murphy were to be successful in obtaining the appointment of a receiver-manager, that official might conceivably terminate both Ms. Cahill's employment and that of her son Chris Cahill Jr. While Mr. Murphy would then have unimpaired resources to deal with the corporate structure dispute, the Cahills would find themselves with minimal resources with which to advance their position. Even though the Cahills have executed documents in support of their position, without significant financial resources to maintain their position in legal proceedings, they might not be financially able to put forward their best position;

- at para. 36 of the Inspector's Third Report, there is a comment about the financial position of the CCS Group. The exact words used by the Inspector are not reproduced here for the privacy concerns alluded to earlier. I accept the Inspector's assessment of the financial position of the CCS Group with respect to its ongoing operations; indeed, I am of the view that all of the information provided to the Inspector amply supports the Inspector's conclusion. It is true that an interim receiver-manager could do many things the Inspector cannot do. However, the appointment of a receiver-manager would not solve the crucial problem of the CCS Group which is the resolution of the dispute about the corporate structure;

95 In summary with respect to the tripartite test, although Mr. Murphy has satisfied the first branch of the test, he has failed to satisfy the remaining two branches.

b) The equitable issues

96 As indicated above, I am of the view that, in addition to the tripartite test, a court which is asked to appoint an interim receiver-manager for a corporation must also consider the equities, and not only the narrow legalities, of the situation. However, in my view the case law establishes that, with the exception of the potential relief from compliance with the tripartite test arising out of the application of equitable principles, the general approach to the appointment of a receiver-manager of a corporation under the provisions of the *Judicature Act* are, generally, the same as those which apply to the granting of such relief under corporate legislation.

97 I accept that another way of referring to the equitable issues would be to say that where the evidence of oppression is overwhelming, an applicant for relief in Mr. Murphy's position need not satisfy the tripartite test.

(i) Are the dictates of fairness so overwhelming that they require the appointment of a receiver-manager?

98 In my view, the dictates of fairness are not so overwhelming in the circumstances here that they compensate for Mr. Murphy's inability to satisfy the last two branches of the tripartite test.

99 In coming to that conclusion, I have taken the following into account:

- the reasonable expectations of the parties would not be served by the appointment of an interim receiver-manager. When Mr. Murphy appointed

> Ms. Cahill as the day to day manager of the CCS Group, he was aware of her lack of business experience. Since there is no evidence that, under Ms. Cahill's management, the CCS Group abandoned or modified the internal controls that were in place when Mr. Murphy acquired the businesses and there is no evidence that Mr. Murphy provided funding to improve the internal controls that were practicable given the operating structure at the time of the acquisition, it is not reasonable for Mr. Murphy to expect that Ms. Cahill would prove to be a sufficiently sophisticated manager to be able to deal adequately with an under-funded operation;
> - the only deadlock which has arisen in the circumstances here has been created by Mr. Murphy. The executed documents relating to the corporate structure provide a mechanism for resolving deadlock - the decision of an arbitrator. It would be unfair for Mr. Murphy to both refuse to comply with executed documents which provide a mechanism for dealing with deadlock and at the same time to insist on receiving the benefit of a court order based on deadlock which he has created;

(ii) Timing

100 Finally, I note that the applicant concedes that he could be ready for trial almost immediately. The respondents agree that they are also virtually ready for trial. This straightforward admission by Mr. Murphy attracts the application of the following commentary made by Sharpe J. in his authoritative text as reproduced in ***Connolly***:

> 2.110 Ideally, the problem could be avoided were it possible to devise procedures to provide for immediate final resolution of such cases on the merits. However, in the absence of immediate and final resolution, the task of the court is to balance the risk of harm to the defendant, inherent in granting remedial relief before the merits of the dispute can be fully explored, against the risk that the plaintiff's rights will be significantly impaired in the time awaiting the trial.

101 Here, the fact that all parties agree that they can be ready for trial in very short order is a strong factor militating against the granting of interlocutory relief where there is no immediate danger to the applicant's interests and where the facts are so hotly contested that only a trial can safely resolve the contested issues.

102 In summary, therefore, the dictates of fairness are not so overwhelming in the circumstances here that they relieve Mr. Murphy with the obligation to satisfy the second and third branches of the tripartite test.

6. Costs

103 If the parties are not agreed on costs, I can be spoken to within 30 days of the release of this decision.

J.B. VEIT J.

* * * * *

Appendix A

Sections 242 and 243 of Alberta's *Business Corporations Act* read as follows:

Relief by Court on the ground of oppression or unfairness

242(1) A complainant may apply to the Court for an order under this section.

(2) If, on an application under subsection (1), the Court is satisfied that in respect of a corporation or any of its affiliates

(a) any act or omission of the corporation or any of its affiliates effects a result,
(b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
(c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the Court may make an order to rectify the matters complained of.

(3) In connection with an application under this section, the Court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing, any or all of the following:

(a) an order restraining the conduct complained of;
(b) an order appointing a receiver or receiver-manager;
(c) an order to regulate a corporation's affairs by amending the articles or bylaws;
(d) an order declaring that any amendment made to the articles or bylaws pursuant to clause (c) operates notwithstanding any unanimous shareholder agreement made before or after the date of the order, until the Court otherwise orders;
(e) an order directing an issue or exchange of securities;
(f) an order appointing directors in place of or in addition to all or any of the directors then in office;
(g) an order directing a corporation, subject to section 34(2), or any other person, to purchase securities of a security holder;
(h) an order directing a corporation or any other person to pay to a security holder any part of the money paid by the security holder for securities;
(i) an order directing a corporation, subject to section 43, to pay a dividend to its shareholders or a class of its shareholders;
(j) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;
(k) an order requiring a corporation, within a time specified by the Court, to produce to the Court or an interested person financial statements in the

form required by section 155 or an accounting in any other form the Court may determine;

(l) an order compensating an aggrieved person;

(m) an order directing rectification of the registers or other records of a corporation under section 244;

(n) an order for the liquidation and dissolution of the corporation;

(o) an order directing an investigation under Part 18 to be made;

(p) an order requiring the trial of any issue;

(q) an order granting leave to the applicant to

(i) bring an action in the name and on behalf of the corporation or any of its subsidiaries, or

(ii) intervene in an action to which the corporation or any of its subsidiaries is a party, for the purpose of prosecuting, defending or discontinuing an action on behalf of the corporation or any of its subsidiaries.

(4) This section does not confer on the Court power to revoke a certificate of amalgamation.

(5) If an order made under this section directs an amendment of the articles or by-laws of a corporation, no other amendment to the articles or bylaws may be made without the consent of the Court, until the Court otherwise orders.

(6) If an order made under this section directs an amendment of the articles of a corporation, the directors shall send articles of reorganization in the prescribed form to the Registrar together with the documents required by sections 20 and 113, if applicable.

(7) A shareholder is not entitled to dissent under section 191 if an amendment to the articles is effected under this section.

(8) An applicant under this section may apply in the alternative under section 215(1)(a) for an order for the liquidation and dissolution of the corporation.

Court approval of stay, dismissal, discontinuance or settlement

243(1) An application made or an action brought or intervened in under this Part shall not be stayed or dismissed by reason only that it is shown that an alleged breach of a right or duty owed to the corporation or its subsidiary has been or may be approved by the shareholders of the corporation or the subsidiary, but evidence of approval by the shareholders may be taken into account by the Court in making an order under section 215, 241 or 242.

(2) An application made or an action brought or intervened in under this Part shall not be stayed, discontinued, settled or dismissed for want of prosecution without the approval of the Court given on any terms the Court thinks fit and, if the Court determines that the interests of any complainant may be substantially affected by the stay, discontinuance, settlement or dismissal, the Court may order any party to the application or action to give notice to the complainant.

(3) A complainant is not required to give security for costs in any application made or action brought or intervened in under this Part.

(4) In an application made or an action brought or intervened in under this Part, the Court may at any time order the corporation or its subsidiary to pay to the complainant interim costs, including legal fees and disbursements, but the complainant may be held accountable for the interim costs on final disposition of the application or action.

Section 13 of Alberta's *Judicature Act* reads as follows; Mr. Murphy relies on 13(2).:

Part performance

13(1) Part performance of an obligation either before or after a breach thereof shall be held to extinguish the obligation

(a) when expressly accepted by a creditor in satisfaction, or
(b) when rendered pursuant to an agreement for that purpose though without any new consideration.

(2) An order in the nature of a mandamus or injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it appears to the Court to be just or convenient that the order should be made, and the order may be made either unconditionally or on any terms and conditions the Court thinks just.