

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

B E T W E E N:

DBDC SPADINA LTD.,
and THOSE CORPORATIONS LISTED ON SCHEDULE “A” HERETO

Applicants

- and -

NORMA WALTON, RONAULD WALTON, THE ROSE & THISTLE GROUP LTD.
and EGLINTON CASTLE INC.

Respondents

- and -

THOSE CORPORATIONS LISTED IN SCHEDULE “B” HERETO, TO BE
BOUND BY THE RESULT

**RESPONDING MOTION RECORD OF THE
MANAGER, SCHONFELD INC.**

March 29, 2021

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1

Court File No.: CV-13-10280-00CL

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FIFTY-EIGHTH REPORT OF THE MANAGER, SCHONFELD INC.
(Motion by Certain Schedule “C” Investors to Reallocate Fees)

I. Introduction

A. Overview and Purpose

1. This is the Fifty-Eighth Report of Schonfeld Inc. in its capacity as Manager of certain companies listed at Schedule “B” to the Order of Justice Newbould dated November 5, 2013¹ and attached as Schedule “B” (the “**Schedule B Companies**”),² together with the properties owned by the Schedule “B” Companies (the “**Schedule B Properties**”)³ and of the Properties listed at

¹ The Waltons (as defined below) appealed the November 5, 2013 order. The Court of Appeal dismissed that appeal.

² Schedule “B” was amended by Order dated January 16, 2014.

³ The Manager was discharged from certain responsibilities with respect to certain of the Properties pursuant to an Order dated April 1, 2014.

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Schedule “C” to the Order of Justice Brown dated August 12, 2014 and attached as Schedule “C” (the “**Schedule C Properties**”).

2. The purpose of this Fifty-Eighth Report is to provide the Court with the Manager’s response to the motion by Christine DeJong Medicine Professional Corporation (the “**DeJongs**”) and Dennis and Peggy Condos (the “**Condos**”) for an order, among other things, reallocating certain professional fees previously allocated to and paid by Schedule C Companies in which the DeJongs and/or the Condos either have or assert an interest (the “**Fee Reallocation Motion**”).

3. For the reasons set out below, and those in the Manager’s prior reports in support of fee approval and allocation, the Manager continues to believe that the fee allocation approved by the Court (subject to the right of the moving parties to bring the Fee Reallocation Motion) is appropriate. While the Manager might recommend a reallocation of fees if it came to the Manager’s attention that relevant considerations had been overlooked previously by the Manager, no such considerations have been raised by the Condos and DeJongs.

4. The Manager notes, as well, that the Fee Reallocation Motion is a dispute over approximately \$50,000. The Manager has encouraged the parties with an economic interest in this amount, being the Applicants and the moving parties, to resolve the dispute to avoid any further expenditure. One such encouragement is set out in a letter from the Manager’s counsel dated September 24, 2019 and attached hereto as **Appendix “A”**. These efforts have been unsuccessful.

B. Terms of reference

5. Based on its review and interaction with the parties to date, nothing has come to the Manager’s attention that would cause it to question the reasonableness of the information presented herein. However, the Manager has not audited, or otherwise attempted to independently verify, the accuracy or completeness of any financial information of the Companies. The Manager therefore expresses no opinion or other form of assurance in respect of any of the Companies’ financial information that may be in this Report.

II. The DeJongs’ and Condos’ Fee Reallocation Motion

6. The DeJongs and Condos object to certain of the Manager’s fees and those of its counsel having been allocated to and paid by the following Schedule C Companies in which the Condos

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and the DeJongs either claim an interest or have been found to have an interest (collectively referred to in the Fee Reallocation Motion as the “**Subject Companies**”):

- (a) Cecil Lighthouse Ltd.;
- (b) Emerson Developments Ltd.;
- (c) Prince Edward Properties Ltd.;
- (d) St. Clarens Holdings Ltd.; and
- (e) United Empire Lands Ltd.

7. The Condos claim an equity interest in Cecil Lighthouse Ltd. (“**Cecil**”). The Applicants dispute the Condos’ interest. As described in its Fifty-Seventh Report dated September 7, 2020, the Manager is seeking the direction of this Court on whether the Condos’ claim is valid. In the event the Court finds that the Condos’ claim against Cecil is not valid, then the Condos would not be affected by any fees allocated to Cecil.

8. The DeJongs were found to have equitable interests in each of the other Subject Companies (being Emerson Developments Ltd., Prince Edward Properties Ltd., St. Clarens Holdings Ltd., and United Empire Lands Ltd.) in the judgment of Justice Newbould dated September 23, 2016.

9. The Condos and DeJongs object to any allocation to the Subject Companies of fees relating to three activities:

- (a) The Manager’s motion returnable June 28, 2018 for contingent authorization to distribute fees to the Applicants;
- (b) The Manager’s application to and subsequent attendance at the Supreme Court of Canada on May 14, 2019; and
- (c) The Manager’s participation in the Toronto Police Services’ criminal investigation of Norma and Ronauld Walton and its subsequent attendance as a witness in the criminal trial (collectively, the “**Reallocation Activities**”).

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10. The fees associated with the Reallocation Activities have already been approved, and the moving parties do not object to those fees. They object only to fees associated with the Reallocation Activities being charged to the Subject Companies.

11. At the request of the DeJongs and the Condos, the Manager and its counsel reviewed all of the docket entries relevant to the Reallocation Activities and prepared a summary of the fees allocated to each of the Subject Companies in respect of each of the Reallocation Activities. The Manager provided to the DeJongs and Condos a summary of its fee allocation analysis as well as the detailed docket entries of the Manager and its counsel. A copy of the correspondence to the DeJongs' and Condos' counsel attaching these materials is attached as **Appendix "B"**.

12. A total of \$50,927.05 was allocated to the Subject Companies in respect of the Reallocation Activities.

13. The Manager has since prepared an analysis that indicates the amount of fees allocated to each Subject Company in respect of each of the Reallocation Activities, a copy of which is attached as **Appendix "C"**. A summary of the fees incurred in respect of each Reallocation Activity and the amounts allocated to each of the Subject Companies is reproduced below:

	Cecil Lighthouse	Emerson	Prince Edward	St. Clarens	United Empire	Total
Proposed Schedule C Distribution	\$1,223.85	\$882.87	\$882.87	\$882.87	\$882.87	\$4,755.33
Criminal Investigation and Trial	\$1,323.47	\$1,300.92	\$1,300.92	\$1,300.92	\$1,323.47	\$6,549.70
Supreme Court of Canada	\$6,551.45	\$8,331.21	\$8,331.21	\$8,331.21	\$8,076.96	\$39,622.04
	\$9,098.77	\$10,515.00	\$10,515.00	\$10,515.00	\$10,283.30	\$50,927.07

14. Dr. DeJong states at paragraph 30 of her affidavit that she is unable to verify "whether all of the preparation time relative [*sic*] to the 3 fee approval Motions are addressed" in the fee analysis that the Manager provided to Dr. DeJong's counsel. The fees associated with the fee allocation and approval motions were allocated across all companies and properties and are not reflected in the chart above. The Manager's view, as set out in its prior fee approval reports, is that fee

allocation and approval is part of its general mandate that ought not to be borne by any one company or property but is reasonably shared by all of the entities within the Manager's mandate.

III. The Reallocation Activities

A. The Motion for contingent authorization to distribute Schedule C funds to the Applicants

15. The Manager and its counsel incurred professional fees of \$4,755.33 in connection with its motion heard August 24, 2018 for contingent authorization to distribute to the Applicants funds held in respect of certain Schedule "C" Companies. The authorization depended on whether the DeJongs' application for leave to appeal to the Supreme Court of Canada was successful, and whether any subsequent appeal was successful. If the DeJongs were unsuccessful, then funds would be paid to the Applicants.

16. The contingent authorization sought by the Manager was granted by Order of Justice Hainey dated August 24, 2018, a copy of which is attached as **Appendix "D"**.

17. As described in the Manager's Fifty-Third Report dated June 19, 2018, given the time that had passed since the sale of the Schedule C Properties, and the additional time that would be required by the DeJongs' leave to appeal application, the Manager determined it was reasonable and appropriate at that time to seek contingent authorization to distribute the funds it held in an effort to conclude its mandate as quickly as possible.

18. The Manager notes that fees in issue, as they relate to the contingent distribution motion, total less than \$5,000.

B. The Manager's Participation in the DeJong's appeal to the Supreme Court of Canada

19. The DeJongs and Condos assert that the Manager's application for leave to intervene and its subsequent intervention in the DeJongs' appeal to the Supreme Court of Canada did not fall within the Manager's mandate. For the reasons that follow, the Manager disagrees with this assertion.

20. The Manager was appointed over, among others, the Subject Companies by Judgment of Justice Brown dated August 12, 2014 (the "**2014 Judgment**"), a copy of which is attached as **Appendix "E"**. The 2014 Judgment incorporated the terms of Justice Newbould's Order dated

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November 5, 2013 (the “**Appointment Order**”), which is attached as **Appendix “F”**, appointing the Manager over the Schedule B Companies.

21. The Appointment Order, as supplemented by the 2014 Judgment, conferred on the Manager broad authority to act in respect of the “Property”, including the Properties and proceeds owned by the Subject Companies. Paragraph 5(k) of the Appointment Order specifically confers on the Manager authority to participate in “all proceedings” with respect to the companies within its mandate, including appeals.

22. The Manager chose to exercise its authority to participate in the Supreme Court appeal for the following reasons.

- (a) First, the Manager’s evidence and investigation provided the factual basis for both the decision of Justice Newbould at first instance and the decisions (both majority and dissent) of the Court of Appeal. Before the Court of Appeal, the Manager took no position on the outcome or the legal issues, but its counsel spent significant time answering questions from the Court about the Manager’s analysis. The Manager explained this in its Notice of Motion for leave to be added as a party or intervener, a copy of which is attached hereto as **Appendix “G”**, and offered similar assistance to the Supreme Court.
- (b) Second, the DeJong’s appeal factum dated March 1, 2019 and filed with the Supreme Court, a copy of which is attached as **Appendix “H”**, criticized the Manager’s conduct, accusing it of having acted improperly in not undertaking a further tracing analysis into funds transferred into the Schedule C Companies (despite the Court of Appeal’s clear finding (at paragraphs 14-15 of reasons attached as **Appendix “I”**) that the Manager was not required to do so unless investors in the Schedule C Companies were prepared to pay for such a tracing) and of favouring the Applicants over other stakeholders. In this context, it was important to the Manager to ensure that its mandate and activities were accurately described.
- (c) Third, the Manager’s mandate includes a number of Properties and Companies, other than the Companies in which the DeJongs claimed an interest, which could

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have been affected by the Supreme Court's decision. The Manager participated in the appeal so that the court would be aware of those Companies, and how they might be impacted by the court's decision. For example, the DeJongs argued that the Applicants should be denied recovery because such recovery would "hurt the innocent investors and defrauded companies ensnared in a fraudster's scheme." But not all of the Schedule C Companies had third party investors. If that argument had been accepted, then further analysis would have been required to determine whether and to what extent that reasoning should have applied to other Schedule C Companies.

23. The Manager's motion for leave to be added as a party or, alternatively, as an intervener is attached as **Appendix "G"**. The Manager described the facts above, and indicated that it would participate in the appeal if the Supreme Court determined that such participation would be helpful or appropriate.

24. By Memorandum of Argument dated March 29, 2019, a copy of which is attached as **Appendix "J"**, the DeJongs vigorously opposed the Manager's motion for leave to intervene. They argued that intervention was neither necessary nor appropriate, asserted that the Manager's role in the proceedings was "DBDC-centric," and argued that the Manager's motion should be dismissed because its participation in the appeal would generate costs to be borne by the DeJongs.

25. In its response to the DeJongs, the Manager re-iterated its willingness to participate in the appeal and corrected certain errors in the DeJongs submissions. The Manager's response is attached as **Appendix "K"**.

26. Notwithstanding the DeJongs' opposition, the Supreme Court of Canada granted the Manager leave to intervene. The Order granting leave is attached as **Appendix "L"**.

27. The Manager reported on its participation in the DeJong's appeal to the Supreme Court of Canada in its Fifty-Sixth Report. A copy of the Fifty-Sixth Report (without appendices) is attached as **Appendix "M"**.

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28. In their current motion materials, the DeJongs raise substantially the same objections to the Manager's participation before the Supreme Court of Canada that they raised in response to the Manager's motion for leave to intervene.

29. For the following reasons, the Manager allocated the fees related to its intervention at the Supreme Court to the Schedule C Properties:

- (a) The appeal concerned whether the Schedule C Companies are liable to the Applicants and the Schedule A Companies (i.e., it did not concern the Schedule B Companies); and
- (b) The Manager intervened in order to describe to the Court the work that it had and had not performed in respect of the Schedule C Companies and to describe the potential impact of the Court's decision on other investors in the Schedule C Companies that were not before the Court.

C. The Criminal Investigation and Trial

30. The Manager and its counsel incurred a total of \$6,549.70 in fees in connection with its cooperation in the criminal investigation of the Waltons and subsequent criminal trial.

31. The DeJongs and Condos assert in their Notice of Motion that they object to fees being allocated to the Subject Companies where such fees relate to "the Manager compiling documentation to support Dr. Bernstein laying criminal charges against the Waltons."

32. This is an example of a fundamental disagreement between the Manager and the moving parties. The moving parties repeatedly allege that the Manager somehow participated in the decision to lay criminal charges against the Waltons, at the behest of the Applications. This did not occur.

a. The Manager's activities relating to the criminal investigation and trial have already been reported to the Court

33. The Manager has previously reported all of its interactions with Toronto Police Services ("TPS") about the criminal investigation. These reports were filed with the court and served on the service list, including the DeJongs and Condos, and were not challenged. Additionally, all of

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the information provided to TPS was publicly available, and all but a few documents were publicly posted on a website maintained by the Manager at <http://www.schonfeldinc.com/walton.html>.

34. The Manager has also reported all of its interactions with TPS and with lawyers from Crown Law Office, Criminal (the “**Crown**”) relating to the criminal proceedings. These reports were filed with the court and served on the service list, including the DeJongs and Condos, and were not challenged.

35. As reported in the Supplement to the Manager’s Fortieth Report dated May 18, 2016, which is attached as **Appendix “N”**, the Manager was contacted by telephone by Detective Ruth Moran on August 5, 2016. Detective Moran explained that a criminal complaint had been made and that TPS had been provided with materials prepared by the Manager and filed publicly in these proceedings. This was the first date on which the Manager had any contact with TPS in relation to the criminal investigation of the Waltons, and the first date on which the Manager became aware of a criminal complaint having been made against the Waltons.

36. The balance of the Manager’s interactions with TPS and the Crown were reported in the Manager’s Supplement to the Fortieth Report dated May 18, 2016 at Appendix B, the Fifty-Second Report dated April 6, 2018 at paragraphs 4-10 (which was filed in response to a motion served by Ms. Walton in an action by Trez Capital Limited Partnership *et al.* against Dr. Bernstein and Ms. Walton *et al.* bearing Court File No. CV-15-11147-00CL), the Fifty-Third Report dated June 19, 2018 at paragraphs 71-73, the Fifty-Sixth Report dated June 25, 2019 at paragraphs 62-65, and the Fifty-Seventh Report dated September 7, 2020 at paragraphs 35-39.

37. Other than Ms. Walton (as described in the Supplement to the Fortieth Report and in the Fifty-Second Report), no party has ever objected to the Manager’s cooperation with TPS and the Crown.

b. The moving parties’ allegations

38. Despite the Manager’s transparent reporting of every interaction with TPS and the Crown, Dr. DeJong swears at paragraph 46 of her affidavit “my counsel advises me of her understanding from the Manager that the charges were initiated by Dr. Bernstein personally upon an information package prepared by the Manager at Dr. Bernstein’s behest.”

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39. At paragraph 48 of his affidavit, Mr. Condos states “my understanding from Norma Walton is that the charges were laid by Dr. Stanley Bernstein personally and an information package prepared by the manager at his behest.” The affidavit does not explain the basis for Ms. Walton’s understanding.

40. Contrary to the statements by Mr. Condos and Dr. DeJong in their affidavits, the Manager did not prepare an information package at the behest of Dr. Bernstein for use in initiating criminal charges against the Waltons. The Manager has never discussed the details of its communications with the TPS with the Applicants, nor has it taken any steps related to the criminal investigation at the direction of the Applicants.

c. The Manager’s interactions with TPS and the Crown were part of its mandate

41. The Manager is of the view that, as an officer of the court, it was obliged to cooperate with the investigation of TPS and the Crown into matters closely related to the Manager’s mandate. The Manager’s testimony in the criminal proceedings related solely to its mandate as inspector and receiver/manager of the companies and properties that are the subject of this proceeding. The associated fees were spread across all of those companies and properties, none of which were any more or less liable for such fees than others. The Manager is not aware of any basis for allocating these fees to all companies other than the Subject Companies.

IV. Conclusion

42. For the foregoing reasons, the Manager respectfully submits that the Fee Reallocation Motion be dismissed to the extent it seeks a reallocation or non-approval of the Manager’s fees and activities.

All of which is respectfully submitted this 29th day of March, 2021.

SCHONFELD INC.

In its capacity as Manager pursuant to the Order of Newbould, J. dated November 5, 2013 and the Judgment and Order of Brown, J. dated August 12, 2014

Per: /s/ Harlan Schonfeld
Harlan Schonfeld, CPA, CIRP

SCHEDULE “A”**COMPANIES**

1. Dr. Bernstein Diet Clinics Ltd.
2. 2272551 Ontario Limited
3. DBDC Investments Atlantic Ltd.
4. DBDC Investments Pape Ltd.
5. DBDC Investments Highway 7 Ltd.
6. DBDC Investments Trent Ltd.
7. DBDC Investments St. Clair Ltd.
8. DBDC Investments Tisdale Ltd.
9. DBDC Investments Leslie Ltd.
10. DBDC Investments Lesliebrook Ltd.
11. DBDC Fraser Properties Ltd.
12. DBDC Fraser Lands Ltd.
13. DBDC Queen’s Corner Ltd.
14. DBDC Queen’s Plate Holdings Inc.
15. DBDC Dupont Developments Ltd.
16. DBDC Red Door Developments Inc.
17. DBDC Red Door Lands Inc.
18. DBDC Global Mills Ltd.
19. DBDC Donalda Developments Ltd.
20. DBDC Salmon River Properties Ltd.
21. DBDC Cityview Lands Ltd.
22. DBDC Weston Lands Ltd.
23. DBDC Double Rose Developments Ltd.
24. DBDC Skyway Holdings Ltd.
25. DBDC West Mall Holdings Ltd.
26. DBDC Royal Gate Holdings Ltd.
27. DBDC Dewhurst Developments Ltd.
28. DBDC Eddystone Place Ltd.
29. DBDC Richmond Row Holdings Ltd.

SCHEDULE “B”**COMPANIES**

1. Twin Dragons Corporation
2. Bannockburn Lands Inc. / Skyline – 1185 Eglinton Avenue Inc.
3. Wynford Professional Centre Ltd.
4. Liberty Village Properties Ltd.
5. Liberty Village Lands Inc.
6. Riverdale Mansion Ltd.
7. Royal Agincourt Corp.
8. Hidden Gem Development Inc.
9. Ascalon Lands Ltd.
10. Tisdale Mews Inc.
11. Lesliebrook Holdings Ltd.
12. Lesliebrook Lands Ltd.
13. Fraser Properties Corp.
14. Fraser Lands Ltd.
15. Queen’s Corner Corp.
16. Northern Dancer Lands Ltd.
17. Dupont Developments Ltd.
18. Red Door Developments Inc. and Red Door Lands Ltd.
19. Global Mills Inc.
20. Donalda Developments Ltd.
21. Salmon River Properties Ltd.
22. Cityview Industrial Ltd.
23. Weston Lands Ltd.
24. Double Rose Developments Ltd.
25. Skyway Holdings Ltd.
26. West Mall Holdings Ltd.
27. Royal Gate Holdings Ltd.
28. Royal Gate Nominee Inc.
29. Royal Gate (Land) Nominee Inc.
30. Dewhurst Development Ltd.

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31. Eddystone Place Inc.
32. Richmond Row Holdings Ltd.
33. El-Ad (1500 Don Mills) Limited
34. 165 Bathurst Inc.

SCHEDULE “C” PROPERTIES

1. 3270 American Drive, Mississauga, Ontario
2. 0 Luttrell Ave., Toronto, Ontario
3. 2 Kelvin Avenue, Toronto, Ontario
4. 346 Jarvis Street, Suites A, B, C, E and F, Toronto, Ontario
5. 1 William Morgan Drive, Toronto, Ontario
6. 324 Prince Edward Drive, Toronto, Ontario
7. 24 Cecil Street, Toronto, Ontario
8. 30 and 30A Hazelton Avenue, Toronto, Ontario
9. 777 St. Clarens Avenue, Toronto, Ontario
10. 252 Carlton Street and 478 Parliament Street, Toronto, Ontario
11. 66 Gerrard Street East, Toronto, Ontario
12. 2454 Bayview Avenue, Toronto, Ontario
13. 319-321 Carlaw, Toronto, Ontario
14. 260 Emerson Ave., Toronto, Ontario
15. 44 Park Lane Circle, Toronto, Ontario
16. 19 Tennis Crescent, Toronto, Ontario
17. 646 Broadview, Toronto, Ontario

A

September 24, 2019

VIA E-MAIL (fisher@simpsonwiggles.com)

Rosemary A. Fisher
Simpson Wigle LAW LLP
1006 Skyview Drive, Suite 103
Burlington, Ontario L7P 0V1

Dear Ms. Fisher:

**Re: DBDC Spadina Ltd. *et al.* v. Norma Walton, *et al.*
CV-13-10280-00CL**

We write in response to your letters dated July 29 and 30, 2019 and delivered to us on September 9, 2019.

The Manager has reviewed your clients' offers to settle their potential challenge to the Manager's allocation of certain professional fees, but is not in a position to deal with the type of offer you have proposed. Prior to its fee approval motions, the Manager carefully considered the fee allocation, and then recommended to the Court the allocation that it believed is the most fair and reasonable in the circumstances. As set out in our prior letter to you dated July 22, 2019, if the Manager erred in its allocation assessment or failed to consider important facts, it is open to recommending a reallocation. We also invited you in that letter to provide a reallocation that could be provided to stakeholders that would bear the cost of it.

Your most recent letters provide neither new facts that were not considered by the Manager, nor a proposed reallocation. In effect, your clients' proposal consists of shifting costs from your clients to the Applicants. The type of settlement proposed should be directed to the Applicants' counsel, who has been copied on this correspondence. The Manager is certainly prepared to consider an alternate allocation negotiated between the parties with a financial interest in order to avoid the costs associated with a dispute, but it is not in a position to negotiate such a compromise.

Separately, we wish to address certain of the factual inaccuracies in your letters of July 29 and 30, 2019. In your letter dated July 29, 2019, you assert your understanding "that the Manager prepared the materials to institute the request for charges rather than being requested to cooperate with the police services subsequent to charges being laid." As has been reported to the Court in response to similar allegations made by Ms. Walton, this is simply not true.

The Manager has reported all of its activities relating to the criminal investigation and proceedings to the Court and you have been served with all of the Manager's reports. We encourage you to review the Supplement to the 40th Report, the 44th Report, the 52nd Report, the 53rd Report and the 56th Report.

I trust that any suggestion that the Manager misled stakeholders or the Court was unintentional and will not be repeated.

We disagree with many of the other assertions made in your letters, but I do not believe that our position on these matters needs to be repeated here. We have each expressed our client's position on the phone, and in correspondence. Further debate of these matters does not appear likely to be fruitful. As the Manager is nearing the completion of its mandate, please let us know as soon as possible whether and when you intend to serve a motion to challenge the Manager's fee allocation.

Yours truly,

Goodmans LLP



for Mark Dunn

cc: Shara Roy, Lenczner Slaght Royce Smith Griffin LLP
Carlie Fox, Goodmans LLP

B

From: [Fox, Carlie](#)
To: ["Rosemary A. Fisher"](#)
Cc: [Tanisha Hinds](#); [Tracey Hepburn](#); [Dunn, Mark](#)
Subject: RE: DUNN FOX 3
Date: Monday, June 1, 2020 1:01:22 PM
Attachments: [200601 Fee Allocation Analysis \(requested by R. Fisher\) - Summary.pdf](#)
[200601 Fee Allocation Analysis \(requested by R. Fisher\) - Schonfeld Dockets.pdf](#)
[200601 Fee Allocation Analysis \(requested by R. Fisher\) - Goodmans Dockets.pdf](#)

Rosemary,

Based on our review of the Manager's fees and those of its counsel, the total fees allocated to Cecil Lighthouse, Emerson, Prince Edward, St. Clarens and United Empire related to the Manager's motion heard June 28, 2018, the application to and subsequent attendance at the Supreme Court of Canada, and the criminal investigation and subsequent criminal trial of Norma and Ronauld Walton total \$50,927.05. The attached PDFs show a summary of the fees allocated to each property, and the detailed docket entries and corresponding amounts allocated to the Schedule C properties in question.

Let us know if you have questions.

Carlie

Carlie Fox

Goodmans LLP

416.849.6907

cfox@goodmans.ca

Bay Adelaide Centre
 333 Bay Street, Suite 3400
 Toronto, ON M5H 2S7
goodmans.ca

From: Rosemary A. Fisher <FisherR@simpsonwagle.com>
Sent: Tuesday, May 12, 2020 8:59 AM
To: Dunn, Mark <mdunn@goodmans.ca>; Fox, Carlie <cfox@goodmans.ca>
Cc: Tanisha Hinds <Hindst@simpsonwagle.com>; Tracey Hepburn <thepburn@simpsonwagle.com>
Subject: RE: DUNN FOX 3

Hello Mark, thank you for your email and trust you are also well. I look forward to an understanding of how much is claimed from the proceeds of the properties of the DeJongs and the Condos. Can you, in the first instance, let me know the total number for each relevant property to ensure I am properly capturing what is referenced in your reports – I have tried to do that myself but am not sure if I have done it correctly. Then it can be further clarified by a break -down (roughly) as between the motion, the SCC and the criminal investigation.

In respect of getting the matter heard, my clients would like to see those numbers first. There are two distinct issues: the validity of the shares and the apportionment of fees. It is possible that the latter issue can be resolved through discussion with Dr. Bernstein's counsel. My clients would like to be in a position to try that first before trying to schedule the matter given that it will be challenging

and potentially prejudicial to do this by video conference.
To that end, I look forward to hearing from you
Regards,
Rosemary

From: Dunn, Mark <mdunn@goodmans.ca>
Sent: Wednesday, May 6, 2020 10:13 AM
To: Rosemary A. Fisher <FisherR@simpsonwigle.com>; Fox, Carlie <cfox@goodmans.ca>
Cc: Tanisha Hinds <Hindst@simpsonwigle.com>; Tracey Hepburn <thehepburn@simpsonwigle.com>
Subject: RE: DUNN FOX 3

Rosemary,

I hope you are well.

We do not have the specific fee break-out that you are requesting in your letter, but I have asked our client to look into the matter.

In the meantime, am I safe to assume that your clients do not object to us writing to the court to inquire whether it is prepared to hear the matter?

**** Attention ****

This communication is intended solely for the named addressee(s) and may contain information that is privileged, confidential, protected or otherwise exempt from disclosure. No waiver of confidence, privilege, protection or otherwise is made. If you are not the intended recipient of this communication, or wish to unsubscribe, please advise us immediately at privacyofficer@goodmans.ca and delete this email without reading, copying or forwarding it to anyone. Goodmans LLP, 333 Bay Street, Suite 3400, Toronto, ON, M5H 2S7, www.goodmans.ca. You may unsubscribe to certain communications by clicking [here](#).

From: Rosemary A. Fisher <FisherR@simpsonwigle.com>
Sent: Monday, May 4, 2020 5:33 PM
To: Dunn, Mark <mdunn@goodmans.ca>; Fox, Carlie <cfox@goodmans.ca>
Cc: Tanisha Hinds <Hindst@simpsonwigle.com>; Tracey Hepburn <thehepburn@simpsonwigle.com>
Subject: DUNN FOX 3

Hello and hope you are well. Please see attached.
Regards,
Rosemary

Professional Fees Allocated to
 Cecil Lighthouse, Emerson Development, Prince Edward Properties, St. Clarens Holdings and United Empire Lands
 related to Proposed Schedule C Distribution, Criminal Trial and Supreme Court

GOODMANS LLP

Order Date	Period Covered	Cecil Lighthouse	Emerson	Prince Edward	St. Clarens	United Empire	TOTAL
July 27, 2018	September 1, 2017 to May 31, 2018	370.51	370.51	370.51	370.51	370.51	
January 28, 2019	June 1, 2018 to December 31, 2018	1,633.31	1,331.56	1,331.56	1,331.56	1,331.56	
July 3, 2019	January 1, 2019 to May 31, 2019	5,269.92	5,269.92	5,269.92	5,269.92	5,269.92	
PENDING	June 1, 2019 to December 31, 2019	35.17	15.22	15.22	15.22	35.17	
		7,308.91	6,987.21	6,987.21	6,987.21	7,007.16	35,277.70
	HST	950.16	908.34	908.34	908.34	910.93	4,586.11
		8,259.07	7,895.55	7,895.55	7,895.55	7,918.09	39,863.81

SCHONFELD INC.

July 27, 2018	September 1, 2017 to May 31, 2018	153.76	153.76	153.76	153.76	153.76	
January 28, 2019	June 1, 2018 to December 31, 2018	70.83	70.83	70.83	70.83	70.83	
July 3, 2019	January 1, 2019 to May 31, 2019	454.75	2,029.76	2,029.76	2,029.76	1,804.76	
PENDING	June 1, 2019 to December 31, 2019	63.75	63.75	63.75	63.75	63.75	
		743.09	2,318.10	2,318.10	2,318.10	2,093.10	9,790.49
	HST	96.60	301.35	301.35	301.35	272.10	1,272.75
		839.69	2,619.45	2,619.45	2,619.45	2,365.20	11,063.24

GRAND TOTAL (including HST)		9,098.76	10,515.00	10,515.00	10,515.00	10,283.29	50,927.05
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<u>Manager's Allocation</u>								
DATE	DESCRIPTION	(hh/mm)	%	CEC	EME	PEP	SCL	UEL
JAMES MERRYWEATHER, CPA, CGA								
30-Sep-17		0.0		0.00	0.00	0.00	0.00	0.00
31-Oct-17		0.0		0.00	0.00	0.00	0.00	0.00
30-Nov-17		0.0		0.00	0.00	0.00	0.00	0.00
31-Dec-17		0.0		0.00	0.00	0.00	0.00	0.00
23-Jan-18	conf call w HS, counsel	0.5	100%	7.76	7.76	7.76	7.76	7.76
24-Jan-18	review draft financials, prepare AJE; file GST returns (Sch B); tc w HS, G Moulton	1.5	67%	5.17	5.17	5.17	5.17	5.17
30-Jan-18	tc w counsel re COA decision; prepare analysis of payment scenarios; transfer funds, GST efunds, related accounting	3.0	83%	91.69	91.69	91.69	91.69	91.69
		5.0		104.62	104.62	104.62	104.62	104.62
28-Feb-18		0.0		0.00	0.00	0.00	0.00	0.00
31-Mar-18		0.0		0.00	0.00	0.00	0.00	0.00
30-Apr-18		0.0		0.00	0.00	0.00	0.00	0.00
30-May-18	review draft Court report, provide comments; update distribution analysis	2.0	25%	7.76	7.76	7.76	7.76	7.76
		2.0		7.76	7.76	7.76	7.76	7.76
S. HARLAN SCHONFELD, CPA, CA CIRP								
30-Sep-17		0.0		0.00	0.00	0.00	0.00	0.00
31-Oct-17		0.0		0.00	0.00	0.00	0.00	0.00

30-Nov-17							
		0.0		0.00	0.00	0.00	0.00
31-Dec-17							
		0.0		0.00	0.00	0.00	0.00
Jan 23-18	mtg w/counsel, G Moulton, J Merryweather	1.0	100%	20.69	20.69	20.69	20.69
Jan 24-18	conf call w/Moulton, Merryweather , R Moran	1.0	100%	20.69	20.69	20.69	20.69
		2.0		41.38	41.38	41.38	41.38
28-Feb-18							
		0.0		0.00	0.00	0.00	0.00
31-Mar-18							
		0.0		0.00	0.00	0.00	0.00
30-Apr-18							
		0.0		0.00	0.00	0.00	0.00
31-May-18							
		0.0		0.00	0.00	0.00	0.00
GRAND TOTAL				153.76	153.76	153.76	153.76
JAMES MERRYWEATHER, CPA, CGA							
27-Jun-18	tc w counsel; revise fee analysis; review draft	0.5	33%	8.33	8.33	8.33	8.33
		0.5		8.33	8.33	8.33	8.33
31-Jul-18							
		0.0		0.00	0.00	0.00	0.00
23-Aug-18	review material from claimant; update proposed distribution schedule; tc w counsel; review, amend Court report, sign and return same; investing in GIC, accounting	3.0	25%	37.50	37.50	37.50	37.50
24-Aug-18	update fee analysis; review Court docs	1.0	50%	25.00	25.00	25.00	25.00
		4.0		62.50	62.50	62.50	62.50
30-Sep-18							
		0.0		0.00	0.00	0.00	0.00
31-Oct-18							
		0.0		0.00	0.00	0.00	0.00
30-Nov-18							
		0.0		0.00	0.00	0.00	0.00
31-Dec-18							

		0.0	0.00	0.00	0.00	0.00	0.00
S. HARLAN SCHONFELD, CPA, CA CIRP							
30-Jun-18							
		0.0	0.00	0.00	0.00	0.00	0.00
31-Jul-18							
		0.0	0.00	0.00	0.00	0.00	0.00
31-Aug-18							
		0.0	0.00	0.00	0.00	0.00	0.00
30-Sep-18							
		0.0	0.00	0.00	0.00	0.00	0.00
31-Oct-18							
		0.0	0.00	0.00	0.00	0.00	0.00
30-Nov-18	N/A						
		0.0	0.00	0.00	0.00	0.00	0.00
31-Dec-18	N/A						
		0.0	0.00	0.00	0.00	0.00	0.00
TOTAL			70.83	70.83	70.83	70.83	70.83

JAMES MERRYWEATHER, CPA, CGA

7-Jan-19	review banking, update cashflow; review draft Court report, provide comments and analysis; prepare fee schedule	2.0	20%	6.00	6.00	6.00	6.00	6.00
		2.0		6.00	6.00	6.00	6.00	6.00
28-Feb-19								
		0.0		0.00	0.00	0.00	0.00	0.00
18-Mar-19	review banking, update cashflow; prepare detailed accounting analysis, draft T2s (Sch B); review Dejong SCOC Factum, tc w counsel	4.0	38%	0.00	168.75	168.75	168.75	168.75
21-Mar-19	prepare detailed accounting analysis, draft T2s (Sch B); review and comments re SCOC affidavit, financial review	3.5	71%	0.00	281.25	281.25	281.25	281.25
		7.5		0.00	450.00	450.00	450.00	450.00
1-Apr-19	review banking, update cashflow; GIC investing; prepare month-end accounting; process AP; prepare and file GST returns	5.0	15%	0.00	84.38	84.38	84.38	84.38

8-Apr-19	review banking, update cashflow; process AP; review legal letter, tc w counsel	1.0	25%	0.00	28.13	28.13	28.13	28.13
17-Apr-19	review banking, update cashflow; tc w counsel, HS; update fee allocation analysis;	1.5	33%	0.00	56.25	56.25	56.25	56.25
30-Apr-19	review draft factum, research same, provide comments; corr w counsel; review and approve amended factum	1.5	100%	0.00	168.75	168.75	168.75	168.75
		9.0		0.00	337.51	337.51	337.51	337.51
1-May-19	review banking, update cashflow; prepare monthly accounting; conf call w HS, Det.	3.0	17%	7.50	7.50	7.50	7.50	7.50
3-May-19	update mortgage analysis, send to Crown; review documents	2.5	20%	7.50	7.50	7.50	7.50	7.50
6-May-19	update and review distribution schedule; corr w Crown; corr w counsel; review docs for counsel request	1.0	50%	7.50	7.50	7.50	7.50	7.50
9-May-19	review documents to prepare for SCC and trial; tc w C Power	4.5	100%	67.50	67.50	67.50	67.50	67.50
13-May-19	review banking, update cashflow; GIC redemption and accounting; process AP;	3.0	75%	33.75	33.75	33.75	33.75	33.75
14-May-19	review documents to prepare for SCC and trial attend at Supreme Court; review docs	3.0	100%	0.00	337.50	337.50	337.50	337.50
20-May-19	review documents to prepare for trial; tc w C	3.0	100%	45.00	45.00	45.00	45.00	45.00
21-May-19	review banking, update cashflow; dealing w GIC renewals; review SCC judgment; mtg. w counsel; review documents to prepare for trial	3.5	86%	45.00	45.00	45.00	45.00	45.00
22-May-19	attend trial and testify at same	5.0	100%	75.00	75.00	75.00	75.00	75.00
		28.5		288.75	626.25	626.25	626.25	626.25

S. HARLAN SCHONFELD, CPA, CA CIRP

31-Jan-19	No hours	0.0		0.00	0.00	0.00	0.00	0.00
28-Feb-19	No hours	0.0		0.00	0.00	0.00	0.00	0.00
21-Mar-19	review SCOC materials, corr w counsel, sign	2.0	100%	40.00	40.00	40.00	40.00	40.00
22-Mar-19	review Dejong factum	1.5	100%	0.00	225.00	225.00	225.00	0.00
31-Mar-19		3.5		40.00	265.00	265.00	265.00	40.00

8-Apr-19	review legal letter and discuss	0.5	100%	0.00	75.00	75.00	75.00	75.00
30-Apr-19	review draft factum, provide comments; corr w counsel; review and approve amended	1.0	100%	0.00	150.00	150.00	150.00	150.00
30-Apr-19		1.5		0.00	225.00	225.00	225.00	225.00
May 22-19	review Inspector reports - prepare as witness	3.0	100%	60.00	60.00	60.00	60.00	60.00
May 23-19	continue to review reports and other docuemnts to prepare as witness	3.0	100%	60.00	60.00	60.00	60.00	60.00
31-May-19		6.0		120.00	120.00	120.00	120.00	120.00
TOTAL				454.75	2,029.76	2,029.76	2,029.76	1,804.76

JAMES MERRYWEATHER, CPA, CGA

30-Jun-19		0.0		0.00	0.00	0.00	0.00	0.00
31-Jul-19		0.0		0.00	0.00	0.00	0.00	0.00
12-Aug-19	review banking, update cashflow; process AP; GIC maturities, renewals and accounting; tc w claimant; review docs from C Power, provide Orders and comments	3.0	42%	18.75	18.75	18.75	18.75	18.75
20-Aug-19	review proofs of claim; corr w Meridian; prepare letter and cheque re Dejong distribution, courier same; GIC redemption;	3.0	17%	45.00	45.00	45.00	45.00	45.00
31-Aug-19		6.0		63.75	63.75	63.75	63.75	63.75
30-Sep-19		0.0		0.00	0.00	0.00	0.00	0.00
31-Oct-19		0.0		0.00	0.00	0.00	0.00	0.00
30-Nov-19		0.0		0.00	0.00	0.00	0.00	0.00
31-Dec-19		0.0		0.00	0.00	0.00	0.00	0.00

S. HARLAN SCHONFELD, CPA, CA CIRP

30-Jun-19		0.0		0.00	0.00	0.00	0.00	0.00
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31-Jul-19	0.0	0.00	0.00	0.00	0.00	0.00
31-Aug-19	0.0	0.00	0.00	0.00	0.00	0.00
30-Sep-19	0.0	0.00	0.00	0.00	0.00	0.00
31-Oct-19	0.0	0.00	0.00	0.00	0.00	0.00
30-Nov-19	-	0.00	0.00	0.00	0.00	0.00
31-Dec-19	-	0.00	0.00	0.00	0.00	0.00
TOTAL		63.75	63.75	63.75	63.75	63.75
GRAND TOTAL		743.09	2,318.10	2,318.10	2,318.10	2,093.10

Goodmans LLP

Dockets Summary of Matter No. 140074 re: Manager

Bill Period: September 2017 to March 2020

Date Worked	TK Name	Hours	Bill Value	Narratives	CEC	EME	PEP	SCL	UEL
1/23/2018	Carlie Fox	1.4	707.00	Attending meeting with H. Schonfeld, G. Moulton, B. Empey and M. Dunn re: subpoena to testify in R. v. Walton.	24.38	24.38	24.38	24.38	24.38
1/23/2018	Brian F. Empey	0.3	280.50	Discussion with H. Schonfeld, G. Moulton, M. Dunn re: subpoenas for evidence in criminal prosecution of N. Walton.	9.67	9.67	9.67	9.67	9.67
1/25/2018	Mark Dunn	2.5	1,775.00	material re: potential Schedule "C" distributions; call with J. Merryweather.	44.38	44.38	44.38	44.38	44.38
1/26/2018	Mark Dunn	1.5	1,065.00	Reviewing and summarizing court of appeal decision; revising and updating motion material for Schedule "C" distributions.	26.63	26.63	26.63	26.63	26.63
1/29/2018	Mark Dunn	2.2	1,562.00	Reviewing Court of Appeal decision; reviewing motion material re: Schedule "C" distribution and considering implications of decision; updating Schedule "C" distribution motion material.	78.10	78.10	78.10	78.10	78.10
1/30/2018	Mark Dunn	1.0	710.00	Reviewing jurisprudence re: joint and severable liability in insolvency; call with J. Merryweather re: Schedule "C" distributions; reviewing chart re: same.	17.75	17.75	17.75	17.75	17.75
3/1/2018	Mark Dunn	3.7	2,627.00	Drafting factum for March 2, 2018 motion; drafting report re: Schedule "C" distributions and other issues.	0.00	0.00	0.00	0.00	0.00
3/6/2018	Mark Dunn	0.8	568.00	Drafting report re: Schedule "C" distributions and other matters.	14.20	14.20	14.20	14.20	14.20
3/8/2018	Mark Dunn	1.3	923.00	Reviewing motion material and drafting order; drafting report re: Schedule "C" distributions; discussions with C. Fox re: same.	23.08	23.08	23.08	23.08	23.08
3/19/2018	Mark Dunn	1.3	923.00	material relevant to same; revising motion material re: police; call with S. Roy re: stay motion.	31.83	31.83	31.83	31.83	31.83
3/19/2018	Carlie Fox	0.1	50.50	emailing M. Dunn re: same; emailing P. Chand and H. Cohen re: varying distribution order.	1.74	1.74	1.74	1.74	1.74
3/20/2018	Mark Dunn	0.3	213.00	Reviewing report re: police interactions; emails with client.	7.34	7.34	7.34	7.34	7.34
3/22/2018	Carlie Fox	0.1	50.50	Reviewing DeJongs notice of leave to appeal to the SCC.	1.74	1.74	1.74	1.74	1.74
3/24/2018	Carlie Fox	0.6	303.00	Attending call with D. Glatt; drafting report of the Manager re: involvement in TPS investigation.	10.45	10.45	10.45	10.45	10.45

Goodmans LLP

Dockets Summary of Matter No. 140074 re: Manager

Bill Period: September 2017 to March 2020

Date Worked	TK Name	Hours	Bill Value	Narratives	CEC	EME	PEP	SCL	UEL
3/26/2018	Carlie Fox	1.8	909.00	Calling J. Parise re: availability for 9:30 appointment; correspondence with J. Merryweather; reviewing and revising hearing request form and compiling attachments to same; attending call with C. Yung re: CourtCall; preparing materials for hearing; correspondence with D. Michaud; drafting report re: involvement in TPS investigation; reviewing rules of civil procedure re: leave to intervene in Trez Action; emailing M. Dunn re: same.	31.34	31.34	31.34	31.34	31.34
3/22/2018	Mark Dunn	0.6	426.00	Receiving and reviewing application for leave to supreme court. E-mails with client re same.	14.69	14.69	14.69	14.69	14.69
4/6/2018	Mark Dunn	1.0	710.00	reviewing motion material; correspondence with H. Cohen re: adjournment request.	24.48	24.48	24.48	24.48	24.48
4/6/2018	Carlie Fox	0.5	252.50	Reviewing and revising 52nd report of the manager re: involvement in police investigation; coordinating service and filing of same.	8.71	8.71	8.71	8.71	8.71
5/23/2018	Mark Dunn	3.4	2,414.00	Drafting 53rd report re: Cecil distribution, schedule C distribution and other matters; reviewing documents relevant to same.	311.18	9.43	9.43	9.43	9.43
5/29/2018	Mark Dunn	3.8	2,698.00	revising schedule C distribution paragraphs in report; reviewing fee approval affidavits.	28.10	28.10	28.10	28.10	28.10
6/4/2018	Mark Dunn	1.0	710.00	Revising 53rd report per J. Merryweather; drafting notice of motion; compiling exhibits; revising per further comments.	5.55	5.55	5.55	5.55	5.55
6/6/2018	Mark Dunn	1.5	1,065.00	Reviewing and revising 53rd report per comments from J. Merryweather; drafting notice of motion; compiling appendices; finalizing affidavits for H. Schonfeld and J. Merryweather.	8.32	8.32	8.32	8.32	8.32
6/19/2018	Mark Dunn	1.8	1,278.00	Revising 53rd report per client comments; call with S. Roy; call with J. Merryweather; further revisions to 53rd report; emails with S. Roy.	9.98	9.98	9.98	9.98	9.98
6/25/2018	Mark Dunn	1.0	710.00	Emails with R. Fisher re: motion; drafting motion material; email with J. Merryweather re: costs borne by certain properties.	78.89	78.89	78.89	78.89	78.89

Goodmans LLP

Dockets Summary of Matter No. 140074 re: Manager

Bill Period: September 2017 to March 2020

Date Worked	TK Name	Hours	Bill Value	Narratives	CEC	EME	PEP	SCL	UEL
6/27/2018	Mark Dunn	1.8	1,278.00	Telephone conference with R. Fisher re: motion; revising draft order per comments from R. Fisher; telephone calls with S. Roy and J. Merryweather re: motion; drafting Notice of Motion.	106.50	106.50	106.50	106.50	106.50
6/28/2018	Mark Dunn	1.5	1,065.00	Preparing for and attending motion for fee approval and other matters.	8.32	8.32	8.32	8.32	8.32
8/22/2018	Carlie Fox	1.1	555.50	Coordinating attendance by Omega to ensure materials related to the 53rd report are provided to the judge hearing August 24 motion; drafting order re: contingent authority to distribute Schedule "C" funds; drafting letter to Commercial List re: motion returnable August 24; emailing M. Dunn re: same.	20.57	20.57	20.57	20.57	20.57
8/24/2018	Mark Dunn	3.5	2,485.00	Preparing for and attending hearing of Managers motion re: contingent authorization to distribute funds and Bernstein motion for discharge re: Fraser property.	69.03	69.03	69.03	69.03	69.03
8/24/2018	Carlie Fox	3.0	1,515.00	Revising draft order re: contingent authority to distribute Schedule "C" funds; attending at Commercial List for motion re: same and re: discharge in respect of Fraser; emailing J. Merryweather re: same.	42.08	42.08	42.08	42.08	42.08
8/29/2018	Carlie Fox	0.3	151.50	Emailing service list re: entered orders in respect of relief sought in the 53rd and 54th reports; emailing J. Merryweather re: same; attending call with J. Merryweather.	0.08	0.08	0.08	0.08	0.08
10/12/2018	Carlie Fox	0.5	252.50	Attending call with C. Yung re: Jarvis settlement with 781 Ontario; meeting with M. Dunn re: same; reviewing order authorizing	14.03	14.03	14.03	14.03	14.03
11/19/2018	Carlie Fox	0.8	404.00	Reviewing letter from H. Cohen re: application to stay criminal proceedings; meeting with M. Dunn re: same; emailing H. Schonfeld and J. Merryweather re: same; meeting with M. Dunn and A. Murray re: seeking leave to intervene at the SCC; reviewing Rules of the Supreme Court re: same.	44.89	44.89	44.89	44.89	44.89
11/19/2018	Alexandra Mu	1.0	310.00	Meeting with C. Fox and M. Dunn re: research on test for leave to intervene at the Supreme Court of Canada.	34.44	34.44	34.44	34.44	34.44
11/19/2018	Mark Dunn	0.4	284.00	Call with J. Merryweather re: SCC and next steps.	31.56	31.56	31.56	31.56	31.56

Goodmans LLP

Dockets Summary of Matter No. 140074 re: Manager

Bill Period: September 2017 to March 2020

Date Worked	TK Name	Hours	Bill Value	Narratives	CEC	EME	PEP	SCL	UEL
11/20/2018	Mark Dunn	0.5	355.00	reviewing rules re: Supreme Court intervention; discussions with C. Fox re: same.	25.64	25.64	25.64	25.64	25.64
11/20/2018	Alexandra Mu	3.2	992.00	Researching the law and procedure re: leave to intervene at the Supreme Court of Canada.	110.22	110.22	110.22	110.22	110.22
11/20/2018	Carlie Fox	1.4	707.00	relevant to subpoena to witness in criminal proceedings; drafting letter to H. Cohen re: same; reviewing jurisprudence re: standard for calling counsel as witness.	23.57	23.57	23.57	23.57	23.57
11/21/2018	Alexandra Mu	0.3	93.00	Researching case law and commentary on the test and procedure for leave to intervene at the Supreme Court of Canada.	10.33	10.33	10.33	10.33	10.33
11/21/2018	Mark Dunn	0.5	355.00	Reviewing material re: Supreme Court intervention.	39.44	39.44	39.44	39.44	39.44
11/22/2018	Mark Dunn	0.8	568.00	Call with A. Faith re: subpoena and related issues; reviewing and revising letter to A. Faith re: motion.	18.93	18.93	18.93	18.93	18.93
11/22/2018	Carlie Fox	0.8	404.00	Supreme Court; attending call with S. Fenton and M. Dunn; drafting letter to H. Cohen.	29.18	29.18	29.18	29.18	29.18
11/23/2018	Alexandra Mu	0.7	217.00	Canada.	24.11	24.11	24.11	24.11	24.11
11/25/2018	Carlie Fox	0.1	50.50	Reviewing correspondence from A. Faith re: potential motion to quash subpoena; emailing M. Dunn re: same.	1.68	1.68	1.68	1.68	1.68
11/26/2018	Alexandra Mu	1.0	310.00	Canada.	34.44	34.44	34.44	34.44	34.44
11/28/2018	Alexandra Mu	0.6	186.00	Researching Supreme Court of Canada records request; teleconference with C. Fox to discuss.	20.67	20.67	20.67	20.67	20.67
11/26/2018	Mark Dunn	0.5	355.00	Finalizing and sending letter to H. Cohen; emails with A. Faith; reviewing material re: Supreme Court intervention; emails with A. Murray re: same.	25.64	25.64	25.64	25.64	25.64
11/29/2018	Mark Dunn	0.7	497.00	Faith.	35.89	35.89	35.89	35.89	35.89
11/30/2018	Alexandra Mu	0.5	155.00	Canada Registrar for a precedent motion book re: application for leave to intervene.	17.22	17.22	17.22	17.22	17.22
11/30/2018	Carlie Fox	2.7	1,363.50	process application in criminal proceedings; drafting 55th report of the Manager.	13.64	13.64	13.64	13.64	13.64
12/3/2018	Carlie Fox	3.6	1,818.00	letter from H. Cohen; correspondence with Supreme Court re: ordering copies of filed materials; reviewing EYs motion for leave to intervene at the Supreme Court in its capacity as Monitor; emailing M. Dunn and A. Murray re: same; Service. emailing A. Faith re: Managers reports detailing involvement with Toronto	79.90	79.90	79.90	79.90	79.90

Goodmans LLP

Dockets Summary of Matter No. 140074 re: Manager

Bill Period: September 2017 to March 2020

Date Worked	TK Name	Hours	Bill Value	Narratives	CEC	EME	PEP	SCL	UEL
12/4/2018	Alexandra Mu	0.9	279.00	intervene.	31.00	31.00	31.00	31.00	31.00
12/4/2018	Carlie Fox	3.0	1,515.00	allocating dockets for fee allocation; drafting timeline of events relating to the Waltons allegations against the Manager re: police investigation.	15.15	15.15	15.15	15.15	15.15
12/4/2018	Mark Dunn	0.5	355.00	Reviewing letter from H. Cohen; calls with A. Faith and C. Fox.	11.83	11.83	11.83	11.83	11.83
12/5/2018	Mark Dunn	1.3	923.00	Review documents re: police investigation and reporting to court, meeting with A Faith, C Fox re: quashing subpoena.	30.77	30.77	30.77	30.77	30.77
12/5/2018	Alexandra Mu	2.6	806.00	intervene.	89.56	89.56	89.56	89.56	89.56
12/5/2018	Carlie Fox	3.0	1,515.00	Reviewing Waltons abuse of process application; emailing A. Faith and B. Kirkham re: same; meeting with A. Faith, B. Kirkham and M. Dunn re: case conference re: subpoena.	50.50	50.50	50.50	50.50	50.50
12/6/2018	Carlie Fox	1.8	909.00	Reviewing research re: cases in which monitors are included in SCC style of cause; attending call with J. Merryweather; reviewing correspondence re: conference in criminal proceedings.	65.65	65.65	65.65	65.65	65.65
12/9/2018	Carlie Fox	0.1	50.50	Reviewing letter from J. Parise re: witnesses for abuse of process application; correspondence from A. Faith re: same.	1.68	1.68	1.68	1.68	1.68
12/10/2018	Mark Dunn	0.2	142.00	Emails with A Faith and client re subpoena.	4.73	4.73	4.73	4.73	4.73
12/12/2018	Carlie Fox	0.5	252.50	Attending call with B. Kirkham re: appointment orders; reviewing same; emailing B. Kirkham re: same.	8.42	8.42	8.42	8.42	8.42
1/2/2019	Carlie Fox	0.3	171.00	Correspondence with J. Merryweather re: 55th report; meeting with M. Dunn re: same; emailing A. Faith.	1.14	1.14	1.14	1.14	1.14
1/7/2019	Carlie Fox	2.0	1,140.00	Reviewing and revising 55th report of the Manager; emailing J. Merryweather re: same; attending call with J. Merryweather re: same and re: application for leave to intervene; revising fee affidavit of H. Schonfeld and compiling exhibits to same; emailing H. Schonfeld re: same; emailing J. Parise re: relief to be sought by Manager at motion returnable January 28, 2019.	7.60	7.60	7.60	7.60	7.60
3/15/2019	Carlie Fox	0.2	114.00	Emailing with M. Dunn re: leave to intervene; reviewing legal research re: same.	12.67	12.67	12.67	12.67	12.67

Goodmans LLP

Dockets Summary of Matter No. 140074 re: Manager

Bill Period: September 2017 to March 2020

Date Worked	TK Name	Hours	Bill Value	Narratives	CEC	EME	PEP	SCL	UEL
3/18/2019	Carlie Fox	2.7	1,539.00	Dunn, S. Roy and M. Robins re: same; attending call with J. Merryweather re: same; meeting with P. Kolla re: materials and agent for motion for leave to be added as a party; drafting motion materials.	171.00	171.00	171.00	171.00	171.00
3/18/2019	Mark Dunn	4.6	3,450.00	Merryweather; drafting notice of motion re: leave to be added as a party.	383.33	383.33	383.33	383.33	383.33
3/18/2019	Peter Kolla	0.3	228.00	Telephone call with C. Fox re: SCC procedure and potential next steps in appeal and providing SCC agent information.	25.33	25.33	25.33	25.33	25.33
3/19/2019	Samanthea Sa	1.9	589.00	Conducting legal research re: motion to be added as respondent party on SCC appeal.	65.44	65.44	65.44	65.44	65.44
3/19/2019	Peter Kolla	0.3	228.00	providing information.	25.33	25.33	25.33	25.33	25.33
3/19/2019	Carlie Fox	3.4	1,938.00	Rose re: same; meeting with M. Dunn and P. Kolla; drafting Notice of Motion to be added as respondent party; reviewing and revising of H. Schonfeld re: same.	215.33	215.33	215.33	215.33	215.33
3/19/2019	Mark Dunn	2.5	1,875.00	Supreme Court.	208.33	208.33	208.33	208.33	208.33
3/20/2019	Carlie Fox	5.5	3,135.00	party in SCC appeal; emailing C. Bauman; correspondence with Norton Rose; drafting memorandum of argument; attending call with C. Bauman and M. Dunn.	348.33	348.33	348.33	348.33	348.33
3/21/2019	Carlie Fox	8.8	5,016.00	comments from J. Merryweather to notice of motion and affidavit; reviewing legal research re: status of monitors in SCC proceedings; emailing M. Dunn re: same; correspondence with S. Samuels re: same; reviewing and revising memorandum of law, notice of motion and affidavit; drafting draft order; emailing C. Bauman; attending call with C. Bauman; preparing record; preparing Forms 14 and 23; receiving and reviewing motion to intervene.	557.33	557.33	557.33	557.33	557.33
3/21/2019	Mark Dunn	3.5	2,625.00	discussions with C. Fox and client re: same; reviewing relevant jurisprudence.	291.67	291.67	291.67	291.67	291.67
3/21/2019	Samanthea Sa	1.2	372.00	Conducting legal research re: motion to be added as respondent party on SCC appeal.	41.33	41.33	41.33	41.33	41.33
3/22/2019	Carlie Fox	1.4	798.00	Correspondence with J. Bell and C. Bauman re: SCC materials service and filing; finalizing materials for SCC.	88.67	88.67	88.67	88.67	88.67
3/26/2019	Carlie Fox	0.1	57.00	Correspondence with J. Bell; reviewing filed copies of Supreme Court materials.	6.33	6.33	6.33	6.33	6.33

Goodmans LLP

Dockets Summary of Matter No. 140074 re: Manager

Bill Period: September 2017 to March 2020

Date Worked	TK Name	Hours	Bill Value	Narratives	CEC	EME	PEP	SCL	UEL
3/20/2019	Mark Dunn	0.5	375.00	Reviewing and revising motion material re: Supreme Court attendance; discussions with C. Fox re: same; reviewing relevant jurisprudence.	41.67	41.67	41.67	41.67	41.67
3/29/2019	Carlie Fox	0.3	171.00	Reviewing letter from J. Opolosky to SCC re: Canadian Chamber of Commerces motion for leave to intervene; reviewing letter from S. Roy to SCC re: Managers motion to be added as party.	19.00	19.00	19.00	19.00	19.00
3/30/2019	Carlie Fox	0.2	114.00	motion for leave to intervene; emailing J. Bell re: payment for Managers motion.	12.67	12.67	12.67	12.67	12.67
4/1/2019	Carlie Fox	0.6	342.00	SCC appeal; reviewing correspondence from J. Merryweather re: same.	38.00	38.00	38.00	38.00	38.00
4/2/2019	Carlie Fox	0.5	285.00	Corresponding with C. Bauman; reviewing Supreme Court Rules re: reply to DeJongs response.	31.67	31.67	31.67	31.67	31.67
4/3/2019	Carlie Fox	0.1	57.00	Reviewing correspondence from J. Bell; emailing J. Merryweather re: SCC motion payment.	6.33	6.33	6.33	6.33	6.33
4/5/2019	Carlie Fox	1.9	1,083.00	Drafting letter to SCC registrar re: reply to Appellants response to motion to be added as party.	120.33	120.33	120.33	120.33	120.33
4/5/2019	Mark Dunn	2.2	1,650.00	Argument re: appeal.	183.33	183.33	183.33	183.33	183.33
4/6/2019	Carlie Fox	0.7	399.00	Appellants response to motion to be added as party; emailing M. Dunn re: same.	44.33	44.33	44.33	44.33	44.33
4/7/2019	Carlie Fox	0.5	285.00	Appellants response to motion to be added as respondent party to appeal.	31.67	31.67	31.67	31.67	31.67
4/8/2019	Carlie Fox	1.7	969.00	Emailing J. Merryweather re: reply letter to SCC; attending call with J. Merryweather re: same; revising same.	107.67	107.67	107.67	107.67	107.67
4/17/2019	Carlie Fox	0.6	342.00	Attending call with H. Schonfeld and J. Merryweather re: intervention at SCC appeal.	38.00	38.00	38.00	38.00	38.00
4/22/2019	Carlie Fox	0.6	342.00	Drafting intervener factum for SCC appeal.	38.00	38.00	38.00	38.00	38.00
4/23/2019	Carlie Fox	0.5	285.00	Drafting factum for intervention in SCC appeal; reviewing Supreme Court rules re: same.	31.67	31.67	31.67	31.67	31.67
4/24/2019	Carlie Fox	0.3	171.00	Emailing M. Robins re: applicants recovery to date; drafting factum for SCC intervention.	9.50	9.50	9.50	9.50	9.50
4/25/2019	Carlie Fox	1.1	627.00	Drafting factum for SCC appeal.	69.67	69.67	69.67	69.67	69.67
4/29/2019	Carlie Fox	1.8	1,026.00	Reviewing and revising intervention factum.	114.00	114.00	114.00	114.00	114.00

Goodmans LLP

Dockets Summary of Matter No. 140074 re: Manager

Bill Period: September 2017 to March 2020

Date Worked	TK Name	Hours	Bill Value	Narratives	CEC	EME	PEP	SCL	UEL
4/29/2019	Mark Dunn	1.5	1,125.00	Drafting and revising Supreme Court factum, discussions with C. Fox re: same; reviewing inspector reports.	125.00	125.00	125.00	125.00	125.00
4/29/2019	Mark Dunn	0.3	225.00	Finalizing factum for Supreme Court intervention.	25.00	25.00	25.00	25.00	25.00
4/30/2019	Carlie Fox	3.5	1,995.00	Reviewing and revising SCC intervention factum; reviewing and incorporating comments from J. Merryweather; correspondence with J. Merryweather and H. Schonfeld re: same.	221.67	221.67	221.67	221.67	221.67
5/1/2019	Carlie Fox	2.8	1,596.00	same.	177.33	177.33	177.33	177.33	177.33
5/2/2019	Carlie Fox	0.5	285.00	Attending call with J. Merryweather and M. Dunn re: managers website; reviewing applicants factum for SCC appeal.	15.83	15.83	15.83	15.83	15.83
5/6/2019	Carlie Fox	0.6	342.00	emailing J. Merryweather re: same; attending call with H. Schonfeld; correspondence with M. Kohl re: minute book inspection.	11.40	11.40	11.40	11.40	11.40
5/7/2019	Carlie Fox	0.3	171.00	Developments.	12.35	12.35	12.35	12.35	12.35
5/7/2019	Mark Dunn	2.7	2,025.00	Reviewing facta of appellant and respondent; reviewing responding facta of appellant, respondent and intervenor.	225.00	225.00	225.00	225.00	225.00
5/13/2019	Mark Dunn	2.5	1,875.00	Reviewing facta and preparing submissions for Supreme Court.	208.33	208.33	208.33	208.33	208.33
5/14/2019	Carlie Fox	5.0	2,850.00	Preparing for and attending supreme court appeal.	316.67	316.67	316.67	316.67	316.67
5/14/2019	Mark Dunn	4.4	3,300.00	Preparing for and attending argument at Supreme Court of Canada.	366.67	366.67	366.67	366.67	366.67
5/21/2019	Carlie Fox	1.5	855.00	Meeting with J. Merryweather re: preparation for testimony in criminal proceedings; correspondence with M. Kohl.	28.50	28.50	28.50	28.50	28.50
5/21/2019	Mark Dunn	2.1	1,575.00	Meeting with J. Merryweather re: criminal trial testimony and other issues; prepare materials for approval and distribution.	52.50	52.50	52.50	52.50	52.50
5/22/2019	Mark Dunn	2.0	1,500.00	Supreme Court decision and dissenting decision of Justice Van Rensburg; drafting report.	40.00	40.00	40.00	40.00	40.00
5/22/2019	Carlie Fox	3.0	1,710.00	Meeting with J. Merryweather; attending criminal proceedings with J. Merryweather for testimony.	57.00	57.00	57.00	57.00	57.00
6/1/2019	Ken Herlin	0.1	99.50	Exchanging emails with H. Schonfeld re: testifying at criminal proceeding.	3.32	3.32	3.32	3.32	3.32
6/6/2019	Mark Dunn	0.4	300.00	Call with client re: criminal trial issues.	10.00	10.00	10.00	10.00	10.00
8/12/2019	Carlie Fox	0.7	399.00	Correspondence with M. Dunn re: applicants claims against Schedule C property proceeds; attending call with C. Yung re: same; reviewing correspondence between J. Merryweather and crown re: sentencing hearing.	19.95	0.00	0.00	0.00	19.95

Goodmans LLP

Dockets Summary of Matter No. 140074 re: Manager

Bill Period: September 2017 to March 2020

Date Worked	TK Name	Hours	Bill Value	Narratives	CEC	EME	PEP	SCL	UEL
12/15/2019	Carlie Fox	0.1	57.00	Reviewing correspondence between Manager and Crown; emailing J. Merryweather re: same.	1.90	1.90	1.90	1.90	1.90
Total:					7,308.91	6,987.21	6,987.21	6,987.21	7,007.16

C

**Professional Fees Allocated to
St. Clarens, Emerson, Prince Edward, United Empire and Cecil Lighthouse
related to Proposed Schedule C Distribution, Criminal Trial and Supreme Court**

Order Date	Period Covered	Cecil Lighthouse	Emerson	Prince Edward	St. Clarens	United Empire
GOODMANS LLP (fees only)						
PROPOSED SCHEDULE C DISTRIBUTION						
July 27, 2018	September 1, 2017 to May 31, 2018	204.14	204.14	204.14	204.14	204.14
January 28, 2019	June 1, 2018 to December 31, 2018	702.63	400.88	400.88	400.88	400.88
		906.77	605.02	605.02	605.02	605.02
CRIMINAL TRIAL						
July 27, 2018	September 1, 2017 to May 31, 2018	149.94	149.94	149.94	149.94	149.94
January 28, 2019	June 1, 2018 to December 31, 2018	306.25	306.25	306.25	306.25	306.25
July 3, 2019	January 1, 2019 to May 31, 2019	190.54	190.54	190.54	190.54	190.54
PENDING	June 1, 2019 to December 31, 2019	33.27	13.32	13.32	13.32	33.27
PENDING	January 1, 2020 to March 31, 2020	1.90	1.90	1.90	1.90	1.90
		681.90	661.95	661.95	661.95	681.90
SUPREME COURT OF CANADA						
July 27, 2018	September 1, 2017 to May 31, 2018	16.43	16.43	16.43	16.43	16.43
January 28, 2019	June 1, 2018 to December 31, 2018	624.43	624.43	624.43	624.43	624.43
July 3, 2019	January 1, 2019 to May 31, 2019	5,079.38	5,079.38	5,079.38	5,079.38	5,079.38
		5,720.24	5,720.24	5,720.24	5,720.24	5,720.24
TOTAL GOODMANS		7,308.91	6,987.21	6,987.21	6,987.21	7,007.16

SCHONFELD INC. (fees only)						
PROPOSED SCHEDULE C DISTRIBUTION						
July 27, 2018	September 1, 2017 to May 31, 2018	99.45	99.45	99.45	99.45	99.45
January 28, 2019	June 1, 2018 to December 31, 2018	70.83	70.83	70.83	70.83	70.83
July 3, 2019	January 1, 2019 to May 31, 2019	6.00	6.00	6.00	6.00	6.00
		176.28	176.28	176.28	176.28	176.28
CRIMINAL TRIAL						
July 27, 2018	September 1, 2017 to May 31, 2018	54.31	54.31	54.31	54.31	54.31
July 3, 2019	January 1, 2019 to May 31, 2019	371.25	371.25	371.25	371.25	371.25
PENDING	June 1, 2019 to December 31, 2019	63.75	63.75	63.75	63.75	63.75
		489.31	489.31	489.31	489.31	489.31
SUPREME COURT OF CANADA						
July 3, 2019	January 1, 2019 to May 31, 2019	77.50	1,652.51	1,652.51	1,652.51	1,427.51
		77.50	1,652.51	1,652.51	1,652.51	1,427.51
TOTAL SCHONFELD INC.		743.09	2,318.10	2,318.10	2,318.10	2,093.10

TOTAL (fees only)		Cecil Lighthouse	Emerson	Prince Edward	St. Clarens	United Empire	Total
	Proposed Schedule C Distribution	1,083.05	781.30	781.30	781.30	781.30	4,208.25
	Criminal Investigation and Trial	1,171.21	1,151.26	1,151.26	1,151.26	1,171.21	5,796.20
	Supreme Court of Canada	5,797.74	7,372.75	7,372.75	7,372.75	7,147.75	35,063.74
		8,052.00	9,305.31	9,305.31	9,305.31	9,100.26	

GRAND TOTAL (including HST)		Cecil Lighthouse	Emerson	Prince Edward	St. Clarens	United Empire	Total
	Proposed Schedule C Distribution	1,223.85	882.87	882.87	882.87	882.87	4,755.33
	Criminal Investigation and Trial	1,323.47	1,300.92	1,300.92	1,300.92	1,323.47	6,549.70
	Supreme Court of Canada	6,551.45	8,331.21	8,331.21	8,331.21	8,076.96	39,622.04
		9,098.77	10,515.00	10,515.00	10,515.00	10,283.30	50,927.07

D

Court File No. CV-13-10280-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE MR.
JUSTICE HAINEY

)
)
)

FRIDAY, THE 24th
DAY OF AUGUST, 2018



BETWEEN:

DBDC SPADINA LTD.,
and THOSE CORPORATIONS LISTED ON Schedule "A" HERETO

Applicants

- and -

NORMA WALTON, RONAULD WALTON, THE ROSE & THISTLE GROUP
LTD. and EGLINTON CASTLE INC.

Respondents

- and -

THOSE CORPORATIONS LISTED IN Schedule "B" HERETO, TO BE
BOUND BY THE RESULT

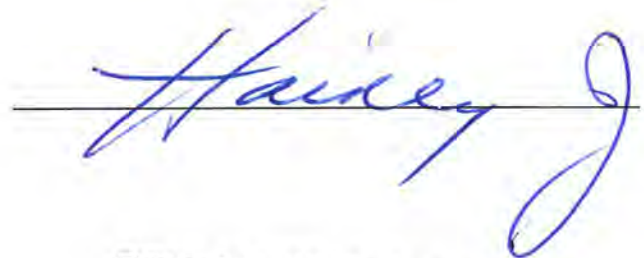
ORDER

THIS MOTION, made by Schonfeld Inc. in its capacity as the manager (the "**Manager**") appointed pursuant to the Order of Justice Newbould dated November 5, 2013 for an Order for contingent authority to distribute certain funds was heard August 24, 2018 at 330 University Avenue, Toronto, Ontario, with an Endorsement issued this day.

ON READING the 53rd Report of the Manager dated June 19, 2018 and the Supplemental Report to the 53rd Report of the Manager dated August 23, 2018, and on hearing the submissions of counsel:

1. THIS COURT ORDERS that, in the event the application for leave to appeal to the Supreme Court of Canada dated March 22, 2018 commenced by companies controlled by Christine and Michael DeJong is dismissed, or if leave is granted and the appeal is dismissed, the Manager is hereby authorized to distribute funds held in respect of certain Schedule "C" Companies in accordance with the Distribution Table attached hereto as Appendix "A".

2. THIS COURT ORDERS that this order is without prejudice to the rights of all parties on the motion by 781526 Ontario Inc. (which claims a 50% beneficial interest in the property located at 346 Jarvis Street, Units A and B) for a declaration that it is entitled to 50% of the net proceeds from the sale of 346 Jarvis Street, Units A and B (the "**Jarvis Proceeds**"), and potentially a reallocation and/or reimbursement of fees and expenses that were previously allocated to the Jarvis Proceeds from the funds distributed by this Order, at a motion to be heard on OCTOBER 23, 2018 FOR ONE HOUR.



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

AUG 27 2018

PER / PAR: 

APPENDIX "A"

Proposed Distribution

Award is taken first from companies with smallest creditor base, award is reduced for payments received in preceding allocations.

	Cecil (1) Lighthouse	United Empire Lands	1780355 Ont.	The Old Apothecary	Atala Inv.	Gerrard Church	Bible Hill	6195 Cedar St	Emerson Dev.	St. Clarens	Prince Edward Properties
Award	21,488,702	20,622,168	19,836,097	19,748,747	19,684,271	19,677,401	19,668,078	19,668,078	19,666,087	19,512,695	19,095,777
Trade creditors	0	0	0	0	0	0	0	43,595	114	12,231	5,110
Shareholder loans	0	0	0	0	0	0	0	0	665,000	665,000	816,019
	21,488,702	20,622,168	19,836,097	19,748,747	19,684,271	19,677,401	19,668,078	19,711,673	20,331,201	20,189,926	19,916,906
Payment											
Applicants	866,534	786,072	87,350	64,476	6,869	9,323	0	1,991	153,392	416,918	567,851
previously paid (1)	(359,815)										
deferred payment (2)			(87,350)								
Trade creditors	0	0	0	0	0	0	0	4	1	261	152
Dejongs	0	0	0	0	0	0	0	0	5,187	14,209	24,266
	506,719	786,072	0	64,476	6,869	9,323	0	1,995	158,580	431,388	592,269
% Paid	4.03%	3.81%	0.00%	0.33%	0.03%	0.05%	0.00%	0.01%	0.78%	2.14%	2.97%

Notes:

- (1) \$359,814.50 was paid from Cecil proceeds, pursuant to June 28, 2018 Order of Justice McEwen; proposed payment above is balance of payment to be made.
 (2) Payment from 1780355 Ontario is deferred, pending the outcome of a motion by an alleged shareholder claiming entitlement to the sale proceeds.

Schedule A Companies

1. Dr. Bernstein Diet Clinics Ltd.
2. 2272551 Ontario Limited
3. DBDC Investments Atlantic Ltd.
4. DBDC Investments Pape Ltd.
5. DBDC Investments Highway 7 Ltd.
6. DBDC Investments Trent Ltd.
7. DBDC Investments St. Clair Ltd.
8. DBDC Investments Tisdale Ltd.
9. DBDC Investments Leslie Ltd.
10. DBDC Investments Lesliebrook Ltd.
11. DBDC Fraser Properties Ltd.
12. DBDC Fraser Lands Ltd.
13. DBDC Queen's Corner Ltd.
14. DBDC Queen's Plate Holdings Inc.
15. DBDC Dupont Developments Ltd.
16. DBDC Red Door Developments Inc.
17. DBDC Red Door Lands Inc.
18. DBDC Global Mills Ltd.
19. DBDC Donalda Developments Ltd.
20. DBDC Salmon River Properties Ltd.
21. DBDC Cityview Lands Ltd.
22. DBDC Weston Lands Ltd.
23. DBDC Double Rose Developments Ltd.
24. DBDC Skyway Holdings Ltd.
25. DBDC West Mall Holdings Ltd.
26. DBDC Royal Gate Holdings Ltd.
27. DBDC Dewhurst Developments Ltd.
28. DBDC Eddystone Place Ltd.
29. DBDC Richmond Row Holdings Ltd.

Schedule B Companies

1. Twin Dragons Corporation
2. Bannockburn Lands Inc. / Skyline – 1185 Eglinton Avenue Inc.
3. Wynford Professional Centre Ltd.
4. Liberty Village Properties Ltd.
5. Liberty Village Lands Inc.
6. Riverdale Mansion Ltd.
7. Royal Agincourt Corp.
8. Hidden Gem Development Inc.
9. Ascalon Lands Ltd.
10. Tisdale Mews Inc.
11. Lesliebrook Holdings Ltd.
12. Lesliebrook Lands Ltd.
13. Fraser Properties Corp.
14. Fraser Lands Ltd.
15. Queen's Corner Corp.
16. Northern Dancer Lands Ltd.
17. Dupont Developments Ltd.
18. Red Door Developments Inc. and Red Door Lands Ltd.
19. Global Mills Inc.
20. Donalda Developments Ltd.
21. Salmon River Properties Ltd.
22. Cityview Industrial Ltd.
23. Weston Lands Ltd.
24. Double Rose Developments Ltd.
25. Skyway Holdings Ltd.
26. West Mall Holdings Ltd.
27. Royal Gate Holdings Ltd.
28. Royal Gate Nominee Inc.
29. Royal Gate (Land) Nominee Inc.
30. Dewhurst Development Ltd.
31. Eddystone Place Inc.
32. Richmond Row Holdings Ltd.

33. El-Ad (1500 Don Mills) Limited
 34. 165 Bathurst Inc.
-

Schedule C Properties

1. 3270 American Drive, Mississauga, Ontario
2. 0 Luttrell Ave., Toronto, Ontario
3. 2 Kelvin Avenue, Toronto, Ontario
4. 346 Jarvis Street, Suites A, B, C, E and F, Toronto, Ontario
5. 1 William Morgan Drive, Toronto, Ontario
6. 324 Prince Edward Drive, Toronto, Ontario
7. 24 Cecil Street, Toronto, Ontario
8. 30 and 30A Hazelton Avenue, Toronto, Ontario
9. 777 St. Clarens Avenue, Toronto, Ontario
10. 252 Carlton Street and 478 Parliament Street, Toronto, Ontario
11. 66 Gerrard Street East, Toronto, Ontario
12. 2454 Bayview Avenue, Toronto, Ontario
13. 319-321 Carlaw, Toronto, Ontario
14. 260 Emerson Ave., Toronto, Ontario
15. 44 Park Lane Circle, Toronto, Ontario
16. 19 Tennis Crescent, Toronto, Ontario
17. 646 Broadview, Toronto, Ontario

DBDC SPADINA LTD. *et al.*

and

NORMA WALTON *et al.*

Court File No: CV-13-10280-00CL

Applicants

Respondents

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

Proceeding commenced at TORONTO

ORDER

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Court File No. CV-13-10280-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
Commercial List

THE HONOURABLE)	TUESDAY, THE 12th
)	
JUSTICE D.M. BROWN)	DAY OF AUGUST, 2014

B E T W E E N:

DBDC SPADINA LTD.,
and THOSE CORPORATIONS LISTED ON SCHEDULE A HERETO

Applicants

and

NORMA WALTON, RONAULD WALTON, THE ROSE & THISTLE GROUP
LTD. and EGLINTON CASTLE INC.

Respondents

and

THOSE CORPORATIONS LISTED ON SCHEDULE B HERETO, TO BE
BOUND BY THE RESULT

JUDGMENT AND ORDER

THIS RETURN OF APPLICATION, MOTION AND CROSS-MOTION, brought by the Applicants for various heads of relief, was heard on July 16-18, 2014 at 330 University Avenue, Toronto, Ontario.

ON READING the Notice of Return of Application, Motion and Cross-Motion and the proposed Fresh as Amended Notice of Application of the Applicants, the Notice of Motion of the Respondent Norma Walton, the Affidavit of James Reitan sworn June 26, 2014 and the Exhibits

thereto, the Affidavit of Norma Walton sworn June 26, 2014 and the Exhibits thereto, the Affidavits of various shareholders in companies controlling the Schedule C Properties and the Exhibits thereto, the Affidavit of James Reitan sworn July 3, 2014 and the Exhibits thereto, the Affidavit of Norma Walton sworn July 3, 2014 and the Exhibits thereto, the Affidavit of Carlos Carreiro sworn July 3, 2014 and the Exhibits thereto, the Affidavit of Yvonne Lui sworn July 3, 2014 and the Exhibits thereto, the Affidavit of Steven Williams sworn July 3, 2014 and the Exhibits thereto, the Affidavit of Talea Coghlin sworn July 4, 2014 and the Exhibits thereto, the Affidavit of George Crossman sworn July 4, 2014 and the Exhibits thereto, the Reports of the Inspector Schonfeld Inc. and the Affidavit of Christine Dejong sworn July 8, 2014 and upon hearing from counsel for the Applicants, the Respondents, the Inspector, the Dejongs, certain of the Schedule C Mortgagees and from Norma Walton, counsel for the Respondents Ronauld Walton, the Rose & Thistle Group Ltd. and Eglinton Castle Inc. appearing but making no submissions, and for reasons for decision released this day,

1. THIS COURT ORDERS that the time for service of the notice of motion and motion record is hereby abridged so that this motion was properly returnable on July 16-18, 2014, and hereby dispenses with further service.

CONTINUATION OF ORDERS

2. THIS COURT ORDERS that the Orders of the Court dated October 4, 2013, October 25, 2013, November 5, 2013, December 18, 2013 and March 21, 2014 continue in full force and effect, except as modified by this Order.

FRESH AS AMENDED NOTICE OF APPLICATION

3. THIS COURT ORDERS that the Applicants are granted leave to issue and serve a Fresh as Amended Notice of Application, in the form attached to the Applicants' Consolidated Notice of Motion dated June 13, 2014.

COMBINATION OF APPLICATIONS

4. THIS COURT ORDERS that the application commenced in Court File No. CV-14-501600 be transferred to the Commercial List and combined with the within application, to be heard at a time to be determined by this Court.

THE RESPONDENTS' ACCOUNTING

5. THIS COURT ORDERS that the Respondents shall disclose forthwith any agreement to cross-collateralize any obligation of the Schedule B Companies or the Schedule C Properties.

SHAREHOLDINGS IN THE SCHEDULE B COMPANIES

6. THIS COURT ORDERS that the Waltons' shareholder interests in each of the Schedule B Companies be calculated by reference to the equity contribution provisions contained in each Schedule B Company agreement and that the shares issued to the Waltons be limited to those for which they have actually paid and that any other shares be cancelled.

THE SCHEDULE C PROPERTIES

7. THIS COURT ORDERS that the Orders of this Court dated December 18, 2013 and March 21, 2014 be amended to apply to all the properties at the following municipal addresses (collectively, the "Schedule C Properties"):

- (a) 3270 American Drive, Mississauga, Ontario;

- (b) 0 Luttrell Ave., Toronto, Ontario;
- (c) 2 Kelvin Avenue, Toronto, Ontario;
- (d) 346 Jarvis Street, Suites A, B, C, E and F, Toronto, Ontario;
- (e) 1 William Morgan Drive, Toronto, Ontario;
- (f) 324 Prince Edward Drive, Toronto, Ontario;
- (g) 24 Cecil Street, Toronto, Ontario;
- (h) 30 and 30A Hazelton Avenue, Toronto, Ontario;
- (i) 777 St. Clarens Avenue, Toronto, Ontario;
- (j) 252 Carlton Street and 478 Parliament Street, Toronto, Ontario;
- (k) 66 Gerrard Street East, Toronto, Ontario;
- (l) 2454 Bayview Avenue, Toronto, Ontario;
- (m) 319-321 Carlaw, Toronto, Ontario;
- (n) 260 Emerson Ave., Toronto, Ontario;
- (o) 44 Park Lane Circle, Toronto, Ontario;
- (p) 19 Tennis Crescent, Toronto, Ontario; and
- (q) 646 Broadview Avenue, Toronto, Ontario.

8. THIS COURT ORDERS that the following properties are removed from all restrictions imposed on dealings with those properties pursuant to the Order of this Court dated July 18, 2014:

- (a) 3775 St. Clair Avenue East, Toronto, Ontario;
- (b) 185 Davenport Road, Toronto, Ontario;
- (c) 1246 Yonge Street, Toronto, Ontario;
- (d) 17 Yorkville, Toronto, Ontario;
- (e) 3 Post Road, Toronto, Ontario;
- (f) 2 Park Lane Circle Road, Toronto, Ontario;
- (g) 14/16/17 Montcrest Boulevard, Toronto, Ontario; and
- (h) 346 Jarvis Street, Suite D, Toronto, Ontario;

9. THIS COURT ORDERS that, for greater certainty, any restriction imposed on any person from dealing with any of the properties listed in paragraph 8 of this Order, pursuant to the Order of this Court dated July 18, 2014, is vacated.

10. THIS COURT ORDERS that Schonfeld Inc. shall, within 15 days of the date of this Order, give notice of this Order to the registered owners of the following properties (the “Disputed Properties”):

- (a) 19 Tennis Crescent, Toronto, Ontario;
- (b) 646 Broadview Avenue, Toronto, Ontario;

(c) 346 Jarvis Street, Suite C, Toronto, Ontario; and

(d) 252 Carlton Street and 478 Parliament Street, Toronto, Ontario.

11. THIS COURT ORDERS that if, within 60 days of the date of this Order, a registered owner of a Disputed Property provides evidence to Schonfeld Inc., to the satisfaction of Schonfeld Inc., that it acquired that Disputed Property for fair market value and that the Waltons no longer hold any interest of any kind in that Disputed Property, that Disputed Property shall be released from the other terms of this Order, and that paragraphs 8 and 9 of this Order shall apply to that Disputed Property.

CONSTRUCTIVE TRUSTS AND TRACING

12. THIS COURT ORDERS constructive trusts in favour of the Applicants in respect of each of the Schedule C Properties listed below for the proportionate share of the purchase price that those amounts represented as at the date of purchase of the properties and for any proportionate share of the increase in value to the date of realization:

- (a) 14 College Street – \$1,314,225;
- (b) 3270 American Drive – \$1,032,000;
- (c) 2454 Bayview Avenue – \$1,600,000;
- (d) 346 Jarvis Street, Suite E – \$937,000;
- (e) 44 Park Lane Circle – \$2,500,000;
- (f) 2 Kelvin Street – \$221,000;

(g) 0 Luttrell Avenue – \$152,900; and

(h) 26 Gerrard Street – \$371,200,

except that no such trust will attach to any such property already sold pursuant to an Order of this Court and where there are no proceeds held in trust by Schonfeld Inc.

13. THIS COURT ORDERS that the Applicants shall be permitted to trace funds provided by the Applicants into and through the accounts of the Schedule B Companies, the accounts of the Respondent the Rose & Thistle Group Ltd., the personal accounts of the Respondents Norma and/or Ronauld Walton, the trust account of Walton Advocates and/or the trust account of Devry Smith Frank LLP, and otherwise into the companies which own the Schedule C Properties.

APPOINTMENT OF SCHONFELD AS RECEIVER/MANAGER OF THE SCHEDULE C PROPERTIES

14. THIS COURT ORDERS that Schonfeld Inc. is appointed as receiver/manager (the “Manager”), without security, of the Schedule C Properties, all proceeds thereof and revenue derived therefrom and the bank accounts of the companies which own or control the Schedule C Properties (the “Schedule C Companies”), save and except any Schedule C Property already sold pursuant to an Order of this Court and where there are no proceeds held or to be held by Schonfeld Inc.

15. THIS COURT ORDERS that, except as modified by this Order, the terms of the Order of this Court dated November 5, 2013 shall apply *mutatis mutandis* to Schonfeld’s appointment as Manager pursuant to paragraph 14 of this Order.

16. THIS COURT ORDERS that the Manager's Borrowing Charge and the Manager's Charge in respect of the Schedule C Properties shall rank in subsequent priority to any all security interests, trusts, liens, charges, mortgages and encumbrances, statutory or otherwise, in favour of a mortgagee or any other Person validly registered on title of the Property. The Manager's Borrowing Charge and the Manager's Charge shall not be registered on title to the Property and shall not, if no stay is in place pursuant paragraph 18 hereof, otherwise impair a mortgagee's ability to sell or lease the Property.

17. THIS COURT ORDERS that, without limiting the generality of the terms governing the appointment of Schonfeld Inc. as Manager of the Schedule C Properties, the Waltons, and any person acting at their instruction, shall, within 15 days of the date of this Order, provide full access to all of the books and records of Schedule C Companies to Schonfeld Inc.

18. THIS COURT ORDERS that the stay of proceedings contained in paragraph 12 of the November 5, 2013 Order of this Court does not apply to stay any proceedings that may be brought by the following mortgagees on the following properties (the "Schedule C Carve-Out Properties") to enforce the terms of their mortgages, including to exercise a power of sale or to appoint a receiver in respect of those properties as those mortgagees may be entitled to, subject to the terms of this Order:

Mortgagee	Property
The Equitable Trust Company, now Equitable Bank	19 Tennis Crescent, Toronto, Ontario PIN: 21065-0069 (LT)
The Equitable Trust Company, now Equitable Bank B & M Handelman Investments Ltd. E. Manson Investments Limited	1 William Morgan Drive, Toronto, Ontario PIN: 10369-0019 (LT)

Mortgagee	Property
Bamburgh Holdings Ltd. 4055845 Canada Inc. Paul Herbert Professional Corporation 558678 Ontario Ltd. Gertner, Jeffrey Handelman, Robert	
Home Trust Company B & M Handelman Investments Ltd. Barry Alan Spiegel Trust Orenbach, Joanna Orenbach, Jonathan Bamburg Holdings Ltd. Lizrose Holdings Ltd. 1391739 Ontario ltd. Natme Holdings Inc. E. Manson Investments Ltd. 558678 Ontario Ltd.	44 Park Lane Circle, Toronto, Ontario
The Equitable Trust Company, now Equitable Bank	346 Jarvis Street, #2, Toronto, Ontario PIN: 21105-0162 (LT)
B. & M. Handelman Investments Limited Bamburgh Holdings Ltd Paul Herbert Yerusha Investments Inc. Eroll Gordon Scotiastit ITF SDRSP 491-02252-0 (Weingarten)	346 E Jarvis Street, Toronto, Ontario
Martha Sorger 1363557 Ontario Limited	777 St. Clarens Avenue, Toronto, Ontario
Martha Sorger 1363557 Ontario Limited	260 Emerson Avenue, Toronto, Ontario

Mortgagee	Property
Equitable Trust Company, now the Equitable Bank, c/o Harbour Mortgage Corp.	3270 American Dr., Mississauga Ontario
Business Development Bank of Canada	2454 Bayview Avenue, Toronto, Ontario
Firm Capital Credit Corporation	30 and 30A Hazelton Avenue, Toronto, Ontario

or any other mortgagee or Schedule C Property which the Applicants agree or the Court orders be added to this list.

19. In the event that any mortgagee on any Schedule C Carve-Out Property sells or otherwise realizes value from a disposition of the Schedule C Carve-Out Property, the net proceeds of such a sale or disposition shall be applied as follows:

- (a) to discharge any valid encumbrance, including any liens or other mortgages, registered in priority to any mortgage held by a mortgagee that is registered against that property;
- (b) to satisfy all usual costs and expenses of the sale of the property, including but not limited to real estate commissions and legal fees;
- (c) to any mortgagee on that property in such amounts as are necessary in order to satisfy all claims that such mortgagee may have on that property pursuant to the terms of their respective mortgages; and
- (d) the balance of the net proceeds of sale or disposition of any property shall be paid to the Manager, to be held in trust, pending further order of the Court.

COSTS OF THE INSPECTOR

20. THIS COURT ORDERS restitution and repayment by the Respondents to the Applicants and/or the Schedule B Companies in respect of all funds and to be paid by the Applicants and/or the Schedule B Companies, as appropriate, in respect of the fees and disbursements of Schonfeld Inc., in its capacity as Inspector in this proceeding, and of its counsel Goodmans LLP.

232 GALLOWAY ROAD

21. THIS COURT ORDERS that the Respondents are jointly and severally liable to the Applicants for restitution in the amount of \$1,518,750 plus interest at the rate set out in the relevant mortgage documents and costs on a full indemnity basis as set out in the relevant mortgage documents in respect of the mortgage discharged from title of the property at 232 Galloway Road, and shall pay that amount to the Applicants.

OTHER RELIEF SOUGHT BY THE APPLICANTS

22. THIS COURT ORDERS that the Applicants' motion for an order that the Respondents are jointly and severally liable for restitution payable to the Applicants in the amount of \$78,420,418 for all funds diverted from the Schedule B Companies and that they pay to the Applicants the balance of those funds not otherwise recovered by the Applicants from the sale of the Schedule B Properties is adjourned to a date to be scheduled.

23. THIS COURT ORDERS that the Applicants' motion for an order that the Respondents indemnify the Schedule B Companies and the Applicants for all amounts due and owing to creditors and lien claimants of the Schedule B Properties and Companies, with that amount to be fixed, is adjourned to a date to be scheduled by this Court.

24. THIS COURT ORDERS that the Applicants' motions for an Order that the Applicants' claims to the Schedule B Companies have priority over any unauthorized interests in the Schedule B Companies is dismissed, without prejudice to the Applicants' right to seek such relief in relation to any particular unauthorized interest.

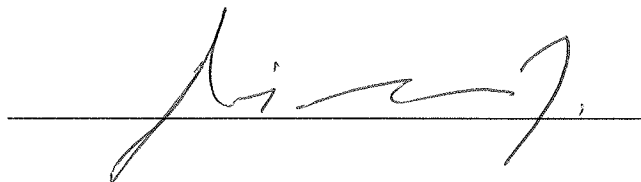
25. THIS COURT ORDERS that the Applicants' motion for an Order that the Applicants be permitted to elect to treat funds advanced by the Applicants to the Schedule B Companies as shareholder loans for the purposes of enforcement of their remedies is dismissed, with the issue of the characterization of such funds to be left to the claims process administered by the Manager.

26. THIS COURT ORDERS that the Applicants may deliver costs submissions of no more than 10 pages (excluding Bill of Costs) by August 20, 2014 and the Respondents may deliver responding costs submissions of no more than 10 pages (excluding Bill of Costs) by August 29, 2014.

ENTERED BY / ENREGISTRÉ À TORONTO
ON / LE 6 SEP 2014
LE / DATE DE REGISTRATION:



SEP 6 8 2014



SCHEDULE "A" COMPANIES

1. Dr. Bernstein Diet Clinics Ltd.
2. 2272551 Ontario Limited
3. DBDC Investments Atlantic Ltd.
4. DBDC Investment Pape Ltd.
5. DBDC Investments Highway 7 Ltd.
6. DBDC Investments Trent Ltd.
7. DBDC Investments St. Clair Ltd.
8. DBDC Investments Tisdale Ltd.
9. DBDC Investments Leslie Ltd.
10. DBDC Investments Lesliebrook Ltd.
11. DBDC Fraser Properties Ltd.
12. DBDC Fraser Lands Ltd.
13. DBDC Queen's Corner Inc.
14. DBDC Queen's Plate Holdings Inc.
15. DBDC Dupont Developments Ltd.
16. DBDC Red Door Developments Inc.
17. DBDC Red Door Lands Inc.
18. DBDC Global Mills Ltd.
19. DBDC Donalda Developments Ltd.
20. DBDC Salmon River Properties Ltd.
21. DBDC Cityview Industrial Ltd.
22. DBDC Weston Lands Ltd.
23. DBDC Double Rose Developments Ltd.
24. DBDC Skyway Holdings Ltd.
25. DBDC West Mall Holdings Ltd.
26. DBDC Royal Gate Holdings Ltd.
27. DBDC Dewhurst Developments Ltd.
28. DBDC Eddystone Place Ltd.
29. DBDC Richmond Row Holdings Ltd.

SCHEDULE “B” COMPANIES

1. Twin Dragons Corporation
2. Bannockburn Lands Inc. / Skyline – 1185 Eglinton Avenue Inc.
3. Wynford Professional Centre Ltd.
4. Liberty Village Properties Ltd.
5. Liberty Village Lands Inc.
6. Riverdale Mansion Ltd.
7. Royal Agincourt Corp.
8. Hidden Gem Development Inc.
9. Ascalon Lands Ltd.
10. Tisdale Mews Inc.
11. Lesliebrook Holdings Ltd.
12. Lesliebrook Lands Ltd.
13. Fraser Properties Corp.
14. Fraser Lands Ltd.
15. Queen’s Corner Corp.
16. Northern Dancer Lands Ltd.
17. Dupont Developments Ltd.
18. Red Door Developments Inc. and Red Door Lands Ltd.
19. Global Mills Inc.
20. Donalda Developments Ltd.
21. Salmon River Properties Ltd.
22. Cityview Industrial Ltd.
23. Weston Lands Ltd.
24. Double Rose Developments Ltd.
25. Skyway Holdings Ltd.
26. West Mall Holdings Ltd.
27. Royal Gate Holdings Ltd.
28. Royal Gate Nominee Inc.
29. Royal Gate (Land) Nominee Inc.
30. Dewhurst Development Ltd.
31. Eddystone Place Inc.
32. Richmond Row Holdings Ltd.

33. El-Ad (1500 Don Mills) Limited

34. 165 Bathurst Inc.

SCHEDULE "C" PROPERTIES

1. 3270 American Drive, Mississauga, Ontario
2. 0 Luttrell Ave., Toronto, Ontario
3. 2 Kelvin Avenue, Toronto, Ontario
4. 346 Jarvis Street, Suites A, B, C, E and F, Toronto, Ontario
5. 1 William Morgan Drive, Toronto, Ontario
6. 324 Prince Edward Drive, Toronto, Ontario
7. 24 Cecil Street, Toronto, Ontario
8. 30 and 30A Hazelton Avenue, Toronto, Ontario
9. 777 St. Clarens Avenue, Toronto, Ontario
10. 252 Carlton Street and 478 Parliament Street, Toronto, Ontario
11. 66 Gerrard Street East, Toronto, Ontario
12. 2454 Bayview Avenue, Toronto, Ontario
13. 319-321 Carlaw, Toronto, Ontario
14. 260 Emerson Ave., Toronto, Ontario
15. 44 Park Lane Circle, Toronto, Ontario
16. 19 Tennis Crescent, Toronto, Ontario
17. 646 Broadview Avenue, Toronto, Ontario

DBDC SPADINA LTD., and those corporations listed on Schedule A hereto
Applicants

NORMA WALTON et al.
Respondents

Court File No. CV-13-10280-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

PROCEEDING COMMENCED AT TORONTO

JUDGMENT AND ORDER

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Lawyers for the Applicants

F

Court File No.: CV-13-10280-00CL



**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE MR.

) FRIDAY, THE 5th DAY

JUSTICE NEWBOULD

) OF NOVEMBER, 2013

B E T W E E N:

DBDC SPADINA LTD.,
and THOSE CORPORATIONS LISTED ON SCHEDULE A HERETO

Applicants

and

NORMA WALTON, RONAULD WALTON, THE ROSE & THISTLE GROUP
LTD. and EGLINTON CASTLE INC.

Respondents

and

THOSE CORPORATIONS LISTED ON SCHEDULE B HERETO, TO BE
BOUND BY THE RESULT

ORDER

THIS MOTION made by the Applicants, DBDC Spadina Ltd. and those Corporations Listed on Schedule "A" hereto for an Order appointing Schonfeld Inc. Receivers + Trustees, as manager (in such capacities, the "**Manager**") without security, of all of the assets, undertakings and properties of the Schedule "B" Corporations, or for other relief, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Affidavits of Jim Reitan sworn October 1, October 3 and October 24, 2013 and the Exhibits thereto, the Affidavit of Susan Lyons and the Exhibits hereto, the Affidavit of Lorna Groves and the Exhibits thereto, the First Interim Report of the Inspector,

Schonfeld Inc., the Supplemental Report to the First Interim Report of the Inspector and the Exhibits thereto, the Second Interim Report of the Inspector and the Exhibits thereto, the Affidavits of Norma Walton sworn October 3 and 31, 2013 and the Exhibits thereto and on hearing the submissions of counsel for the Applicants, counsel for the Inspector and counsel for the Respondents,

SERVICE

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

CONTINUING ORDERS

2. THIS COURT ORDERS that the Orders of the Honourable Justice Newbould dated October 4, 2013 and October 25, 2013 continue in full force and effect except as modified by this Order.

APPOINTMENT

3. THIS COURT ORDERS that the Manager is hereby appointed Manager, without security, of all of the real property owned by the Schedule "B" Companies hereto (the "**Real Estate**") and all of the current and future assets, undertakings and property, real and personal, of the Schedule "B" Corporations of every nature and kind whatsoever, and wherever situate, including all proceeds thereof (collectively with the Real Estate, the "**Property**") effective upon the granting of this Order.

MANAGER'S POWERS

4. THIS COURT ORDERS that the Manager shall have the powers of the Inspector granted pursuant to the Order of the Honourable Justice Newbould dated October 4, 2013, including but not limited to access to the premises and books and records of the Respondent The Rose & Thistle Group Ltd.
5. THIS COURT ORDERS that the Manager is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Manager is hereby expressly empowered and authorized to do any of the following where the Manager considers it necessary or desirable:
 - (a) to undertake sole and exclusive authority to manage and control the Property and any and all proceeds, receipts and disbursements arising out

of or from the Property, wheresoever located, and any and all proceeds, receipts and disbursements arising out of or from the Property, and for greater certainty, the Manager shall have sole and exclusive right and control of the Schedule "B" Corporations' bank accounts wherever located in accordance with this Order;

- (b) to open bank accounts at any banking institution acceptable to the Applicant to transfer funds from the current bank accounts of the Schedule "B" Companies, as necessary, ~~with prior notice to the Parties;~~ ✓ 25
- (c) to receive, preserve, and protect and maintain control of the Property, or any part or parts thereof, including, but not limited to, the changing of locks and security codes, the relocating of Property to safeguard it, the engaging of independent security personnel, the taking of physical inventories and the placement of such insurance coverage as may be necessary or desirable;
- (d) to manage, operate, and carry on the business of the Schedule "B" Corporations, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the business ~~upon prior notice to the Parties,~~ or cease to perform any contracts of any of the Schedule "B" Corporations ~~upon prior notice to the Parties;~~ ✓ 25
- (e) to engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the powers and duties conferred by this order including but not limited to a property manager, including but not limited to:
 - (i) DMS Properties;
 - (ii) Briarlane Property Rental Management Inc.; and

- (iii) Sterling Karamar;
- (f) to purchase or lease such machinery, equipment, inventories, supplies, premises or other assets to continue the business of the Schedule "B" Corporations or any part or parts thereof;
- (g) to receive and collect all monies and accounts now owed or hereafter owing to the Schedule "B" Corporations and to exercise all remedies of the Schedule "B" Corporations in collecting such monies, including, without limitation, to enforce any security held by any of the Schedule "B" Corporations, ~~provided that the Manager shall give prior notice to the Parties of any enforcement of security;~~ ✓ 2/15
- (h) subject to paragraph 4 below, to settle, extend or compromise any indebtedness owing to any of the Schedule "B" Corporations, ~~provided that the Manager shall give prior notice to the Parties of the settlement of any material indebtedness;~~ ✓ 2/15
- (i) to execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Manager's name or in the name and on behalf of the Schedule "B" Corporations, for any purpose pursuant to this Order;
- (j) to undertake environmental investigations, assessments, engineering and building condition or other examinations of the Real Estate;
- (k) subject to paragraph 12 below, to initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to the Schedule "B" Corporations, the Property or the Manager, and to settle or compromise any such proceedings. The authority hereby conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceeding;

- (l) subject to paragraph 13 below, to market the Property and in particular the Real Estate, including advertising and soliciting offers in respect of the Property and negotiating such terms and conditions of sale as the Manager in its discretion may deem appropriate;
- (m) to enter into agreements and to sell, convey, transfer, or assign the Property or any part or parts thereof of the Schedule "B" Corporations' business, with the prior approval of this Court in respect of any transaction, and in each such case notice under subsection 63(4) of the Ontario *Personal Property Security Act*, shall not be required, and in each case the Ontario *Bulk Sales Act* shall not apply;
- (n) to have on-line and electronic as well as hard copy access to the bank accounts of the Rose & Thistle Group Ltd. to review all receipts and disbursements total from such accounts and to request and receive on a timely basis from the Respondents particulars of all receipts and disbursements sufficient for the Inspector to identify such transfers, the parties involved and the reasons therefore;
- (o) upon notice to all parties and affected registered encumbrances, to apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property;
- (p) to report to, meet with and discuss with such affected Persons (as defined below) as the Manager considers appropriate on all matters relating to the Property, and to share information, subject to such terms as to confidentiality as the Manager deems advisable;
- (q) to apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and, if thought desirable by the Manager, in the name of the Schedule "B" Corporations;

- (r) to do all acts and execute, in the name and on behalf of the Schedule "B" Corporations, all documents, and for that purpose use the seal of the corporation, if any; and
- (s) to take any steps reasonably incidental to the exercise of these powers.

and in each case where the Manager takes any such actions or steps, it shall, subject to paragraph 4 below, be exclusively authorized and empowered to do so, to the exclusion of all other Persons (as defined below), including the Schedule "B" Corporations, and without interference from any other Person. For greater certainty, nothing in this Management Order or to the Manager's exercise of its powers hereunder shall cause the Manager to be, or deemed to be, a receiver within the meaning of the *Bankruptcy and Insolvency Act*.

~~6. The Manager shall take reasonable steps to provide the Parties with an accounting on a monthly basis of any collections referred to in subparagraphs 5(g) above.~~ ✓ 21

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE MANAGER

7. THIS COURT ORDERS that (i) the Schedule "B" Corporations and The Rose & Thistle Group Inc., (ii) all of their current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on its instructions or behalf, including but not limited to the Respondents and all others having notice of this Order; (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order; and (iv) Meridian Credit Union; and (v) without limiting the generality of the foregoing, Norma Walton, Ronauld Walton, anyone acting under the instructions of anyone listed in this paragraph; and (vi) anyone with notice of this order (all of the foregoing, collectively, being "**Persons**" and each being a "**Person**") shall forthwith advise the Manager of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Manager, and shall deliver all such Property to the Manager upon the Manager's request, and in any event no later than 36 hours following the Manager's request.
8. THIS COURT ORDERS that all Persons shall forthwith advise the Manager of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Schedule "B" Corporations, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "**Records**") in that Person's possession or control, and shall provide to the Manager or permit the Manager to make, retain and take away copies thereof and grant to the Manager unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this

paragraph 9 or in paragraph 11 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Manager due to the privilege attaching to solicitor-client communication or litigation work product belong to a Shareholder or a director of a Schedule "B" Corporations personally or due to statutory provisions prohibiting such disclosure.

9. THIS COURT ORDERS that the Records shall, upon reasonable notice to the Manager and during normal business hours of the Manager, be open to examination by each of the parties and their respective legal counsel, and that a copy of these Records be provided by the Manager of the parties upon request, the reasonable costs associated with such access and copies to be determined by the Manager, and invoiced to and paid by the requesting party to the Manager forthwith.
10. THIS COURT ORDERS that if any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Manager for the purpose of allowing the Manager to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Manager in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Manager. Further, for the purposes of this paragraph, all Persons shall provide the Manager with all such assistance in gaining immediate access to the information in the Records as the Manager may in its discretion require including providing the Manager with instructions on the use of any computer or other system and providing the Manager with any and all access codes, account names and account numbers that may be required to gain access to the information.

NO PROCEEDINGS AGAINST THE MANAGER

11. THIS COURT ORDERS that, except as may be provided herein, no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**"), shall be commenced or continued against the Manager except with the written consent of the Manager or with leave of this Court.

NO PROCEEDINGS AGAINST THE SCHEDULE "B" CORPORATIONS OR THE PROPERTY

12. THIS COURT ORDERS that no Proceeding against or in respect of any of the Schedule "B" Corporations or the Property shall be commenced or continued except with the written consent of the Manager or with leave of this Court and any and all Proceedings currently under way against or in respect of the Schedule "B" Corporations or the Property, with the exception of the proceedings referred to in paragraph 7, are hereby stayed and suspended pending further Order of this Court. Notwithstanding any other provision in this Order, the parties shall not be precluded from taking any steps or from commencing or continuing any proceedings in Ontario Superior Court of Justice, Court File No. CV-13-10280-00CL (Commercial List), and in such circumstances the Manager

shall not be obliged to defend or participate on behalf of the Schedule "B" Corporations and the Manager shall not be liable for any costs, damages or awards related to any such proceedings.

NO EXERCISE OF RIGHTS OR REMEDIES

13. THIS COURT ORDERS that, except as may be provided herein, all rights and remedies against the Schedule "B" Corporations, the Manager, or affecting the Property, are hereby stayed and suspended except with the written consent of the Manager or leave of this Court, provided however that nothing in this paragraph shall (i) empower the Manager or the Schedule "B" Corporations to carry on any business which the Schedule "B" Corporations is not lawfully entitled to carry on, (ii) exempt the Manager or the Schedule "B" Corporations from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH THE MANAGER

14. THIS COURT ORDERS that no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Schedule "B" Corporations, without written consent of the Manager or leave of this Court.

CONTINUATION OF SERVICES

15. THIS COURT ORDERS that all Persons having oral or written agreements with the Schedule "B" Corporations or statutory or regulatory mandates for the supply of goods and/or services, including without limitation, all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Schedule "B" Corporations are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Manager, and that the Manager shall be entitled to the continued use of the Schedule "B" Corporations' current telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Manager in accordance with normal payment practices of the Schedule "B" Corporations or such other practices as may be agreed upon by the supplier or service provider and the Manager, or as may be ordered by this Court.
16. THIS COURT ORDERS that Respondents are enjoined from canceling or failing to renew any insurance policies or other coverage in respect of to the Rose & Thistle Group Ltd. and/or the Schedule B Companies or any property owned by them, except with the express written approval of the Manager.
17. THIS COURT ORDERS that the Inspector shall be added as a named insured to any existing insurance policies or other coverage in respect of to the Rose & Thistle Group Ltd. and/or the Schedule B Companies or any property owned by them.

MANAGER TO HOLD FUNDS

18. THIS COURT ORDERS that all funds, monies, cheques, instruments, and other forms of payments received or collected by the Manager from and after the making of this Order from any source whatsoever, including without limitation the sale of all or any of the Property and the collection of any accounts receivable in whole or in part, whether in existence on the date of this Order or hereafter coming into existence, shall be deposited into either the existing bank accounts held by Schedule "B" Corporations' or one or more new accounts to be opened by the Manager, at the Manager's discretion, as the Manager may reasonably decide and the monies standing to the credit of such accounts from time to time, net of any disbursements provided for herein, shall be held by the Manager to be paid in accordance with the terms of this Order or any further Order of this Court.

LIMITATION ON ENVIRONMENTAL LIABILITIES

19. THIS COURT ORDERS that nothing herein contained shall require the Manager to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the *Ontario Environmental Protection Act*, the *Ontario Water Resources Act*, or the *Ontario Occupational Health and Safety Act* and regulations thereunder (the "Environmental Legislation"), provided however that nothing herein shall exempt the Manager from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Manager shall not, as a result of this Order or anything done in pursuance of the Manager's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation.

LIMITATION ON THE MANAGER'S LIABILITY

20. THIS COURT ORDERS that the Manager shall incur no liability or obligation as a result of its appointment or the carrying out the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part as so found by a court of competent jurisdiction. The Manager shall further enjoy the protections from liability as would otherwise be afforded to a trustee in bankruptcy under section 14.06 of the *Bankruptcy and Insolvency Act* or under any other similar legislation applicable to trustees and receivers.

MANAGER'S ACCOUNTS

21. THIS COURT ORDERS that any expenditures or liability which shall properly be made or incurred by the Manager including the fees and disbursements of the Manager and the fees and disbursements of its legal counsel, incurred at the standard rates and charges of

the Manager and its counsel, shall be allowed to it in passing its accounts and shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person (the "**Manager's Charge**").

22. THIS COURT ORDERS that the Manager and its legal counsel, if any, shall pass their accounts from time to time, and for this purpose the accounts of the Manager and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.
23. THIS COURT ORDERS that prior to the passing of its accounts, the Manager shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands, against its fees and disbursements, including legal fees and disbursements, incurred at the normal rates and charges of the Manager or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

FUNDING OF THE MANAGERSHIP

24. THIS COURT ORDERS that the Manager be at liberty and it is hereby empowered to borrow by way of a revolving credit or otherwise, such monies from time to time as it may consider necessary or desirable, provided that the outstanding principal amount does not exceed \$5 million (or such greater amount as this Court may by further Order authorize) at any time, at such rate or rates of interest as it deems advisable for such period or periods of time as it may arrange, for the purpose of funding the exercise of the powers and duties conferred upon the Manager by this Order, including interim expenditures. The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the "Manager's Borrowings Charge") as security for the payment of the monies borrowed, together with interest and charges thereon, in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subordinate in priority to the Manager's Charge and the charges as set out in sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.
25. THIS COURT ORDERS that neither the Manager's Borrowings Charge nor any other security granted by the Manager in connection with its borrowings under this Order shall be enforced without leave of this Court.
26. THIS COURT ORDERS that the Manager is at liberty and authorized to issue certificates substantially in the form annexed as Schedule "A" hereto (the "Manager's Certificates") for any amount borrowed by it pursuant to this Order.
27. THIS COURT ORDERS that the monies from time to time borrowed by the Manager pursuant to this Order or any further order of this Court and any and all Manager's Certificates evidencing the same or any part thereof shall rank on a *pari passu* basis, unless otherwise agreed to by the holders of any prior issued Manager's Certificates.

GENERAL

28. THIS COURT ORDERS that the Manager may from time to time apply to this Honourable Court for advice and directions in the discharge of the Manager's powers and duties hereunder.
29. THIS COURT ORDERS that nothing in this Order shall prevent the Manager from acting as receiver, interim receiver or trustee in bankruptcy of the Schedule "B" Companies.
30. THIS COURT HEREBY REQUESTS that aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada to give effect to this Order and to assist the Manager and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Manager, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Manager and its agents in carrying out the terms of this Order.
31. THIS COURT ORDERS that the Manager be at liberty and is hereby authorized and empowered to apply to any court, tribunal regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order.
32. THIS COURT ORDERS that any interested party may apply to this Court to seek the advice and direction of the Court in respect of this Order or the Manager's activities on not less than seven (7) days' notice to the Manager and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.
33. THIS COURT ORDERS that any court materials in these proceeds may be served by emailing a PDF or other electronic copy of such materials to counsels' email addresses as recorded on the Service List from time to time.



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

NOV 18 2013

NB

SCHEDULE "A" COMPANIES

1. Dr. Bernstein Diet Clinics Ltd.
2. 2272551 Ontario Limited
3. DBDC Investments Atlantic Ltd.
4. DBDC Investment Pape Ltd.
5. DBDC Investments Highway 7 Ltd.
6. DBDC Investments Trent Ltd.
7. DBDC Investments St. Clair Ltd.
8. DBDC Investments Tisdale Ltd.
9. DBDC Investments Leslie Ltd.
10. DBDC Investments Lesliebrook Ltd.
11. DBDC Fraser Properties Ltd.
12. DBDC Fraser Lands Ltd.
13. DBDC Queen's Corner Inc.
14. DBDC Queen's Plate Holdings Inc.
15. DBDC Dupont Developments Ltd.
16. DBDC Red Door Developments Inc.
17. DBDC Red Door Lands Inc.
18. DBDC Global Mills Ltd.
19. DBDC Donalda Developments Ltd.
20. DBDC Salmon River Properties Ltd.
21. DBDC Cityview Industrial Ltd.
22. DBDC Weston Lands Ltd.
23. DBDC Double Rose Developments Ltd.
24. DBDC Skyway Holdings Ltd.

25. DBDC West Mall Holdings Ltd.
26. DBDC Royal Gate Holdings Ltd.
27. DBDC Dewhurst Developments Ltd.
28. DBDC Eddystone Place Ltd.
29. DBDC Richmond Row Holdings Ltd.

SCHEDULE “B” COMPANIES

1. Twin Dragons Corporation
2. Bannockburn Lands Inc. / Skyline – 1185 Eglinton Avenue Inc.
3. Wynford Professional Centre Ltd.
4. Liberty Village Properties Inc.
5. Liberty Village Lands Inc.
6. Riverdale Mansion Ltd.
7. Royal Agincourt Corp.
8. Hidden Gem Development Inc.
9. Ascalon Lands Ltd.
10. Tisdale Mews Inc.
11. Lesliebrook Holdings Ltd.
12. Lesliebrook Lands Ltd.
13. Fraser Properties Corp.
14. Fraser Lands Ltd.
15. Queen’s Corner Corp.
16. Northern Dancer Lands Ltd.
17. Dupont Developments Ltd.
18. Red Door Developments Inc. and Red Door Lands Ltd.
19. Global Mills Inc.
20. Donalda Developments Ltd.
21. Salmon River Properties Ltd.
22. Cityview Industrial Ltd.
23. Weston Lands Ltd.
24. Double Rose Developments Ltd.

25. Skyway Holdings Ltd.
26. West Mall Holdings Ltd.
27. Royal Gate Holdings Ltd.
28. Dewhurst Developments Ltd.
29. Eddystone Place Inc.
30. Richmond Row Holdings Ltd.
31. El-Ad Limited
32. 165 Bathurst Inc.

SCHEDULE "C"**MANAGER CERTIFICATE**

CERTIFICATE NO. _____

AMOUNT \$_____

1. THIS IS TO CERTIFY that [MANAGER'S NAME], the Manager (the "Manager") of the assets, undertakings and properties [DEBTOR'S NAME] acquired for, or used in relation to a business carried on by the Debtor, including all proceeds thereof (collectively, the "Property") appointed by Order of the Ontario Superior Court of Justice (Commercial List) (the "Court") dated the _____ of MONTH, 20YR (the "Order") made in an action having Court file number _____-CL-_____, has received as such Manager from the holder of this certificate (the "Lender") the principal sum of \$_____, being part of the total principal sum of \$_____ which the Manager is authorized to borrow under and pursuant to the Order.
2. The principal sum evidenced by this certificate is payable on demand by the Lender with interest thereon calculated and compounded [daily][monthly not in advance on the _____ day of each month] after the date hereof at a notional rate per annum equal to the rate of _____ per cent above the prime commercial lending rate of Bank of _____ from time to time.
3. Such principal sum with interest thereon is, by the terms of the Order, together with the principal sums and interest thereon of all other certificates issued by the Manager pursuant to the Order or to any further order of the Court, a charge upon the whole of the Property, in priority to the security interests of any other person, but subject to the priority of the charges set out in the Order and in the *Bankruptcy and Insolvency Act*, and the right of the Manager to indemnify itself out of such Property in respect of its remuneration and expenses.
4. All sums payable in respect of principal and interest under this certificate are payable at the main office of the Lender at Toronto, Ontario.
5. Until all liability in respect of this certificate has been terminated, no certificates creating charges ranking or purporting to rank in priority to this certificate shall be issued by the Manager to any person other than the holder of this certificate without the prior written consent of the holder of this certificate.
6. The charge securing this certificate shall operate so as to permit the Manager to deal with the Property as authorized by the Order and as authorized by any further or other order of the Court.
7. The Manager does not undertake, and it is not under any personal liability, to pay any sum in respect of which it may issue certificates under the terms of the Order.

DATED the _____ day of _____, 20_____.

[MANAGER'S NAME], solely in its capacity
as Manager of the Property, and not in its
personal capacity

Per: _____

Name:

Title:

DBDC SPADINA LTD., and those corporations listed on Schedule
A hereto
Plaintiffs

-and- NORMA WALTON et al.

Defendants

Court File No. CV-13-10280-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

PROCEEDING COMMENCED AT TORONTO

ORDER

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Lawyers for the Plaintiffs

Ga

SCC File No.: 38051

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

CHRISTINE DEJONG MEDICINE PROFESSIONAL CORPORATION

APPELLANT
(Respondent)

- and -

DBDC SPADINA LTD. and THOSE CORPORATIONS LISTED ON
SCHEDULE A HERETO

RESPONDENTS
(Appellants)

[Style of cause continued on Schedule A]

**NOTICE OF MOTION TO BE ADDED AS A RESPONDENT PARTY
OF THE PROPOSED RESPONDENT PARTY, SCHONFELD INC., IN ITS CAPACITY
AS THE COURT-APPOINTED MANAGER OF THOSE COMPANIES LISTED ON
SCHEDULE “B” AND THOSE PROPERTIES LISTED ON SCHEDULE “C” HERETO**

(Pursuant to Rules 18, 47 and 55-57 of the Rules of the Supreme Court of Canada)

TAKE NOTICE that Schonfeld Inc. (“**Schonfeld**”), in its capacity as Inspector pursuant to the Order of Justice Newbould dated October 4, 2013 and Manager of (i) certain companies listed in Schedule “B” to the Order of Justice Newbould dated November 5, 2013 (the “**November 5 Order**”) (the “**Schedule “B” Companies**”), together with the real estate properties owned by the Schedule “B” Companies (the “**Schedule “B” Properties**”), as amended by Order of Justice Newbould dated January 16, 2014, and (ii) the properties listed at Schedule “C” to the Order of Justice Brown dated August 12, 2014 (the “**Schedule “C” Properties**”, together with the Schedule “B” Properties, the “**Properties**”), hereby applies to a judge or the Registrar of the Court pursuant to Rules 18 and 47 of the *Rules of the Supreme*

- 2 -

Court of Canada for an order adding it as a Respondent in the appeal or, in the alternative, an order pursuant to Rules 55-57 granting it leave to intervene, or such further or other order as the judge or the Registrar may deem appropriate.

AND FURTHER TAKE NOTICE that the following documents will be referred to in support of the motion:

- (a) the affidavit of S. Harlan Schonfeld sworn March 21, 2019; and
- (b) such further and other materials as counsel may advise and this Honourable court may permit.

AND FURTHER TAKE NOTICE that the motion shall be made on the following grounds:

A. The Extensive Involvement of the Manager

2. This proceeding was commenced in October 2013. Since that time, the parties have appeared before the Ontario Superior Court of Justice more than 200 times. More than 50 orders and endorsements have been granted. Schonfeld, in its capacity as Manager and Inspector pursuant to the *Business Corporations Act (Ontario)*, R.S.O. 1990 c.B-16 (“**OBCA**”), has participated actively in the court proceedings relating to this matter including the hearing before the Honourable Mr. Justice Newbould (the “**Application Judge**”) and the Court of Appeal.

B. Schonfeld’s Mandate

3. This appeal is, in substance, a dispute between two victims of a fraud committed by Norma and Ronald Walton (the “**Waltons**”). Schonfeld was appointed Inspector pursuant to section 161(2) of the *OBCA* to investigate, among other things, the financial affairs of certain real estate development companies owned by the Waltons and the Respondent companies. These real estate development companies have been referred to throughout these proceedings as the **Schedule “B” Companies**.

4. The Inspector’s initial investigation uncovered significant financial irregularities at the Schedule “B” Companies. Among other things, funds invested in one company had been taken

- 3 -

by the Waltons, processed through a bank account held by one of their companies, The Rose & Thistle Group Ltd. (**“Rose & Thistle”**), and paid to other Schedule “B” Companies, the Waltons’ personal accounts and other companies in which Dr. Bernstein had no interest (the **“Schedule “C” Companies”**). The Appellants invested in four Schedule “C” Companies (the **“DeJong Companies”**).

5. By Order of Justice Newbould dated November 5, 2013, Schonfeld was appointed receiver/manager of the Schedule “B” Companies. After further investigation into the Waltons’ misconduct, which is described below, Schonfeld was appointed manager-receiver over the real estate properties owned by the Schedule “C” Companies (the **“Schedule “C” Properties”**) by Order of Justice Brown dated August 12, 2014.

C. Schonfeld’s involvement in the proceedings below

6. At first instance, the Manager/Inspector reported the results of its investigation to the Court and made submissions clarifying and explaining its reports. Before the Court of Appeal, counsel to the Manager/Inspector was questioned at length about its investigation. The Manager’s work product is the primary evidence relied on both by the Court at first instance and by the Court of Appeal.

D. Schonfeld’s Proposed Participation as a Respondent

7. The central dispute between the Appellants and the Respondents is whether certain companies in which the Appellants invested (defined in the Appellant’s factum as the **“Dejong Companies”**) are liable to certain companies that the Respondents invested in (which have been referred to throughout these proceedings as the **“Schedule “B” Companies”**) in knowing receipt and knowing assistance.

8. Schonfeld did not take a position on the dispute between the Appellants and Respondents before the Application Judge or the Court of Appeal and it will take no position on that dispute if this motion is granted.

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E. The Manager's Mandate is Not Complete

9. The Manager is presently holding \$2,637,720¹ in respect of the Schedule "C" Companies. A total of \$1,958,678 of these funds relate to the DeJong Companies. This appeal will determine how these funds are distributed, and the Manager's mandate cannot be completed until such a determination is made.

10. The Schedule "C" Properties were sold several years ago, and the Manager has been holding the proceeds of these sales pending the outcome of the various legal disputes that could impact distribution of these funds. Given the amount of time that has passed, and the further time that will be required to address this appeal, the Manager determined in June 2018 that it was appropriate to seek permission to distribute the Schedule "C" proceeds if this Court denies the DeJongs' application for leave to appeal or grants leave but dismisses the appeal. If the Supreme Court hears the DeJongs' appeal and grants some or all of the relief sought, then the distribution approved in 2018 will need to be revisited.

11. Accordingly, the Manager has filed this motion requesting that the Manager be added as a respondent party to this appeal and that the title of proceedings be amended to show Schonfeld Inc., in its capacity as the court-appointed Manager of the Schedule "B" Companies and the Schedule "C" Properties, as "Respondent" with full rights to participate in this appeal.

¹ These amounts do not include accrued interest on GICs, nor do they account for unpaid professional fees of the Manager and its counsel.

Dated at Toronto, in the Province of Ontario, this 21st day of March, 2019.

SIGNED BY:



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**Ottawa Agent for
Schonfeld Inc.**

ORIGINAL TO: THE REGISTRAR

AND TO:

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Professional Corporation**

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Maxine Vincelette

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**Agent for the Appellant, Christine
DeJong Medicine Professional
Corporation**

- 7 -

AND TO:

**LENCZNER SLAGHT
ROYCE SMITH GRIFFIN
LLP**
Barristers and Solicitors
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**Counsel for the Respondents,
DBDC Spadina Ltd. and those
corporations listed on Schedule
A hereto**

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David Elliot
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Email: david.elliott@dentons.com

**Agent for the Respondents, DBDC
Spadina Ltd. and those corporations
listed on Schedule A hereto**

NOTICE TO THE RESPONDENT TO THE MOTION: A respondent to the motion may serve and file a response to this motion within 10 days after service of the motion. If no response is filed within that time, the motion will be submitted for consideration to a judge or the Registrar, as the case may be.

SCHEDULE “A” COMPANIES

1. Dr. Bernstein Diet Clinics Ltd.
2. 2272551 Ontario Limited
3. DBDC Investments Atlantic Ltd.
4. DBDC Investments Pape Ltd.
5. DBDC Investments Highway 7 Ltd.
6. DBDC Investments Trent Ltd.
7. DBDC Investments St. Clair Ltd.
8. DBDC Investments Tisdale Ltd.
9. DBDC Investments Leslie Ltd.
10. DBDC Investments Lesliebrook Ltd.
11. DBDC Fraser Properties Ltd.
12. DBDC Fraser Lands Ltd.
13. DBDC Queen’s Corner Ltd.
14. DBDC Queen’s Plate Holdings Inc.
15. DBDC Dupont Developments Ltd.
16. DBDC Red Door Developments Inc.
17. DBDC Red Door Lands Inc.
18. DBDC Global Mills Ltd.
19. DBDC Donalda Developments Ltd.
20. DBDC Salmon River Properties Ltd.
21. DBDC Cityview Lands Ltd.
22. DBDC Weston Lands Ltd.
23. DBDC Double Rose Developments Ltd.
24. DBDC Skyway Holdings Ltd.
25. DBDC West Mall Holdings Ltd.
26. DBDC Royal Gate Holdings Ltd.
27. DBDC Dewhurst Developments Ltd.
28. DBDC Eddystone Place Ltd.
29. DBDC Richmond Row Holdings Ltd.

SCHEDULE “B” COMPANIES

1. Twin Dragons Corporation
2. Bannockburn Lands Inc. / Skyline – 1185 Eglinton Avenue Inc.
3. Wynford Professional Centre Ltd.
4. Liberty Village Properties Ltd.
5. Liberty Village Lands Inc.
6. Riverdale Mansion Ltd.
7. Royal Agincourt Corp.
8. Hidden Gem Development Inc.
9. Ascalon Lands Ltd.
10. Tisdale Mews Inc.
11. Lesliebrook Holdings Ltd.
12. Lesliebrook Lands Ltd.
13. Fraser Properties Corp.
14. Fraser Lands Ltd.
15. Queen’s Corner Corp.
16. Northern Dancer Lands Ltd.
17. Dupont Developments Ltd.
18. Red Door Developments Inc. and Red Door Lands Ltd.
19. Global Mills Inc.
20. Donalda Developments Ltd.
21. Salmon River Properties Ltd.
22. Cityview Industrial Ltd.
23. Weston Lands Ltd.
24. Double Rose Developments Ltd.
25. Skyway Holdings Ltd.
26. West Mall Holdings Ltd.
27. Royal Gate Holdings Ltd.
28. Royal Gate Nominee Inc.
29. Royal Gate (Land) Nominee Inc.
30. Dewhurst Development Ltd.
31. Eddystone Place Inc.

- 32. Richmond Row Holdings Ltd.
- 33. El-Ad (1500 Don Mills) Limited
- 34. 165 Bathurst Inc.

SCHEDULE “C” PROPERTIES

1. 3270 American Drive, Mississauga, Ontario
2. 0 Luttrell Ave., Toronto, Ontario
3. 2 Kelvin Avenue, Toronto, Ontario
4. 346 Jarvis Street, Suites A, B, C, E and F, Toronto, Ontario
5. 1 William Morgan Drive, Toronto, Ontario
6. 324 Prince Edward Drive, Toronto, Ontario
7. 24 Cecil Street, Toronto, Ontario
8. 30 and 30A Hazelton Avenue, Toronto, Ontario
9. 777 St. Clarens Avenue, Toronto, Ontario
10. 252 Carlton Street and 478 Parliament Street, Toronto, Ontario
11. 66 Gerrard Street East, Toronto, Ontario
12. 2454 Bayview Avenue, Toronto, Ontario
13. 319-321 Carlaw, Toronto, Ontario
14. 260 Emerson Ave., Toronto, Ontario
15. 44 Park Lane Circle, Toronto, Ontario
16. 19 Tennis Crescent, Toronto, Ontario
17. 646 Broadview, Toronto, Ontario

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IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

CHRISTINE DEJONG MEDICINE PROFESSIONAL CORPORATION

APPELLANT
(Respondent)

- and -

DBDC SPADINA LTD. and THOSE CORPORATIONS LISTED ON
SCHEDULE A HERETO

RESPONDENTS
(Appellants)

[style of cause continued on Schedule A]

**FACTUM OF THE APPELLANT,
CHRISTINE DEJONG MEDICINE PROFESSIONAL CORPORATION**

(Rule 42 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156)

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PART I – OVERVIEW AND STATEMENT OF FACTS

Overview

1. This appeal is a contest between two sets of victims of the same fraudulent scheme. One set of victims has sued the other for knowingly assisting in the fraud.
2. The question on this appeal is whether the act of being defrauded can make victims culpable for the very fraud that victimized them. The answer must be an emphatic **no**.
3. Dr. Christine DeJong and her husband, through investment companies, invested over \$3.8 million with the Waltons in several project-specific real estate ventures. The DeJongs and Waltons each agreed to contribute half of the capital in each project. The DeJongs did. The Waltons did not, because they were running a fraud. The Waltons did not invest the DeJongs' funds. Rather, they took them almost immediately for their own purposes.
4. To date, the DeJongs have recovered no money back from their investments. They were the sole investors in four companies (the "DeJong Companies") that have funds remaining. The DeJongs want those funds back to recover some of their losses.
5. Dr. Bernstein, through his investment companies, also invested with the Waltons and was also defrauded. But he was the first to discover the fraud and has already recovered a significant portion of his investment. To recover even more, he brought an application to collect \$22.6 million against the DeJong Companies, alleging that they committed knowing assistance in the fraud. If he succeeds, the DeJongs' chance of any recovery will be wiped out.
6. But there is nothing connecting Dr. Bernstein's investments to the money left in the DeJong Companies. He undertook a tracing analysis and received constructive trusts over money that the tracing could support. Although the court invited him to conduct further tracing, he declined to do so. Instead, he claimed knowing assistance against the DeJong Companies, on the basis that Ms. Walton, who was a director of those companies, committed the fraud.
7. The application judge rejected Dr. Bernstein's claim of knowing assistance. Despite the lack of evidence connecting Dr. Bernstein's investments to the DeJong Companies, a majority of the Court of Appeal reversed. The DeJongs appeal on three issues.

8. First, the DeJong Companies did not assist or participate in the Waltons' fraud on Dr. Bernstein. Nothing the DeJong Companies did facilitated the fraud. Nor did they benefit from it: the DeJong Companies lost significant sums to the Waltons. Two of the four DeJong Companies *did not even exist* during the period of the Bernstein fraud, and the other two played no role in the fraud on Dr. Bernstein.

9. The Court of Appeal nonetheless found that the DeJong Companies participated in the fraud on Dr. Bernstein because the Waltons took money *from* the DeJong Companies to further their larger fraudulent scheme. But being the victim of a larger fraud does not make one complicit in the fraud of other victims. Culpability for knowingly assisting a fraud cannot arise from the act of being defrauded.

10. Second, liability for knowing assistance requires that the DeJong Companies had knowledge of Ms. Walton's wrongs against Dr. Bernstein and his companies. The Court of Appeal attributed the knowledge of the fraudsters to the DeJong Companies by concluding that Ms. Walton was their directing mind. But corporations cannot be imputed with the acts or knowledge of a principal who is acting solely for her own benefit and defrauding the corporation. Where a fraudster abuses her position to harm and defraud a corporation, she ceases to act on its behalf. The corporation cannot be both the perpetrator and victim of the same fraud. When Ms. Walton used her position in the DeJong Companies to carry out her fraud, she was acting as their adversary, not their agent. Her knowledge of the fraud cannot fairly be imputed to the same corporations she was defrauding.

11. Third, this is an extraordinary use of the doctrine of knowing assistance, by one victim of a fraud against other innocent investor hurt by the same fraud. All equitable remedies are discretionary and this Court should not award a remedy for knowing assistance where, as here, it works an unjust result. There is no reason to prefer Dr. Bernstein's interests over the other victims merely because he discovered the fraud and started a lawsuit before they did.

The parties

12. The appellant, Christine DeJong Medicine Professional Corporation ("DeJong PC"), is the professional corporation of Dr. Christine DeJong, a community obstetrician and gynecologist. Through DeJong PC, Dr. DeJong and her husband, Michael DeJong, a

homebuilder, invested in a number of commercial real estate projects with Norma and Ronauld Walton. Mr. DeJong also invested with the Waltons through his own companies.¹

13. The respondents, DBDC Spadina Ltd. and the Schedule A Corporations (the “DBDC Applicants”) are investment companies owned and controlled by Dr. Stanley K. Bernstein, the founder of a successful weight loss clinic empire spanning over 60 locations in Canada. Through the DBDC Applicants, Dr. Bernstein also invested with the Waltons.²

14. Norma and Ronauld Walton are married. Both are lawyers. They created the Rose & Thistle Group Ltd. (“Rose & Thistle”) in 2001. The Waltons promoted Rose & Thistle as a legitimate real property investment company formed to acquire, develop, and manage commercial real estate properties in the Greater Toronto area.³ In reality, Rose & Thistle was at the heart of a complex investment fraud perpetrated by the Waltons.

15. For greater clarity, a glossary of the identity of the parties and other entities and terms relevant to this appeal is appended as Schedule D to this factum. The glossary includes a comparison of how similar terms were defined in the decisions below.

The Waltons’ fraudulent scheme

16. At the peak of their scheme, the Waltons had managed to convince dozens of innocent investors—including the DeJongs and Dr. Bernstein—to invest more than \$100 million in some 50 single-purpose corporations created to finance individual commercial real estate projects.⁴ In

¹ Reasons of the Application Judge, dated July 16, 2016 (“Application Judge’s Reasons”), para. 60, Appeal Record (“AR”), Vol. I, Tab 4, p. 87; Reasons of Brown J., August 12, 2014 (“Brown J. Reasons”), paras. 281-282, AR, Vol. IV, Tab 32, pp. 281-282.

² Endorsement of Newbould J., dated November 5, 2013 (“Newbould J. November 5, 2013 Reasons”), paras. 4-6, AR, Vol. III, Tab 23, p. 127; Affidavit of Norma Walton, sworn October 31, 2013 (“Walton October 31, 2013 Affidavit”), paras. 4-5, AR, Vol. X, Tab 53, pp. 123-124.

³ Brown J. Reasons, paras. 5-6, AR, Vol. IV, Tab 32, pp. 75-76; Print-out from Rose & Thistle Website, Exhibit “125”, Affidavit of Jim Reitan, sworn June 26, 2014 (“Reitan Affidavit”), AR, Vol. X, Tab 50N, p. 8; Walton October 31, 2013 Affidavit, paras. 3-8, AR, Vol. X, Tab 53, pp. 123-125.

⁴ Walton October 31, 2013 Affidavit, paras. 9, 14-40, AR, Vol. X, Tab 53, pp. 125-142; Affidavit of Norma Walton, sworn December 17, 2013 (“Walton December 17, 2013 Affidavit”), paras. 16-20, AR, Vol. XI, Tab 54, pp. 8-32.

many of these projects, the Waltons promised to invest an equal amount of equity. In reality, they contributed little, if anything, to the projects.⁵

17. Instead, the Waltons treated their investors' funds as their own, spreading the funds out across a complex web of over 50 bank accounts, sometimes using them to fund their obligations to creditors in certain projects, sometimes using them to line their own pockets. The Waltons misappropriated the investors' money to benefit themselves by:

- (1) using the money to purchase and renovate their personal residence at 44 Park Lane Circle, a palatial mansion in Toronto's affluent Bridle Path neighborhood;
- (2) transferring the money to entities owned solely by them;
- (3) transferring the money into Ms. Walton's personal bank account and using it for their "own personal use"; and
- (4) using the money to repay loans they owed and to satisfy financial obligations they owed to other investors.⁶

18. Rose & Thistle was at the centre of the scheme. Although the Waltons represented that investment funds would remain in project-specific entities, this was rarely true in practice. Soon after investor funds were deposited in the entity's account, the Waltons would move the funds to Rose & Thistle. From there, the Waltons could direct the money into their personal bank accounts or into one of the many other project-specific accounts in their scheme. Ms. Walton described Rose & Thistle as a central "clearing house" through which she "smoothed out" the flow of investor funds.⁷

⁵ Application Judge's Reasons, paras. 29, 71-72, 80, 88, AR, Vol. I, Tab 4, pp. 76-77, 90, 92, 94.

⁶ Application Judge's Reasons, paras. 12, 72, AR, Vol. I, Tab 4, pp. 69, 90; Brown J. Reasons, paras. 104, 130-131, 145, 149, AR, Vol. IV, Tab 32, pp. 115, 121, 125-127; Newbould J. November 5, 2013 Reasons, para. 11, 46, AR, Vol. III, Tab 23, pp. 129, 140-141; Reasons of the Court of Appeal, dated January 25, 2018 ("Court of Appeal Reasons"), para. 247, AR, Vol. II, Tab 7, p. 110.

⁷ Brown J. Reasons, para. 181, AR, Vol. IV, Tab 32, p. 135.

The DeJongs' investments with the Waltons

19. In 2004, the DeJongs began investing with the Waltons. Their investments were initially structured as share purchases in real property holding companies. In 2012, the DeJongs started participating in project-specific companies as equal shareholders with the Waltons.⁸

20. Between April 2012 and November 2013, the DeJongs entered into shareholder agreements (the “Shareholder Agreements”) with the Waltons in respect of six such companies, including the following four involved in this appeal (the “DeJong Companies”):

- (1) **United Empire Lands Ltd. (“United Empire”)**, into which DeJong PC agreed to invest in February 2013, advancing \$992,750;⁹
- (2) **Prince Edward Properties Ltd. (“Prince Edward”)**, into which DeJong PC agreed to invest in September 2013, advancing \$816,019;¹⁰ and
- (3) **St. Clarens Holdings Ltd. (“St. Clarens”)** and **Emerson Developments Ltd. (“Emerson”)**, into which DeJong PC agreed to invest in November 2013, advancing \$665,307.¹¹

21. The Shareholder Agreements set out the scope of each project and the nature of each real estate investment, stipulating that:

- (1) the Waltons would contribute equity equal to that invested by DeJong PC;
- (2) in exchange for their equity contributions, the DeJongs and Waltons would each have a 50% ownership of a project-specific holding company and would be named as its directors;
- (3) the equity investments would be used solely for acquiring, renovating, and managing a project-specific property;
- (4) any significant decisions that differed from the project plan required more than 50% shareholder approval; and

⁸ Affidavit of Christine DeJong, sworn July 8, 2014 (“DeJong July 8, 2014 Affidavit”), para. 3, AR, Vol. V, Tab 47, p. 91.

⁹ Application Judge’s Reasons, para. 65, AR, Vol. I, Tab 4, p. 89.

¹⁰ Application Judge’s Reasons, para. 75, AR, Vol. I, Tab 4, p. 91.

¹¹ Application Judge’s Reasons, para. 84, AR, Vol. I, Tab 4, p. 93.

- (5) the Waltons would keep proper records of the company's dealings and provide the DeJongs with access to those records.¹²

22. Unbeknownst to the DeJongs, the Waltons repeatedly breached the Shareholder Agreements and their fiduciary duties by: (1) failing to inject their share of the promised capital, and in most cases any capital at all, into the DeJong Companies; (2) using the DeJongs' money as the Waltons saw fit instead of acquiring or developing the property it was earmarked for; (3) for one company, using money taken from other investors to fund the Waltons' own financial obligations; (4) charging the companies for undisclosed fees and work that was never carried out; and (5) failing to keep an accurate accounting of records.¹³ These breaches were the cause of the DeJongs' loss of their investments.¹⁴ Examining the Waltons' conduct in respect of each individual DeJong Company reveals the extent of their fraud.

23. ***United Empire***. The Shareholder Agreement required the DeJongs and Waltons to each contribute \$992,750. The DeJongs paid that amount. The Waltons paid nothing. All of the DeJongs' money was supposed to be used to purchase a property at 3270 American Drive. But only \$10,000 was used for that purpose.¹⁵ At least \$706,850 was transferred out to Rose & Thistle almost immediately after the DeJongs invested. Around \$515,000 of those funds were then transferred to companies in which the DBDC Applicants had invested with the Waltons as equal shareholders (the "DBDC Companies" referred to below as the "Schedule B Companies").¹⁶ Instead of contributing their share of equity, the Waltons advanced funds taken

¹² Agreement respecting UEL dated February 2013, Capital Request Documents and Cash Flow Statement, Exhibit "D", DeJong July 8, 2014 Affidavit, AR, Vol. V, Tab 47D, pp. 122-126; Agreement and Capital Required Document respecting 324 Prince Edward Drive, Toronto, Exhibit "K", Affidavit of Christine DeJong, sworn February 11, 2015 ("DeJong February 11, 2015 Affidavit"), AR, Vol. VII, Tab 48K, pp. 104-107; Agreement respecting 777 St. Clarens Avenue/260 Emerson Avenue, Toronto and Capital Request Documents, Exhibit "F", DeJong February 11, 2015 Affidavit, AR, Vol. VII, Tab 48F, pp. 56-59.

¹³ Application Judge's Reasons, paras. 71-72, 80, 88, AR, Vol. I, Tab 4, pp. 90, 92, 94.

¹⁴ Application Judge's Reasons, paras. 73, 81, 89, AR, Vol. I, Tab 4, pp. 90-92, 94.

¹⁵ Application Judge's Reasons, paras. 65-72, AR, Vol. I, Tab 4, pp. 89-90.

¹⁶ Brown J. Reasons, para. 287, AR, Vol. IV, Tab 32, p. 168; Affidavit of Christine DeJong, sworn October 7, 2015 ("DeJong October 7, 2015 Affidavit"), paras. 21-22, AR, Vol. VIII, Tab 49, pp. 189-190; Froese Forensic Report, para. 2.63-2.65, Exhibit "J", Affidavit of Norma Walton, sworn July 4, 2014 ("Walton July 4, 2014 Affidavit"), AR, Vol. XII, Tab 58J, p. 20.

from the DBDC Companies into the purchase of American Drive. As a result of the Waltons' wrongdoing, the DBDC Applicants were able to obtain a constructive trust for \$1,032,000, subordinating the DeJongs' interest in the assets of United Empire.¹⁷

24. ***Prince Edward***. The DeJongs and Waltons were supposed to each advance \$816,019 into the corporation. The DeJongs advanced their share. The Waltons advanced, at most, \$100. Almost immediately after the DeJongs invested, the Waltons moved most of these funds out to Rose & Thistle. They used part of the funds (\$346,314.89) to purchase project-specific property, with the remainder unaccounted for. The Waltons charged Prince Edward for \$60,000 of due diligence that was never done and claimed they had provided \$80,000 that was, in fact, never advanced.¹⁸

25. ***St. Clarens and Emerson***. The DeJongs and Waltons were supposed to each advance \$665,307. The DeJongs advanced their share. The Waltons only advanced \$80,000. They charged the corporations for \$50,000 of due diligence that was never done and \$225,000 for an assignment fee that was never disclosed or agreed to. The two properties owned by St. Clarens and Emerson were sold by the mortgagee after the Waltons failed to service the mortgage.¹⁹

26. The DeJongs also invested \$500,000 and \$617,000, respectively, into two other companies that are not at issue in this appeal: Lesliebrook Holdings and Front Church Properties.²⁰ These companies were also structured as single-purpose companies jointly owned by the Waltons and the DeJongs. Without consulting the DeJongs, and in breach of their agreements, Ms. Walton exchanged the DeJongs' shares in Lesliebrook and Front Church for shares in another company, Academy Lands.²¹ The DeJongs cannot recover any of their lost investments from Lesliebrook, Front Church, or Academy Lands because the assets of these

¹⁷ Application Judge's Reasons, paras. 67-69, 71-73, AR, Vol. I, Tab 4, pp. 89-91.

¹⁸ Application Judge's Reasons, paras. 75-80, AR, Vol. I, Tab 4, pp. 91-92.

¹⁹ Application Judge's Reasons, paras. 84-88, AR, Vol. I, Tab 4, pp. 93-94.

²⁰ DeJong July 8, 2014 Affidavit, para. 15, AR, Vol. V, Tab 47, p. 94; Cheque and Share Certificates related to Academy Lands Ltd., Exhibit "B", DeJong July 8, 2014 Affidavit, AR, Vol. V, Tab 47B, pp. 111-113.

²¹ Brown J. Reasons, paras. 282-285, AR, Vol. IV, Tab 32, p. 167; DeJong July 8, 2014 Affidavit, para. 15, AR, Vol. V, Tab 47, p. 94.

companies were either distributed without the DeJongs' knowledge²² or have been swept up by Dr. Bernstein's claims.²³

27. By the time the DeJongs learned of the Waltons' fraud, their investments with the Waltons totaled over \$3.8 million.²⁴

The DBDC Applicants' investments with the Waltons

28. After participating in their real estate acquisition scheme for numerous years as a mortgagee, Dr. Bernstein began investing with the Waltons in 2010 through the DBDC Applicants.²⁵ The DBDC Applicants, like DeJong PC, invested as equal shareholders with the Waltons in single-purpose companies formed to acquire, develop, and manage specific commercial real estate projects. In this arrangement, the Waltons were responsible for managing and supervising the projects, and arranging financing.²⁶

29. Although the DBDC Applicants' investments were much larger than the DeJongs'—totaling approximately \$110 million invested across 31 projects—the investments were structured in much the same way as the DeJong investments, and were governed by agreements similar to those that governed the DeJong investments.²⁷ The Waltons similarly breached those agreements by: (1) failing to contribute their promised capital; (2) using the DBDC Applicants' funds outside the earmarked projects; (3) using other investors' money to fund their own obligations; and (4) not managing project-specific corporations properly or keeping proper

²² DeJong July 8, 2014 Affidavit, paras. 15, 18, AR, Vol. V, Tab 47, pp. 94-95.

²³ DeJong October 7, 2015 Affidavit, para. 19, AR, Vol. VII, Tab 49, pp. 188-189; Brown J. Reasons, paras. 264, 267, AR, Vol. IV, Tab 32, pp. 161-162; Twenty-Fifth Report of the Manager, dated March 6, 2015, paras. 7, 10, AR, Vol. XVI, Tab 83, pp. 99-101.

²⁴ Application Judge's Reasons, para. 60, AR, Vol. I, Tab 4, p. 87; DeJong July 8, 2014 Affidavit, para. 11, AR, Vol. V, Tab 47, p. 92.

²⁵ Brown J. Reasons, para. 1, AR, Vol. IV, Tab 32, p. 75; Affidavit of Stanley Bernstein, sworn August 4, 2015 ("Bernstein Affidavit"), paras. 5-9, AR, Vol. X, Tab 51, pp. 99-100.

²⁶ Endorsement of Newbould J., dated October 7, 2013 ("Newbould J. October 7, 2013 Reasons"), para. 7, AR, Vol. III, Tab 21, p. 121; Bernstein Affidavit, paras. 10-11, AR, Vol. X, Tab 51, pp. 100-101.

²⁷ Brown J. Reasons, paras. 1, 5-7, 282, AR, Vol. IV, Tab 32, pp. 75-76, 167; Application Judge's Reasons, paras. 50-51, AR, Vol. I, Tab 4, p. 85.

records.²⁸ As the DBDC Applicants conceded before the court below, the DBDC Companies and the DeJong Companies were “operated exactly the same way by the Waltons.”²⁹

30. There are two key differences between Dr. Bernstein and the DeJongs. First, unlike the DeJongs, Dr. Bernstein directed the Waltons to keep his involvement in the DBDC Companies secret. He did so to avoid having to personally guarantee the mortgages of properties owned by the DBDC Companies, as required by institutional lenders.³⁰ Dr. Bernstein even temporarily resigned as a director of the DBDC Companies to further this deception. These institutional lenders have since brought claims for fraud, conspiracy, and oppression against Dr. Bernstein.³¹

31. Second, Dr. Bernstein has recovered around 40% of his investments with the Waltons and has obtained numerous constructive trusts.³² In contrast, the DeJongs have recovered nothing to date and can only recover from the four DeJong Companies. If Dr. Bernstein’s \$22.6 million claim for knowing assistance against the DeJong Companies is upheld, it will overwhelm the DeJongs’ claims and they would stand to recoup little to nothing at all.

The DBDC Applicants’ application against the Waltons

32. Dr. Bernstein was the first investor to learn of, and sue on, the Waltons’ fraud. Within six months of suspecting the Waltons, Dr. Bernstein had an Inspector investigating the status of his investments,³³ a Manager overseeing the DBDC Companies,³⁴ and an application pending

²⁸ Newbould J. November 5, 2013 Reasons, para. 46, AR, Vol. III, Tab 23, pp. 140-141; Application Judge’s Reasons, paras. 71-72, 80, 88, AR, Vol. I, Tab 4, pp. 90, 92, 94.

²⁹ DBDC Applicants’ Factum before the Court of Appeal, dated December 6, 2016, para. 5(b)(i), AR, Vol. XVI, Tab 83, p. 111.

³⁰ Trez Capital Limited Partnership v. Bernstein – Reasons for Decision of the Court of Appeal dated February 6, 2018, paras. 4-6, 30, Exhibit “E”, Affidavit of Norma Walton sworn February 12, 2016 (“Walton February 12, 2016 Affidavit”), AR, Vol. XIV, Tab 59E, pp. 2-3, 12-13.

³¹ Trez Capital Limited Partnership v. Bernstein, Amended Statement of Claim, Court File No. CV-15-11147-00CL, para. 1(a), Exhibit “A”, Walton February 12, 2016 Affidavit, AR, Vol. XIII, Tab 59A, p. 111.

³² Application Judge’s Reasons, paras. 19, 58, AR, Vol. I, Tab 4, pp. 73, 86-87.

³³ Newbould J. October 7, 2013 Reasons, paras. 2-3, 33, AR, Vol. III, Tab 21, pp. 2-3, 119.

³⁴ Newbould J. November 5, 2013 Reasons, paras. 2-3, 11, AR, Vol. III, Tab 23, pp. 127, 129.

against several properties, some of which innocent investors had ownership interests in.³⁵ All the while, the DeJongs were unaware that any investor was going after the Waltons.³⁶

33. Dr. Bernstein first learned of issues with his Walton investments in June 2013, when the CFO of his diet clinics reviewed the investments and raised concerns.³⁷ In October 2013, Dr. Bernstein commenced an oppression application on behalf of the DBDC Applicants. The original respondents were the Waltons, Rose & Thistle, and another company they owned, Eglinton Castle Inc. (the “Walton Respondents”). The DBDC Companies were named as respondents in order to be bound by the result.³⁸

34. Initially, the DBDC Applicants merely sought an accounting of their investments from the Walton Respondents.³⁹ No other parties were named or involved. But what began as a simple oppression application eventually sprawled into complex proceedings that ended up catching innocent investors, including the DeJongs, in its wake.

35. Soon after they brought their initial application in October 2013, the DBDC Applicants obtained a court order appointing an Inspector to investigate the Walton Respondents.⁴⁰ In November 2013, after the Inspector uncovered evidence of the Waltons’ mishandling of the DBDC Applicants’ investments, its mandate was expanded to include the role of Manager over the DBDC Companies.⁴¹

36. Based on the Inspector’s findings, the DBDC Applicants amended their application in December 2013 to assert allegations of fraud against the Waltons. The amendment also identified

³⁵ DBDC Applicants’ Amended Amended Notice of Application, dated December 17, 2013 (“December 17, 2013 Notice of Application”), para. 1(o), AR, Vol. II, Tab 12, pp. 174-175.

³⁶ DeJong July 8, 2014 Affidavit, para. 17, AR, Vol. V, Tab 47, p. 94.

³⁷ Newbould J. October 7, 2013 Reasons, para. 8, AR, Vol. III, Tab 21, pp. 113-114; Reitan Affidavit, paras. 23-31, AR, Vol. IX, Tab 50, pp. 25-27.

³⁸ Court of Appeal Reasons, para. 168, AR, Vol. II, Tab 7, pp. 74-75; DBDC Applicants’ Notice of Application dated October 1, 2013 (“October 1, 2013 Notice of Application”), AR, Vol. II, Tab 10, pp. 131-147.

³⁹ October 1, 2013 Notice of Application, paras. 1(c)-1(k), AR, Vol. II, Tab 10, pp. 133-135.

⁴⁰ Newbould J. October 7, 2013 Reasons, paras. 2-3, 32, AR, Vol. III, Tab 21, pp. 119.

⁴¹ Newbould J. November 5, 2013 Reasons, paras. 2-3, 53, AR, Vol. III, Tab 23, pp. 127, 143.

over 20 properties into which the DBDC Applicants alleged the Waltons had diverted their investments. Some of these properties belonged to companies owned solely by the Waltons (“Walton Companies”), while others belonged to companies in which innocent investors, including the DeJongs, had an interest (“Innocent Investor Companies”).⁴² Despite this, the DeJongs would not become involved in the proceeding until six months later.⁴³

The Net Transfer Analysis

37. The DBDC Applicants’ claim against the DeJong Companies has its roots in a single piece of evidence: the Net Transfer Analysis.⁴⁴ This analysis examined the transfer of funds between the Rose & Thistle “clearing house” account and two groups of accounts: (1) those of DBDC Companies, and (2) all other accounts to which the Waltons had access.⁴⁵ The latter accounts were grouped together solely on the basis that they were not DBDC Company accounts (the “non-DBDC Accounts” and the “non-DBDC Companies”)—regardless of whether they belonged to Innocent Investor Companies or the fraudsters themselves. The analysis looked at the flow of funds between Rose & Thistle and these two groups, showing the Waltons directed:

- a net transfer of \$22.6 million dollars from the DBDC Companies to Rose & Thistle (after accounting for \$1 million of legitimate management fees⁴⁶),
- a net transfer of \$25.4 million dollars from Rose & Thistle to the 54⁴⁷ non-DBDC Accounts the Waltons had access to.⁴⁸

⁴² December 17, 2013 Notice of Application, para. 1(o), AR, Vol. II, Tab 12, pp. 174-175.

⁴³ Brown J. Reasons, paras. 3, 281, AR, Vol. IV, Tab 32, pp. 75, 166-167; Court of Appeal Reasons, paras. 168-169, AR, Vol. II, Tab 7, pp. 74-76.

⁴⁴ Cash Transfer Analysis of the Inspector, circulated February 21, 2014, (“Net Transfer Analysis”), Exhibit “A”, Fourth Interim Report of the Inspector, dated April 23, 2014 (“Inspector’s Fourth Report”), AR, Vol. XIV, Tab 68A, pp. 148-158.

⁴⁵ Brown J. Reasons, paras. 17-20, AR, Vol. IV, Tab 32, pp. 83-85.

⁴⁶ Brown J. Reasons, para. 225, AR, Vol. IV, Tab 32, p. 149.

⁴⁷ The Net Transfer Analysis looked at 50 non-DBDC Company Accounts, but, a summary document included 54 accounts. *See* Summary of the Cash Transfer Analysis (Net Transfer Summary), Exhibit “B”, Inspector’s Fourth Report, AR, Vol. XIV, Tab 68B, p. 160.

⁴⁸ Brown J. Reasons, para. 39, AR, Vol. IV, Tab 32, pp. 92-93; Inspector’s Fourth Report, paras. 12-13, AR, Vol. XIV, Tab 68, pp. 132-133.

38. The Net Transfer Analysis was a blunt tool designed to provide an overview of the flow of DBDC Applicants' funds, to justify subsequent, "more detailed", property-specific tracing of those funds. The usefulness of the Net Transfer Analysis is restricted to this purpose.⁴⁹

39. The Net Transfer Analysis gave no regard to any investors' ownership interests other than those of the DBDC Applicants. Because it focused on the DBDC Applicants' investments, the analysis obscured whether other companies, like the DeJong Companies, suffered a net loss relative to Rose & Thistle. Instead, the analysis indiscriminately pooled the accounts belonging to Innocent Investor Companies together with accounts solely owned by the Waltons, including Ms. Walton's personal bank account and the accounts of corporate entities the Waltons owned.⁵⁰

40. In effect, the Net Transfer Analysis treated the accounts of the fraudsters and their victims (other than the DBDC Applicants) as the same.⁵¹ By grouping the accounts of Walton Companies and the Innocent Investor Companies together, the Net Transfer Analysis also obscured the fact that the Innocent Investor Companies saw little of the money from Rose & Thistle. Of the 54 non-DBDC Accounts examined in the Net Transfer Analysis, 11 received disproportionately large net transfers from Rose & Thistle totalling \$1 million or more.⁵² There

⁴⁹ Inspector's Fourth Report, para. 14, AR, Vol. XIV, Tab 68, p. 133; Court of Appeal Reasons, paras. 185, 194-204, AR, Vol. II, Tab 7, pp. 83, 87-92.

⁵⁰ Walton December 17, 2013 Affidavit, paras. 20(d), 20(h), 20(l), 20(m), 20(s), 20(u), 20(v), 20(z), AR, Vol. XI, Tab 54, pp. 12, 15-16, 18-20, 24-28, 30-31; Newbould J. November 5, 2013 Reasons, para. 46, AR, Vol. III, Tab 23, pp. 140-141; Court of Appeal Reasons, para. 189, AR, Vol. II, Tab 7, pp. 84-85.

⁵¹ Court of Appeal Reasons, para. 199, AR, Vol. II, Tab 7, p. 89; Net Transfer Analysis, Exhibit "A", Inspector's Fourth Report, AR, Vol. XIV, Tab 68A, pp. 148-158.

⁵² The following 11 accounts had net receipts of \$1 million or more: 1) Ms. Walton's personal account (\$5.5 million); 2) Rose and Thistle Properties (\$3.2 million); 3) Plexor Plastics Corp. (\$2.8 million); 4) Rose & Thistle Construction Inc. (\$2.4 million); 5) Due from Shareholders (\$1.9 million); 6) Urban Amish Interiors (\$1.8 million); 7) 1780355 Ontario Inc. (\$1.6 million); 8) Walton Advocates (\$1.6 million); 9) Old Apothecary Building (66 Gerard) (\$1.3 million); 10) Gerard House Inc. (\$1.2 million); and 11) College Lane Ltd. (\$1.1 million). Net Transfer Summary, Exhibit "B", Inspector's Fourth Report, AR, Vol. XIV, Tab 68B, p. 160.

is no evidence that any innocent investors had any interest in these accounts, except for maybe one (1780355 Ontario Inc.).⁵³ As a whole, the transfers out from Rose & Thistle and into those 11 accounts—none of which belonged to the DeJong Companies—totaled \$24.4 million, more than the net \$22.6 million transferred out from DBDC Companies. The largest net transfer recorded, \$5.5 million, was made to Ms. Walton’s personal bank account.

The Net Transfer Analysis is ill-suited for imposing liability on the DeJong Companies

41. In this application, the Net Transfer Analysis is the DBDC Applicants’ only evidence of liability against the non-DBDC Companies, including the DeJong Companies. The Net Transfer Analysis was not designed for this purpose and is ill-suited to it.

42. First, while there are four DeJong Companies, the Net Transfer Analysis only includes *half* of them, Prince Edward and United Empire, and shows that:

- (1) ***Prince Edward*** lost more than it gained, experiencing a net transfer to Rose & Thistle of \$520,850. Indeed, only \$100 was transferred the other way.⁵⁴
- (2) ***United Empire*** had a net transfer in of \$336,600 from Rose & Thistle. But its holdings became the subject of a constructive trust in favour of the DBDC Applicants in the amount of \$1,032,000.⁵⁵ Any money United Empire gained from Rose & Thistle was offset more than threefold by this constructive trust.

43. The remaining two DeJong Companies, St. Clarens and Emerson, were created in mid-November 2013. The Net Transfer Analysis does not consider these companies *at all* because the date this analysis ended, October 2013, was before the companies even existed. Moreover, neither company received any funds from the DBDC Companies because they were created *after*

⁵³ Walton December 17, 2013 Affidavit, para. 20(e), AR, Vol. XI, Tab 54, p. 13.

⁵⁴ Application Judge’s Reasons, paras. 77, 80, AR, Vol. I, Tab 4, pp. 91-92; Court of Appeal Reasons, para. 225, AR, Vol. II, Tab 7, p. 100.

⁵⁵ Brown J. Reasons, paras. 264, 267, AR, Vol. IV, Tab 32, pp. 161-162; DeJong October 7, 2015 Affidavit, paras. 11-13, AR, Vol. VIII, Tab 49, pp. 186-187.

the accounts of the DBDC Companies were frozen on October 4, 2013 and *after* a Manager was installed over the Companies on November 5, 2018.⁵⁶

44. The Net Transfer Analysis' treatment of the DeJong Companies is summarized here:

Company	Property Owned	Transfer In from Rose & Thistle	Transfer Out to Rose & Thistle	Net Transfer
United Empire	3270 American Dr.	\$1,185,050	\$847,450	\$337,600
Prince Edward	324 Prince Edward Dr.	\$100	\$520,950	\$(520,850)
St. Clarens	777 St. Clarens Ave.	Not in analysis		N/A
Emerson	260 Emerson Ave.	Not in analysis		N/A

Return of application and motions before Justice Brown

45. When they commenced this application in 2013, the DBDC Applicants focused on the Walton Respondents and a specific list of properties. The DBDC Applicants did not implicate the DeJong Companies. The DeJongs and the DeJong Companies were not put on notice.⁵⁷

46. By the time the DeJongs first learned about this application in January 2014, 20 orders had already been made in the proceedings.⁵⁸ Even at this time, the remedies sought by the DBDC Applicants only implicated the Walton Respondents. The twice-amended notice of application referenced only some of the properties owned by DeJong Companies. But none of the DeJong Companies were parties to the application.⁵⁹

⁵⁶ Newbould J. October 7, 2013 Reasons, para. 33, AR, Vol. III, Tab 21, p. 119; Newbould J. November 5, 2013 Reasons, para. 53, AR, Vol. III, Tab 23, p. 143; Court of Appeal Reasons, paras. 226-227, AR, Vol. II, Tab 7, pp. 100-101.

⁵⁷ Brown J. Reasons, paras. 2, 12, AR, Vol. IV, Tab 32, pp. 75, 81; Court of Appeal Reasons, paras. 168, 175, AR, Vol. II, Tab 7, pp. 74-75, 78.

⁵⁸ DeJong July 8, 2014 Affidavit, para. 17, AR, Vol. V, Tab 47, p. 94; Court of Appeal Reasons, para. 169, footnote 18, AR, Vol. II, Tab 7, pp. 75-76.

⁵⁹ December 17, 2013 Notice of Application, para. 2(aa), AR, Vol. II, Tab 12, pp. 184-185.

47. The DeJongs did not begin participating in these proceedings until July 2014. In motions before Justice Brown, the DBDC Applicants sought to establish that the Walton Respondents had breached their fiduciary duties and had been unjustly enriched at the DBDC Applicants' expense. The main relief touching the DeJong Companies was the constructive trust claimed against the property owned by United Empire, 3270 American Drive. The DeJongs brought a cross-motion to resist that relief, seeking the approval of a settlement agreement in respect of the property with the goal of avoiding a forced sale, in order to preserve the property's value.⁶⁰ In exchange for receiving the Waltons' shares in United Empire, the DeJongs offered to forgo pursuing the \$515,000 that had been traced into the DBDC Companies.⁶¹ Justice Brown did not approve the settlement agreement, concluding that the proceeds of sale should instead be addressed in the claims process for 3270 American Drive. However, he declined to grant costs against the DeJongs, because they "st[oo]d at the receiving end of the Waltons' misconduct."⁶²

48. The DBDC Applications sought an award of \$78.4 million against the Walton Respondents. While Justice Brown held that the Walton Respondents were liable for breach of contract, unlawful misappropriation, and unjust enrichment, he deferred the assessment of the quantum of the remedy to hear arguments with respect to each cause of action.⁶³

49. As a remedy for unjust enrichment, Justice Brown granted constructive trusts only where the DBDC Applicants were able to trace their funds to a specific property and only to the extent of the quantum traced. This included the \$1.1 million constructive trust over 3270 American Drive. Nevertheless, the "state of the evidence," including the Net Transfer Analysis, did "not permit" the granting of any additional proprietary remedies.⁶⁴

50. To address this evidentiary deficiency, Justice Brown granted an order tracing the DBDC Applicants' funds in order to provide "if possible, a better understanding of how the Waltons

⁶⁰ Brown J. Reasons, paras. 3, 167, AR, Vol. IV, Tab 32, pp. 75, 131.

⁶¹ DeJong July 8, 2014 Affidavit, paras. 29-32, AR, Vol. V, Tab 47, pp. 98-99.

⁶² Brown J. Reasons, paras. 289-290, AR, AR, Vol. IV, Tab 32, pp. 168-169.

⁶³ Brown J. Reasons, paras. 226-227, AR, Vol. IV, Tab 32, p. 149.

⁶⁴ Brown J. Reasons, paras. 267-268, AR, Vol. IV, Tab 32, p. 162.

used” those funds⁶⁵ and to address the competing claims of creditors like the DeJongs who were “faced with sorting out the mess created by the Waltons.”⁶⁶ Justice Brown anticipated that the DBDC Applicants would do exactly as he had ordered: complete the tracing analysis in order to resolve the creditors’ claims. But the DBDC Applicants never undertook the tracing.⁶⁷

51. Justice Brown made no finding of unjust enrichment or any misconduct against the Innocent Investor Companies, including the DeJong Companies. There was no deferred relief, or any other ruling, with respect to these companies—none of these companies were yet parties to the proceedings. Their alleged role in the Waltons’ scheme would not be pleaded by the DBDC Applicants until well over a year later.⁶⁸

Allegations of knowing participation against Innocent Investor Companies

52. The DBDC Applicants chose to forgo the tracing analysis that would have given finality to their proprietary remedies. Instead, in late November 2015, the DBDC Applicants amended their application to substantially expand their claim. They claimed against ten additional entities (the “Respondent Companies”), referred to as the “listed Schedule C Companies” in the courts below. Six of the Respondent Companies were Innocent Investor Companies, including the four DeJong Companies.⁶⁹ It was the first time any Innocent Investor Company was either named as a party or accused of any wrongdoing.⁷⁰

⁶⁵ Brown J. Reasons, paras. 275, 278, AR, Vol. IV, Tab 32, pp. 164-165.

⁶⁶ Brown J. Reasons, para. 232, AR, Vol. IV, Tab 32, p. 151.

⁶⁷ Court of Appeal Reasons, para. 174, AR, Vol. II, Tab 7, pp. 77-78; Application Judge’s Reasons, para. 58, AR, Vol. I, Tab 4, pp. 86-87.

⁶⁸ Court of Appeal Reasons, para. 175, AR, Vol. II, Tab 7, p. 78; DBDC Applicants’ Third Fresh as Amended Notice of Application, dated November 22, 2016 (“November 22, 2015 Notice of Application”), AR, Vol. III, Tab 13, p. 1.

⁶⁹ Affidavit of Dennis John Condos, sworn June 16, 2014, paras. 2-8, AR, Vol. XIV, Tab 60, pp. 15-16; Affidavit of Gideon and Irene Levytam, sworn June 20, 2014, paras. 2-7, AR, Vol. XIV, Tab 61, pp. 24-25; DeJong July 8, 2014 Affidavit, paras. 3-11, AR, Vol. V, Tab 47, pp. 91-92.

⁷⁰ Court of Appeal Reasons, paras. 168-169, 175, 177-180, AR, Vol. II, Tab 7, pp. 75-76, 78-81; November 22, 2015 Notice of Application, paras. 2(a), 3(rr)-3(ccc), 3(kkk)-3(uuu), AR, Vol. III, Tab 13, pp. 10, 23-26.

53. It was also the first time that the DBDC Applicants raised claims of knowing receipt and knowing assistance. The amended notice of application alleged that all of the Respondent Companies “knowingly assisted in a dishonest and fraudulent design on the part of the Waltons.” The only form of assistance alleged is that the Respondent Companies “received property from the [DBDC] Applicants as a result of the Waltons’ breach of their fiduciary duties.”⁷¹

54. The DBDC Applicants did not advance any new evidence to support these claims; the Net Transfer Analysis was the central evidence that the Respondent Companies had “assisted” the Waltons’ fraud by receiving funds from Rose & Thistle.⁷²

55. The DBDC Applicants claimed \$22.6 million in damages, the amount the Net Transfer Analysis showed was transferred from the DBDC Companies to Rose & Thistle.⁷³ The DBDC Applicants sought to hold the ten Respondent Companies jointly and severally liable, even though these ten companies’ accounts represented less than 20% of the non-DBDC Accounts considered by the Net Transfer Analysis. Moreover, the Net Transfer Analysis showed that a net total of only \$4.37 million (or 19% of the \$22.6 million claimed) had been transferred into those ten companies from Rose & Thistle.⁷⁴

Decisions below

The application judge finds no knowing receipt and no knowing assistance

56. In June 2016, the DBDC Applicants successfully moved for judgment against the Waltons before Justice Newbould for \$66.9 million, the unrecovered balance of the DBDC Applicants’ \$110 million dollar investment with the Waltons (para. 1). The application judge found that the Waltons were liable for civil fraud and fraudulent misrepresentations, which caused Dr. Bernstein to invest with the Waltons (paras. 19-32).

⁷¹ November 22, 2015 Notice of Application, paras. 3(kkk)-3(uuu), AR, Vol. III, Tab 13, pp. 25-26; Court of Appeal Reasons, paras. 178-180, AR, Vol. II, Tab 7, pp. 79-81.

⁷² Application Judge’s Reasons, paras. 56-58, AR, Vol. I, Tab 4, pp. 86-87; Court of Appeal Reasons, paras. 181-182, AR, Vol. II, Tab 7, pp. 81-82.

⁷³ November 22, 2015 Notice of Application, paras. 1(jj), 2(a), AR, Vol. III, Tab 13, pp. 9-10.

⁷⁴ Court of Appeal Reasons, para. 243, AR, Vol. II, Tab 7, p. 108; Net Transfer Summary, Exhibit “B”, Inspector’s Fourth Report, AR, Vol. XIV, Tab 68B, p. 160.

57. The application judge fully dismissed the DBDC Applicants' \$22.6 million claims for knowing receipt and knowing assistance against the ten Respondent Companies, including the DeJong Companies (paras. 43-59). While acknowledging that the Waltons were the ultimate wrongdoer, these claims were "not a contest between Dr. Bernstein and the Waltons." Instead, they were "a contest between Dr. Bernstein and the investors in the [Respondent] Companies who suffered from the same misconduct as did Dr. Bernstein" (para. 52) [emphasis added]. Just as she had done to the DBDC Applicants, Ms. Walton had "knowingly breached her fiduciary obligations to the [Respondent] Companies" (para. 52).

58. The claim of knowing receipt failed because there was no evidence of receipt of the DBDC Applicants' money. The Net Transfer Analysis could not show what happened to the money transferred from the DBDC Companies to Rose & Thistle, let alone that this money had wound up in the Respondent Companies (paras. 57):

There is no proof where Rose & Thistle obtained the money that was transferred to 6195 Cedar Street Ltd. It may have come from one of Dr. Bernstein's companies. It may not have. It may have come from investors in the [Respondent Companies] whose money was transferred to Rose & Thistle. The report does not state where the money came from. The same can be said for all of the [Respondent Companies] that the applicants seek a judgment against for knowing receipt of trust funds. [Emphasis added.]

59. The application judge criticized the DBDC Applicants for choosing not to undertake the tracing ordered by Justice Brown. The application judge took the lack of tracing as "recognition that the [DBDC Applicants] did not have evidence that their money went into those properties." (para. 58). Without the tracing, "the [DBDC Applicants] have not established that it was the[ir] money that was received by the [Respondent] Companies in question" (para. 58).

60. The claims of knowing assistance were similarly dismissed. Ms. Walton's knowledge of her own fraud could not be imputed onto the Respondent Companies (para. 51).

61. The application judge also granted affirmative relief in favour of the DeJongs. First, consistent with relief ordered for the DBDC Companies,⁷⁵ Justice Newbould cancelled the

⁷⁵ Brown J. Reasons, paras. 229-230, AR, Vol. IV, Tab 32, pp. 149-150.

Waltons' shares in the DeJong Companies because they had failed to invest their promised equity (except for Emerson and St. Clarens where 88% of their shares were cancelled) (paras. 74, 83, 90). Second, Justice Newbould granted DeJong PC constructive trusts in assets held by the DeJong Companies reflecting the funds DeJong PC had invested (paras. 71-73, 80-81, 88-89).

The majority of the Court of Appeal allowed the appeal

62. The Court of Appeal for Ontario allowed the DBDC Applicants' appeal. Justice Blair, writing for himself and Justice Cronk, upheld the finding on knowing receipt but reversed the application judge's findings on knowing assistance and constructive trusts. The Respondent Companies were held jointly and severally liable for approximately \$22.6 million.

63. ***Knowing receipt.*** The majority confirmed that there was no claim for knowing receipt. The DBDC Applicants had chosen not to pursue their rights under the tracing order granted by Justice Brown and were unable to demonstrate the receipt of any DBDC funds by any particular Respondent Company, other than the funds with respect to which Justice Brown had already granted constructive trusts (para. 38).

64. ***Knowing assistance.*** The majority held that the Respondent Companies assisted the Waltons' fraud because Ms. Walton "utilized" them "as actors in the process of orchestrating her shell game through the Rose & Thistle 'clearing house' account" (paras. 84-88). Specifically, all but two Respondent Companies (St. Clarens and Emerson) "received ... or transferred monies" to Rose & Thistle (paras. 86-87). This was sufficient to constitute assistance. This assistance was given with knowledge of the fraud because Ms. Walton's knowledge could be attributed to the Respondent Companies (para. 68). The majority summarily dismissed arguments that the Respondent Companies should not be imputed with Ms. Walton's mental state because she was not acting within the scope of her authority or for the benefit of the corporations, and had instead defrauded them.

65. Although the DeJongs and other investors were victims of the Waltons' fraud, Justice Blair refused to find that the Respondent Companies were victims (paras. 82, 125). These companies benefitted from the scheme because they "acquired the properties they were created to acquire" and "received the funds enabling them to do so" (para. 104.) He held that it was "not important" that the Respondent Companies suffered the same fraud or breaches of fiduciary duty

as the DBDC Companies (para. 105). Ultimately, what mattered was that the Respondent Companies were “significant net beneficiaries in the flow of funds from the pooling and commingling of the various investors’ money” (para. 124). He never considered the companies individually, nor that the DeJong Companies lost significantly from this very flow of funds.

The dissent held that the DeJong Companies were victims, not assistants

66. Justice van Rensburg dissented on the issue of knowing assistance and the award of damages against the Respondent Companies.

67. Liability for knowing assistance could not be made out against the Respondent Companies (para. 158). The majority had not identified any evidence of the Respondent Companies’ participation or assistance in the specific fraud alleged: the breach of fiduciary duty to the DBDC Applicants (para. 224). Nor did the Net Transfer Analysis demonstrate that the Respondent Companies participated in Ms. Walton’s diversion of the DBDC Companies’ funds: the analysis only showed that the collective 54 non-DBDC Accounts benefitted from the Waltons’ fraud, not that any of the Respondent Companies in particular received any benefit or assistance from the funds (para. 223). The Respondent Companies’ receipt and payment of monies to Rose & Thistle made them no more liable for a breach of fiduciary duty than the same acts would make the DBDC Companies liable (para. 230):

They were not participants acting in their own right to further a breach of fiduciary duty. They were used by the Waltons as part of a fraudulent scheme. In this regard the [DBDC Companies] and the innocent investor [Respondent] Companies are on an equal footing. [Emphasis added.]

68. Justice van Rensburg also held that there could be no attribution of Ms. Walton’s knowledge to the Respondent Companies “because the scheme was for the Waltons’ personal benefit and defrauded the [Respondent] Companies, and because the evidence of each company’s individual benefit from the scheme is questionable” (para. 234).

69. Finally, Justice van Rensburg held that equity cannot support the knowing assistance claim. A remedy for knowing assistance should not be used “in these exceptional circumstances” where “one group of defrauded investors” seeks judgment “against another group that has been defrauded in a similar manner” (para. 248). To allow the DBDC Applicants to overwhelm the claims for the losses of the investors, like the DeJongs, “would be an unjust result” (para. 247).

PART II – THE ISSUES

70. The issue on appeal is whether the DBDC Applicants' claim for knowing assistance against the DeJong Companies is made out. It is not. The Court of Appeal made three errors:

- (1) finding that the DeJong Companies participated in the Waltons' fraud;
- (2) holding that the corporate attribution doctrine applied to the DeJong Companies such that Ms. Walton's knowledge of her fraud was attributed to them; and
- (3) making one victim of a fraud liable for the losses of other victims of the same fraud.

71. Each error is sufficient to restore the order of the application judge.

PART III – STATEMENT OF ARGUMENT

Standard of review

72. The application judge, an experienced Commercial List judge, was the only judge at first instance to hear and decide the knowing assistance claim. His findings of fact and mixed fact and law are owed deference.

73. To the extent the DBDC Applicants relied on findings of Justice Brown to make out their claim against the DeJong Companies, these findings were not binding on the application judge. None of the DeJong Companies were parties before Justice Brown. Nor had the claim for knowing assistance been pleaded. In any event, Justice Brown's findings only relate to the non-DBDC Companies in general, and do not related to any individual DeJong Company.

Knowing assistance and knowing receipt

74. There are two equitable causes of action for accessory liability for a breach of fiduciary duty: knowing receipt and knowing assistance. A defendant is liable for knowing receipt where the stranger receives property from a fiduciary that was obtained in breach of that fiduciary duty. Liability is based on the receipt of the property itself and will be imposed so long as the stranger had at least constructive knowledge that the property came from a breach of fiduciary duty.⁷⁶

⁷⁶ *Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 805, para. 48.

75. In contrast, knowing assistance is “fault-based.”⁷⁷ Culpability is at the core of knowing assistance and the indicia of fault must be sufficient “to bind the stranger’s conscience.”⁷⁸ Liability is imposed only in reference to a fraudulent and dishonest breach of fiduciary duty that the defendant assisted in brokering.⁷⁹ Knowing assistance also requires a higher threshold of knowledge than knowing receipt: actual knowledge must be shown because knowing assistance is “concerned with the furtherance of fraud.”⁸⁰

76. Where a fiduciary has perpetrated a dishonest and fraudulent breach of her duty, a stranger to the fiduciary relationship is liable for knowing assistance if the stranger, (i) participates in the breach; and (ii) has actual knowledge of the fiduciary relationship and the dishonest breach.⁸¹ Neither element is met in this case.

The DeJong Companies did not assist in Ms. Walton’s breach of fiduciary duty

77. The DeJong Companies did not assist Ms. Walton in breaching her fiduciary duties to the DBDC Applicants. To bear culpability for knowing assistance, an accessory’s act must assist and causatively impact the fiduciary’s breach of her duty.

78. There is no such act here. The DeJong Companies did not receive DBDC Company funds (other than those already impressed with a constructive trust in favour of the DBDC Applicants). Nor did the DeJong Companies benefit at all from the fraud. And the fact that the Waltons took money out of the DeJong Companies does not constitute a participatory act; being victimized by a fraud does not make the victim liable for the fraudsters’ other bad acts. In sum, nothing the DeJong Companies did caused Ms. Walton’s breach of her fiduciary duty on the DBDC Applicants or made that breach easier.

⁷⁷ *Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 805, para. 46; *Gold v. Rosenberg*, [1997] 3 S.C.R. 767, para. 33.

⁷⁸ *Air Canada v. M & L Travel Ltd.*, [1993] 3 S.C.R. 787, para. 41 (WL).

⁷⁹ Leonard I. Rotman, *Fiduciary Law*, (Toronto: Thomson Canada Ltd, 2005), p. 677, Appellant’s Book of Authorities, (“ABOA”), Tab 11; *Air Canada v. M & L Travel Ltd.*, [1993] 3 S.C.R. 787, para. 58 (WL).

⁸⁰ *Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 805, para. 46.

⁸¹ *Gold v. Rosenberg*, [1997] 3 S.C.R. 767, para. 34.

The law of knowing assistance: assistance must have a causative impact

79. Liability for knowing assistance requires that the stranger to the fiduciary relationship commit a wrongful act in “furtherance of fraud”.⁸² A wrongful act by itself is inadequate. Rather, the wrongful act must be “sufficiently connected to the trustee’s or fiduciary’s dishonest and fraudulent scheme.”⁸³

80. Causation is a key factor in establishing the “sufficient connection” is met. A participatory act is sufficient only if it has “some causative impact on facilitating the [fiduciary’s] breach of duty.”⁸⁴ If the defendant has not furthered the fraud, he should not be liable for the breach or the claimant’s loss.⁸⁵ Otherwise, there is no basis in equity to bind the accessory’s conscience: “if there is no causative effect and therefore no assistance given by [the accessory] ... I cannot see that the requirements of conscience require any remedy at all.”⁸⁶

81. The requirement of causal impact is consistent with other “action[s] in equity,” which require proof of causation.⁸⁷ Indeed, the cause of action for breach of fiduciary duty itself “engages questions of causation.”⁸⁸ It would be strange if knowing assistance, as an ancillary action to a breach of fiduciary duty, did not also require an element of causation.

82. While Canadian courts have not consistently articulated the causative impact standard, in practice, courts have required a causative act. In *Air Canada v. M & L Travel Ltd.*, the accessory

⁸² *Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 805, para. 48.

⁸³ Paul M. Perell, “Intermeddlers of Strangers to the Breach of Trust on Fiduciary Duty” (1998) 21 *Advoc. Q.* 94, p. 106 (HeinOnline); *Air Canada v. M & L Travel Ltd.*, [1993] 3 S.C.R. 787, para. 58 (WL).

⁸⁴ John McGhee, ed., *Snell’s Equity*, (London: Sweet & Maxwell, 2015), p. 800, ABOA, Tab 10; see also Paul S. Davies, *Accessory Liability* (Oxford: Hart Publishing, 2015), p. 32, ABOA, Tab 12.

⁸⁵ Paul S. Davies, *Accessory Liability* (Oxford: Hart Publishing, 2015), p. 31, ABOA, Tab 12.

⁸⁶ *Brown v. Bennett* [1999] B.C.C. 525, p. 533 (Eng. C.A.) (WL), ABOA, Tab 3; see also S. Elliott and C. Mitchell “Remedies for Dishonest Assistance” (2004) 67 *Mod. L. Rev.* 16, pp. 17-20, (HeinOnline).

⁸⁷ *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, para. 90.

⁸⁸ *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4, para. 48; see also *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534.

had stopped the payment of trust funds, opened a new account, attempted to transfer the funds into that account, and thus “directly caused” the breach of trust.⁸⁹ In other cases, the accessory: (i) prepared invoices, opened bank accounts, arranged for wire transfers, and accepted cash, all of which were required for the fraud;⁹⁰ (ii) covered up the fraud and dispersed and laundered the money fraudulently taken;⁹¹ and (iii) entered into shadow purchases and sales of properties that “assisted the trustees in the carrying out of their dishonest and fraudulent design to misstate the financial position of the Bank.”⁹²

83. In contrast, courts have declined to find parties liable for knowing assistance without a causal link between the accessory’s act and the breach of fiduciary duty. A defendant was not liable for assisting in his wife’s embezzlement of money when he failed to report her activities because he did not commit “any act which had the effect of assisting” her breach.⁹³ Similarly, a former director and investor of a company was found not to have participated because he was not involved in the impugned transaction and only acted as a “silent partner” in the company.⁹⁴ And where the directors of a company received benefits from a fraudulent breach, but did not individually participate in the breach, they were not held liable.⁹⁵ Courts in British Columbia and Saskatchewan have recognized that the accessory’s participation must be “active participation in

⁸⁹ *Air Canada v. M & L Travel Ltd.*, [1993] 3 S.C.R. 787, para. 62 (WL); see also *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12, para. 105; *Commercial Union Life Assurance Co. of Canada v. John Ingle Insurance Group Inc.* (2002), 61 O.R. (3d) 296, para. 72 (C.A.); *HSBC Bank Canada v. Lourenco*, 2012 ABQB 380, para. 70.

⁹⁰ *Enbridge Gas Distribution Inc. v. Marinaccio*, 2012 ONCA 650, paras. 26-27; see also *864401 Ontario Ltd. v. McGill*, 2018 ONSC 6440, paras. 68-70; *Locking v. McCowan*, 2016 ONCA 88, para. 18.

⁹¹ *Bank of China v. Fan*, 2015 BCSC 590, paras. 114, 118.

⁹² *Northland Bank v. Willson*, 1999 ABQB 659, para. 77, var’d on other grounds 2001 ABCA 137.

⁹³ *Treaty Group Inc. v. Simpson*, 2001 CarswellOnt 617, para. 15 (Sup. Ct.) (WL).

⁹⁴ *4 Star Courier & Logistics Inc. v. Domino’s Pizza Canadian Distribution ULC* (2012), 6 B.L.R. (5th) 132, para. 28 (Ont. Sm. Cl. Ct.).

⁹⁵ *Bare Land Condominium Plan 8820814 (Owners) v. Birchwood Village Greens Ltd.*, 1998 ABQB 1023, para. 60.

causing” the fiduciary’s breach or “at least ... have made the fiduciary’s breach of duty easier than it would otherwise have been.”⁹⁶

84. Consistent with these decisions, other common law jurisdictions require a causative link between the accessory’s act and the fraud.

85. **United Kingdom.** The doctrine of knowing assistance originated in the U.K. There, a defendant is only liable if her participation is “sufficient,” *i.e.* has a causal connection to the breach of fiduciary duty.⁹⁷ A claimant “must show that the defendant’s action or omissions have had *some* causative significance”⁹⁸ such that the participatory act itself “must not be of minimal importance.”⁹⁹ For example, a woman who accompanied her husband on trips to Switzerland where he laundered misappropriated funds was not liable for knowing assistance, despite the fact that her presence may have lent an appearance of legitimacy to the trips. A more meaningful act was required.¹⁰⁰

86. **Australia.** As in the U.K., the Australian courts have recognized that participation must be “facilitative conduct” that “makes a difference.”¹⁰¹ “Mere passive acquiescence in the breach” cannot establish liability. Participation must take the form of some activity “over and above mere knowledge of the fiduciary’s breaches”¹⁰² and the assistance must have some non-minimal causal

⁹⁶ *101082401 Saskatchewan Ltd. v. Tunnels of Little Chicago Association Inc.*, [2018 SKQB 271](#), para. 94; *Imperial Parking Canada Corp. v. Anderson*, [2016 BCSC 468](#), para. 26; *Bronson v. Hewitt*, [2010 BCSC 169](#), paras. 498-500, var’d on other grounds, [2013 BCCA 367](#); *Richards v. Air India Ltd.*, [2011 BCSC 1171](#), para. 56.

⁹⁷ *OBG Ltd. v. Allan*, [\[2007\] UKHL 21](#), para. 36.

⁹⁸ David J. Hayton, *Underhill and Hayton: Law Relating to Trusts and Trustees*, 16th ed. (London: Butterworths LexisNexis, 2003), p. 959, ABOA, Tab 8.

⁹⁹ *Baden v Société Générale pour Favoriser le Développement du Commerce et de l’Industrie en France SA* (1983), [\[1992\] 4 All ER 161](#), p. 234 (Eng. Ch.), ABOA, Tab 1, aff’d, [\[1985\] BCLC 258 \(Eng. C.A.\)](#) (QL); see also Paul S. Davies, *Accessory Liability* (Oxford: Hart Publishing, 2015), pp. 33, 37-39, ABOA, Tab 12; *JD Wetherspoon plc v. Van de Berg & Co Ltd*, [\[2009\] EWHC 639 \(Ch\)](#), para. 518; S. Elliott and C. Mitchell “Remedies for Dishonest Assistance” (2004) 67 *Mod. L. Rev.* 16, p. 37 (HeinOnline).

¹⁰⁰ *Brinks Ltd. v. Abu-Saleh (No. 3)*, [\[1996\] C.L.C. 133](#), pp. 148-149 (Eng. Ch.) (WL), ABOA, Tab 2; *Brown v. Bennett* [\[1999\] B.C.C. 525](#), p. 533 (Eng. C.A.) (WL), ABOA, Tab 3.

¹⁰¹ *Re-Engine Pty Ltd. v. Fergusson*, [\[2007\] VSC 57](#), paras. 117, 120.

¹⁰² *Re-Engine Pty Ltd. v. Fergusson*, [\[2007\] VSC 57](#), para. 120.

significance.¹⁰³ A company wholly owned and controlled by a director and his family was not liable for knowing assistance of the director's breach of fiduciary duty merely because the company was likely to benefit indirectly from the wrongdoing. The court considered it "manifestly untenable" that the fiduciary's control of the company justified an inference that the company was engaged in the breaches of duty.¹⁰⁴ Those facts are directly analogous here.

87. **United States.** The U.S. parallel to knowing assistance—the tort of substantial assistance in breach of a fiduciary duty—requires an even more substantial contribution than U.K. and Australian law. The stranger's assistance must be a "substantial factor in causing the resulting tort"¹⁰⁵ or otherwise have "proximately caused the harm on which the primary liability is predicated."¹⁰⁶ This excludes "minimal or slight conduct."¹⁰⁷ On this basis, a court has concluded that even though a Ponzi scheme was only possible because the defendant over-extended margin credit to the fraudster, this was not sufficient. The defendant's "conduct was not a proximate cause of the Ponzi scheme" and therefore did not attract liability.¹⁰⁸

88. In other words, other than the Court of Appeal in this case, common law courts have not found knowing assistance on the basis of passive participation in a breach of trust or fraud. Passive acquiescence alone, even with knowledge of the fraud, is not enough.

¹⁰³ *Re-Engine Pty Ltd. v. Fergusson*, [\[2007\] VSC 57](#), para. 124.

¹⁰⁴ *Tableau Holdings Pty Ltd. v. Joyce*, [\[1999\] WASCA 49](#), para. 35.

¹⁰⁵ *Restatement (Second) of Torts* § 876, comment, clause (b) (2018), ABOA, Tab 13; see *Neilson v. Union Bank of California, N.A.*, [290 F. Supp. 2d 110](#), p. 1135 (C.D. Cal. 2003) (WL), ABOA, Tab 5.

¹⁰⁶ *SPV Osus Ltd. v. UBS AG*, [882 F. 3d 333](#), p. 345 (2d. Cir. 2018) (WL), ABOA, Tab 6; Deborah A. Demott, "Accessory Disloyalty: Comparative Perspectives on Substantial Assistance to Fiduciary Breach" in Paul S. Davies & James Penner, eds., *Equity, Trusts and Commerce* (Oxford: Hart Publishing, 2017) 253, p. 260, ABOA, Tab 9.

¹⁰⁷ Deborah A. Demott, "Accessory Disloyalty: Comparative Perspectives on Substantial Assistance to Fiduciary Breach" in Paul S. Davies & James Penner, eds., *Equity, Trusts and Commerce* (Oxford: Hart Publishing, 2017) 253, p. 260, ABOA, Tab 9; *Restatement (Second) of Torts* § 876, comment, clause (b) (2018), ABOA, Tab 13.

¹⁰⁸ *Cromer Finance Ltd. v. Berger*, [137 F. Supp. 2d 452](#), pp. 470-472 (S.D. N.Y. 2001) (WL), ABOA, Tab 4.

The DeJong Companies committed no assisting act, let alone one with a causative link

89. To succeed in the claim, the DBDC Applicants must show that the DeJong Companies undertook an act that assisted Ms. Walton’s breach of her fiduciary duties to the DBDC Applicants. But here, there is no evidence of any assisting act—and certainly no act that facilitated Ms. Walton’s breaches or made them easier than they would have otherwise been.

The case of knowing assistance, as pleaded, fails on the evidence

90. The analysis of assistance is focused on the act of assistance itself, *i.e.* “on what the [accessory] actually does.”¹⁰⁹ The difficulty here is that the DBDC Applicants cannot point to *any act* committed by the DeJong Companies that assisted Ms. Walton in breaching her duties.

91. The DBDC Applicants have pleaded that the DeJong Companies committed only a single act of assistance, the receipt of DBDC Company money.¹¹⁰ But this claim fails on the evidence.

92. As the motion judge found, there is no evidence that the DeJong Companies received anything from the DBDC Companies. The DBDC Applicants had limited tracing evidence that led to limited constructive trust orders by Justice Brown. But, beyond that, there was no evidence showing that the Respondent Companies, or specifically the DeJong Companies, held any DBDC money. The Net Transfer Analysis, which was the only evidence before the application judge, was not created with a view to determining whether any of the Respondent Companies received any DBDC money: “It may have come from one of Dr. Bernstein’s companies. It may not have. It may have come from investors in the [non-DBDC] Companies whose money was transferred to Rose & Thistle. The [Net Transfer Analysis] does not state where the money came from.”¹¹¹ The inability to prove receipt was upheld at the Court of Appeal.

93. The only way to obtain evidence of receipt would have been a tracing analysis.¹¹² The DBDC Applicants had every opportunity to adduce this evidence, including express

¹⁰⁹ Paul S. Davies, *Accessory Liability* (Oxford: Hart Publishing, 2015) p. 33, ABOA, Tab 12.

¹¹⁰ November 22, 2015 Notice of Application, paras. 3(kkk)-3(uuu), AR, Vol. III, Tab 13, pp. 25-26; Court of Appeal Reasons, paras. 178-180, AR, Vol. II, Tab 7, pp. 79-81.

¹¹¹ Application Judge’s Reasons, para. 57, AR, Vol. I, Tab 4, p. 86.

¹¹² Application Judge’s Reasons, para. 59, AR, Vol. I, Tab 4, p. 87.

authorization from Justice Brown to trace DBDC funds into and through the non-DBDC Companies. They chose not to do so. The DBDC Applicants should not be permitted to now bootstrap their case and rely on knowing assistance to compensate for their evidentiary failures.

94. Justice Blair side-stepped the DBDC Applicants' inability to prove receipt by concluding that proof of receipt was not necessary to establish a claim for knowing assistance.¹¹³ But even if receipt is not sufficient by itself, receipt can be part of a claim of knowing assistance if, as here, that is how the applicants decide to frame their case.¹¹⁴ Where a party pleads and relies on receipt as the sole act of assistance, it cannot succeed without proving it. Pleadings define the issues in a case¹¹⁵ and a court cannot grant relief on a different theory of assistance than the one pleaded.¹¹⁶

The DeJong Companies did not receive funds from Rose & Thistle

95. To overcome the lack of evidence showing that the DeJong Companies received the DBDC Applicants' funds, Justice Blair relied on a different, but flawed, theory of liability. He artificially included the DeJong Companies within the pool of non-DBDC Companies that had experienced a "net gain" from Rose & Thistle under the Net Transfer Analysis. He then relied on these net gains to establish that the DeJong Companies assisted Ms. Walton in diverting funds from the DBDC Companies.¹¹⁷

96. But the question in this appeal is not whether a pool of non-DBDC Companies were implicated in the fraud. The question is whether the *DeJong Companies*—St. Clarens, Emerson, Prince Edward, and United Empire—committed an act that assisted Ms. Walton's breach of her fiduciary duties to the DBDC Applicants. Aside from money already accounted for by a constructive trust, there is no evidence that the DeJong Companies received money from Rose & Thistle at all. Without receiving funds to divert, shelter, or hide, the DeJong Companies could play no role in Ms. Walton breaching her fiduciary duties to the DBDC Applicants.

¹¹³ Court of Appeal Reasons, para. 100, AR, Vol. II, Tab 7, pp. 44-45.

¹¹⁴ *Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 805, para. 26.

¹¹⁵ *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56, para. 43.

¹¹⁶ *Rodaro v. Royal Bank* (2002), 59 O.R. (3d) 74, paras. 60-63 (C.A.).

¹¹⁷ Court of Appeal Reasons, paras. 87, 101, AR, Vol. II, Tab 7, pp. 40, 45.

97. This issue, like much in this case, stems from unwarranted aggregation. The Net Transfer Analysis as a whole shows a net transfer out of the DBDC Companies to Rose & Thistle of \$22.6 million and a net transfer of \$25.4 million from Rose & Thistle to the 54 non-DBDC Accounts. But when the DeJong Companies are separated out from all the other non-DBDC Companies, it becomes clear that the DeJong Companies did not play a role in transferring funds away from the DBDC Companies. The Net Transfer Analysis, despite its limitations, shows that the DeJong Companies lost more money to Rose & Thistle than they received. On a net basis, the DeJong Companies lost at least \$184,000 to Rose & Thistle as a result of Ms. Walton's fraud.

98. *St. Clarens and Emerson* could not have assisted in Ms. Walton's fraud on the DBDC Applicants. They did not exist until after Dr. Bernstein had discovered the fraud and the Waltons no longer had access to the DBDC Companies' funds. St. Clarens and Emerson were not included in the Net Transfer Analysis. In any event, the application judge found that almost all of the money put into these companies or into the properties they owned came from the DeJongs' investments.¹¹⁸

99. *Prince Edward* lost a net amount of \$520,850 to Rose & Thistle. Indeed, the only money that flowed into Prince Edward was invested by the DeJongs, "except perhaps \$100."¹¹⁹

100. *United Empire* is the only DeJong Company that the Net Transfer Analysis suggests received more funds from Rose & Thistle than it transferred out (at a net of \$336,600). United Empire is also the only DeJong Company to which the DBDC Applicants have traced any of their funds, resulting in a \$1.1 million constructive trust over United Empire's property. Because of that constructive trust, United Empire has already accounted to the DBDC Applicants for three times the amount of the net transfer from Rose & Thistle, leaving no funds behind that could be linked to DBDC Companies. The DBDC Applicants should not be permitted to double count transfers to impute added liability to United Empire.¹²⁰

¹¹⁸ Application Judge's Reasons, paras. 84-91, AR, Vol. I, Tab 4, pp. 93-95; Court of Appeal Reasons, para. 91, AR, Vol. II, Tab 7, p. 42.

¹¹⁹ Application Judge's Reasons, para. 83, AR, Vol. I, Tab 4, p. 93.

¹²⁰ Court of Appeal Reasons, para. 244, AR, Vol. II, Tab 7, pp. 108-109.

101. Justice Blair conflated the separate corporate identities of St. Clarens, Emerson, Prince Edward, and United Empire with all 54 non-DBDC Companies and non-DBDC Accounts. Had Justice Blair not done so, he would have recognized that these companies had lost, not gained, and therefore could not have participated by benefiting from the scheme.

The DeJong Companies did not assist in a global fraud against the DBDC Applicants

102. As illustrated above, the DeJong Companies did not receive either funds or benefits from the DBDC Companies. But to be held culpable for knowing assistance, each DeJong Company must have done something else to facilitate the fraud against the DBDC Applicants. As Justice van Rensburg stated, “***they must have done something*** to participate in the breach of fiduciary duty.”¹²¹ The Bernstein Applicants have not articulated what that “something” is.

103. Justice Blair’s reasons describe the participatory act as the Respondent Companies’ transfers to and from Rose & Thistle. But, with respect to the DeJong Companies, there is no receipt of transfers *from* Rose & Thistle (except as already accounted for by the constructive trust on United Empire). What remains are the DeJong Companies’ transfers *to* Rose and Thistle.

104. At its heart, this theory makes the DeJong Companies’ participatory act the Waltons’ taking of the DeJong Companies’ money without the knowledge or permission of the DeJongs, *i.e.* the Waltons’ perpetration of a fraud on the DeJong Companies. This is not sufficient for liability under knowing assistance for three separate reasons.

105. First, the DBDC Applicants’ claim is not about the Waltons’ overall fraudulent scheme; it relates only to the Waltons’ breach of fiduciary duty to the DBDC Applicants, namely the diversion of DBDC funds for the Waltons’ personal use. There is no connection between more funds flowing from the DeJong Companies to Rose & Thistle—some used for the Waltons’ personal enrichment—and the diversion of DBDC funds.

106. Second, there is no evidence that the Waltons’ fraud on the DeJongs and the DeJong Companies had any causal impact on the breach of the Waltons’ fiduciary duty to the DBDC

¹²¹ Court of Appeal Reasons, para. 215, AR, Vol. II, Tab 7, pp. 95-96 [emphasis added].

Applicants. Nor is there generally any evidence that any act of the DeJong Companies made the diversion of funds from the DBDC Companies to Rose & Thistle any easier.

107. Third, it must be remembered that the DeJong Companies' transfers to Rose & Thistle were instruments of fraud; the transfers were the means by which Ms. Walton breached her fiduciary duty to the DeJong Companies. To consider these same transfers as an element of knowing assistance is to implicate the DeJong Companies *because they were defrauded*. This "would mean that being a defrauded entity, as part of a larger fraud, can constitute knowing assistance in the fraudster's breach of fiduciary duty to another fraud victim."¹²² For example, a victim of a Ponzi scheme would be deemed to assist in the scheme because her stolen funds prolonged the fraud by allowing earlier investors to be paid out. This cannot be right. Being a victim of fraud carries none of the culpability required for knowing assistance.

108. St. Clarens and Emerson best illustrate the problems with Justice Blair's analysis. The chronology of these companies makes it factually impossible for St. Clarens and Emerson to have received any DBDC funds at all.¹²³ Yet Justice Blair found that they "participated in or assisted Ms. Walton in her breach of fiduciary duties to the DBDC Applicants."¹²⁴

109. The sole basis for this finding was that Ms. Walton deceitfully caused St. Clarens and Emerson to pay a \$225,000 "assignment fee" to a Walton company and thus "skim off the \$225,000 unbeknownst to DeJong."¹²⁵ In essence, St. Clarens' and Emerson's participatory act was allowing the Waltons to steal from them and the DeJongs.

110. This conclusion makes no sense. It cannot follow that, because St. Clarens and Emerson are victims of Ms. Walton's breach of her fiduciary duties, they are now liable for knowingly assisting in a breach of her fiduciary duty to completely unrelated entities, the DBDC Applicants.

¹²² Court of Appeal Reasons, para. 227, AR, Vol. II, Tab 7, p. 101.

¹²³ See *Brown v. Bennett*, [1999] B.C.C. 525, p. 533 (Eng. C.A.) (WL), ABOA, Tab 3; David J. Hayton, *Underhill and Hayton: Law Relating to Trusts and Trustees*, 16th ed. (London: Butterworths LexisNexis, 2003), p. 959, ABOA, Tab 8.

¹²⁴ Court of Appeal Reasons, para. 96, AR, Vol. II, Tab 7, p. 43.

¹²⁵ Court of Appeal Reasons, para. 95, AR, Vol. II, Tab 7, p. 43; Application Judge's Reasons, para. 86, AR, Vol. I, Tab 4, pp. 93-94.

What can be said for St. Clarens and Emerson holds true for each of the DeJong Companies. All are victims of the Waltons' fraud and breach of fiduciary duties.¹²⁶

The DeJong Companies had no knowledge of the fraud

111. This Court has emphasized that the highest proof of knowledge is required to bind a stranger's conscience so as to give rise to personal liability for knowing assistance.¹²⁷ The DBDC Applicants argue that Ms. Walton's knowledge of her own fraud should be attributed to the DeJong Companies under the corporate attribution doctrine from *Canadian Dredge*. Developed as a judicial device to provide a mechanism to assess the *mens rea* of corporations for criminal offences, the doctrine applies in civil cases as well.¹²⁸ In either context, the doctrine has the effect of merging the corporation with its directing mind.¹²⁹

112. But this cannot be done on an arbitrary or *ad hoc* basis. Attributing the mental state of a directing mind to a corporation is justified only where "there is a community interest" between the two.¹³⁰ As Prof. MacPherson explains:

Human nature being what it is, a fiduciary can forget his or her duties to the corporation and victimize the corporation in order to serve his or her personal goals. When this happens, the connection and community of interest between the senior officer as fiduciary on the one hand, and the corporation as beneficiary on the other, is lost. This connection is essential to the application of the identification doctrine.¹³¹ [Emphasis added.]

¹²⁶ Application Judge's Reasons, paras. 72-73, 80-81, 88-89, AR, Vol. I, Tab 4, pp. 90-92, 94.

¹²⁷ *Air Canada v. M & L Travel Ltd.*, [1993] 3 S.C.R. 787, para. 41 (WL).

¹²⁸ *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63, para. 101.

¹²⁹ Darcy L. MacPherson, "Reforming the doctrine of attribution: a Canadian solution to British concerns?" in Stephen Tully, ed., *Research Handbook on Corporate Legal Responsibility* (Cheltenham, UK: Edward Elgar Publishing Limited, 2005) 194, p. 201, ABOA, Tab 7.

¹³⁰ Darcy L. MacPherson, "Emaciating the Statutory Audit – A Comment on *Hart Building Supplies Ltd. v. Deloitte & Touche*" (2005) 41 Can. Bus. L. J. 471, p. 483 (HeinOnline).

¹³¹ Darcy L. MacPherson, "The Civil and Criminal Applications of the Identification Doctrine: Arguments for Harmonization" (2007) 45 Alta. L. Rev. 171, p. 187 (HeinOnline).

113. Because a corporation is “vulnerable to abuse by other people (those who have effective control of corporate operations),”¹³² this Court has developed limits around the corporate attribution doctrine.¹³³ There can be no attribution where the directing mind has ceased to act in the interests of the corporation by acting: (a) outside the scope of authority assigned to her; (b) in fraud of the corporation; or (c) not for the benefit of the company.¹³⁴ These limits recognize that applying a directing mind’s knowledge of her bad acts cannot be used “to condemn a corporation” for the conduct of someone who is not “acting not in any real sense as its directing mind but rather as its arch enemy.”¹³⁵

114. This case is the perfect illustration of why limits to the corporate attribution doctrine exist. Ms. Walton abused her authority over the DeJong Companies and breached the fiduciary duties she owed to them to perpetrate a fraud solely for her own benefit. Holding the DeJong Companies responsible for the actions of the person who hijacked them for her own fraudulent scheme would be akin to blaming a hostage for the actions of its captor. As a matter of policy, “the actions of the rogue should not be attributed to the corporation.”¹³⁶

(a) Ms. Walton acted outside the scope of her authority

115. It is not enough for Ms. Walton to be a directing mind of the DeJong Companies. Her fraudulent acts must also be within the scope of her authority at the DeJong Companies. They clearly are not.

116. For a corporation to be impressed with the knowledge of Ms. Walton’s breach of fiduciary duty, those actions must relate to the business of the corporation and her role in

¹³² Darcy L. MacPherson, “The Civil and Criminal Applications of the Identification Doctrine: Arguments for Harmonization” (2007) [45 Alta. L. Rev. 171](#), p. 186, footnote 82 (HeinOnline).

¹³³ *Canadian Dredge and Dock Co. v. The Queen*, [1985] 1 S.C.R. 662, paras. 70, 84 (WL).

¹³⁴ *Canadian Dredge and Dock Co. v. The Queen*, [1985] 1 S.C.R. 662, paras. 84-85, 95 (WL); *Eastern Chrysler Plymouth Inc. v. Manitoba Public Insurance Corp.*, 2000 MBQB 66, para. 4 aff’d [2000 MBCA 128](#), para. 8; Darcy L. MacPherson, “The Civil and Criminal Applications of the Identification Doctrine: Arguments for Harmonization” (2007) [45 Alta. L. Rev. 171](#), p. 175 (HeinOnline).

¹³⁵ *Canadian Dredge and Dock Co. v. The Queen*, [1985] 1 S.C.R. 662, para. 95 (WL).

¹³⁶ Darcy L. MacPherson, “Emaciating the Statutory Audit – A Comment on *Hart Building Supplies Ltd. v. Deloitte & Touche*” (2005) [41 Can. Bus. L. J. 471](#), pp. 483-484 (HeinOnline).

carrying out the business.¹³⁷ Where a directing mind is acting for her “own individual purposes,” the identity of interests between her and the corporation is broken.¹³⁸ In such instances, she cannot be said to be acting within the ambit of her authority as an officer and director and therefore no longer acts on behalf of the corporation.¹³⁹

117. In this case, Ms. Walton had twisted the purpose of the DeJong Companies, using them as tools to steal from the DeJongs instead of as real estate acquisition vehicles. Courts have considered instances where a directing mind uses a corporation or its assets for her own illicit aims, including operating a marijuana grow-op,¹⁴⁰ burning down the business,¹⁴¹ or driving a company car while intoxicated.¹⁴² In these cases, the directing mind was acting outside her function and the acts were not attributed to the business.

118. It is no different here. The Shareholder Agreements established the DeJong Companies as single-purpose entities created to acquire, develop, and manage single properties. If Ms. Walton caused the DeJong Companies to participate in the fraud on Dr. Bernstein—and they did not—her actions were far beyond the scope of her authority. Instead, she surreptitiously abused the discretion given to her by the DeJong Companies to advance her own large-scale fraud. The application judge rightly held that this was insufficient justification to hold the DeJong Companies liable for Ms. Walton’s deceit.

119. Moreover, even the limited authority delegated to Ms. Walton under the Shareholder Agreements was itself illusory and obtained by fraud. The Shareholder Agreements delegate authority to the Waltons under the express assumption that they were equal shareholders. But they were not. The Waltons deceived the DeJongs by advancing little to no equity in the DeJong Companies. Consequently, the Waltons should have had little to no shareholdings in, and no

¹³⁷ *Canadian Dredge and Dock Co. v. The Queen*, [1985] 1 S.C.R. 662, para. 39 (WL); *Austeville Properties Ltd. v. Josan*, 2016 BCSC 1963, para. 42.

¹³⁸ *Austeville Properties Ltd. v. Josan*, 2016 BCSC 1963, para. 43.

¹³⁹ *Austeville Properties Ltd. v. Josan*, 2016 BCSC 1963, para. 42; *R. v. Fercan Developments*, 2013 ONCJ 826, para. 316, aff’d 2016 ONCA 269.

¹⁴⁰ *R. v. Fercan Developments*, 2013 ONCJ 826, paras. 310, 315-317.

¹⁴¹ *Austeville Properties Ltd. v. Josan*, 2016 BCSC 1963, paras. 45-49.

¹⁴² *Eastern Chrysler Plymouth Inc. v. Manitoba Public Insurance Corp.*, 2000 MBQB 66, para. 4.

control over, the DeJong Companies.¹⁴³ It is true that the Waltons exercised control over the DeJong Companies, but this authority was seized through fraud. On this basis, it is questionable whether Ms. Walton was even a directing mind of the DeJong Companies at all.

(b) Ms. Walton acted in fraud of the DeJong Companies

120. Ms. Walton perpetrated a fraud on the DeJong Companies. She conceived, designed, and executed a plan intentionally embezzling from and impoverishing them. She contributed little to the companies, fraudulently induced investments by the DeJongs, siphoned off the DeJong Companies' money, and charged the companies for undisclosed fees and work never done. Ms. Walton was held to have knowingly breached her fiduciary obligations to the DeJong Companies.¹⁴⁴ This finding is uncontested.

121. Where a directing mind "conceives and designs a plan and then executes it whereby the corporation is intentionally defrauded," it is "unrealistic in the extreme" to attribute her conduct to the DeJong Corporations.¹⁴⁵ If the mental state of a directing mind is ever to be attributed to the corporation, then "surely that mental state should not be one of an individual who is stealing from the corporation."¹⁴⁶

122. Justice Blair did not think that whether the DeJong Companies were victims of fraud had "much bearing" on the *Canadian Dredge* analysis, noting only offhand that it was the DeJongs, not the companies they invested in, that were victims.¹⁴⁷ This is doubly wrong.

123. First, Ms. Walton breached her fiduciary duties to the DBDC Companies in much the same manner that she breached her fiduciary duties to the DeJong Companies.¹⁴⁸ And just as the DBDC Companies were defrauded by the Waltons' conduct, so too were the DeJong

¹⁴³ Application Judge's Reasons, paras. 74, 83, 91, AR, Vol. I, Tab 4, pp. 91, 93, 95.

¹⁴⁴ Application Judge's Reasons, para. 52, AR, Vol. I, Tab 4, p. 85.

¹⁴⁵ *Canadian Dredge and Dock Co. v. The Queen*, [1985] 1 S.C.R. 662, para. 84 (WL).

¹⁴⁶ Darcy L. MacPherson, "The Civil and Criminal Applications of the Identification Doctrine: Arguments for Harmonization" (2007) 45 *Alta. L. Rev.* 171, p. 187 (HeinOnline).

¹⁴⁷ Court of Appeal Reasons, para. 82, AR, Vol. II, Tab 7, pp. 38-39.

¹⁴⁸ Application Judge's Reasons, paras. 52, 72-73, 80-81, 88-89, AR, Vol. I, Tab 4, pp. 85, 90-92, 94.

Companies.¹⁴⁹ Distinguishing between these frauds and imputing Ms. Walton’s knowledge of her fraud of the DBDC Companies onto the DeJong Companies—the other companies she was actively defrauding—is illogical.¹⁵⁰ To find that the DeJong Companies were not victims is to wish away the findings of the application judge.

124. Second, Justice Blair refused to recognize the DeJong Companies as victims because Ms. Walton’s fraud purportedly entailed the corporate acts of the companies.¹⁵¹ But this is the very reason that limits on the corporate attribution doctrine exist. If a directing mind commits a fraud on the corporation, her interests no longer overlap with those of the corporation and the corporate acts taken at her behest can *no longer be attributed to the corporation*. As one commentator notes, “one person cannot be both perpetrator and victim of the crime”—to suggest otherwise requires “Olympic-calibre mental gymnastics.”¹⁵²

(c) Ms. Walton’s actions were not to the benefit of the DeJong Companies

125. Where a directing mind is acting wholly for her own benefit and “simply using the corporation as a means to that end” without an intent to benefit the corporation, the corporate attribution doctrine will also not apply.¹⁵³ Enriching oneself by using a company as “tool or vehicle” to defraud third parties—for example by using the company to execute a Ponzi scheme—provides no benefit to the company and leaves no room for the attribution doctrine to operate.¹⁵⁴

¹⁴⁹ Court of Appeal Reasons, paras. 166, 246, AR, Vol. II, Tab 7, pp. 73-74, 109-110.

¹⁵⁰ *Golden Oaks Enterprises Inc. (Trustee of) v. Lalonde*, [2016 ONSC 5313](#), para. 130.

¹⁵¹ Court of Appeal Reasons, paras. 102-104, AR, Vol. II, Tab 7, pp. 45-47.

¹⁵² Darcy L. MacPherson, “Reforming the doctrine of attribution: a Canadian solution to British concerns?” in Stephen Tully, ed., *Research Handbook on Corporate Legal Responsibility* (Cheltenham, UK: Edward Elgar Publishing Limited, 2005) 194, p. 201, ABOA, Tab 7.

¹⁵³ Darcy L. MacPherson, “Reforming the doctrine of attribution: a Canadian solution to British concerns?” in Stephen Tully, ed., *Research Handbook on Corporate Legal Responsibility* (Cheltenham, UK: Edward Elgar Publishing Limited, 2005) 194, p. 201, ABOA, Tab 7; *Canadian Dredge and Dock Co. v. The Queen*, [\[1985\] 1 S.C.R. 662](#), para. 84 (WL).

¹⁵⁴ *Oger v. Chiefscope Inc.* (1996), [29 O.R. \(3d\) 215](#), para. 23 (Gen. Div.) (WL), aff’d (1998) [113 O.A.C. 373](#) (C.A.); *Golden Oaks Enterprises Inc. (Trustee of) v. Lalonde*, [2016 ONSC 5313](#), para. 129.

126. Ms. Walton’s activities were clearly taken solely for her benefit. Both Justice Newbould and Justice Brown found that the root of the fraud was the Waltons’ desire to further their own interests.¹⁵⁵ Ms. Walton used investor funds to buy and renovate her personal mansion and fill her bank account and those of her personal companies. The \$225,000 “assignment” fee she fraudulently levied on St. Clarens and Emerson is only one example of how she used the DeJong Companies as a personal piggy bank.

127. Justice Blair strangely found that the DeJong Companies benefited from Ms. Walton’s fraud because they acquired the necessary funding and properties for their ongoing operations.¹⁵⁶ But this finding confused the ongoing viability of the DeJong Companies with a benefit received from Ms. Walton’s fraudulent scheme. The DeJong Companies were only able to function because the DeJongs poured their own money into those companies. The “success” of the DeJong Companies was not *because* of the Waltons’ fraud, but *in spite* of it.

Applying Canadian Dredge is not warranted

128. In the alternative, this Court should decline to attribute Ms. Walton’s knowledge to the DeJong Companies. As this Court explained in *Deloitte & Touche v. Livent Inc.*, the attribution doctrine allows courts to fix a corporation with knowledge, but does not require it: “courts retain the discretion to refrain from applying it.”¹⁵⁷ The Court must ask whether “the circumstances before the court justify this attribution,” or whether doing so would be “unjust”?¹⁵⁸ Where the doctrine would not protect an interest in the community or “advantage society by advancing law and order,” the rationale for its application “fades away”.¹⁵⁹ There is no policy reason to apply the doctrine where, as here, doing so would only hurt the innocent investors and defrauded companies ensnared in a fraudster’s scheme.

¹⁵⁵ Brown J. Reasons, paras. 212, 265, 273, AR, Vol. IV, Tab 28, pp. 145, 161, 163-164; Application Judge’s Reasons, paras. 29, 34, 36, AR, Vol. I, Tab 4, pp. 76-79.

¹⁵⁶ Court of Appeal Reasons, para. 80, AR, Vol. II, Tab 7, p. 37.

¹⁵⁷ *Deloitte & Touche v. Livent Inc. (Receiver of)*, [2017 SCC 63](#), para. 104.

¹⁵⁸ Darcy L. MacPherson, “Emaciating the Statutory Audit – A Comment on *Hart Building Supplies Ltd. v. Deloitte & Touche*” (2005) [41 Can. Bus. L. J. 471](#), pp. 481-483 (HeinOnline).

¹⁵⁹ *Deloitte & Touche v. Livent Inc. (Receiver of)*, [2017 SCC 63](#), para. 103.

129. By ignoring the limits to the corporate attribution doctrine and applying the mental state of a fraudster to the corporations at a significant cost to innocent investors, Justice Blair turned *Livent* on its head. In *Livent*, this Court did not suggest, as Justice Blair did, that the doctrine should be relaxed in the civil context. Quite the opposite: it refused to apply the doctrine—even though none of the limits applied—because applying it would hurt innocent stakeholders by taking away an avenue of civil redress for fraud committed against a corporation by its directing minds.¹⁶⁰ The same innocent stakeholders, here the DeJongs, require this Court’s protection.

130. Justice Blair’s insistence on holding the DeJong Companies liable for Ms. Walton’s fraud would have absurd consequences. If the DeJong Companies were deemed culpable for Ms. Walton’s fraud, the companies would be barred by the doctrine of *ex turpi causa* from suing Ms. Walton, the very fraudster who breached her fiduciary duties to them.¹⁶¹ This would be fundamentally unjust: “[i]t would be a remarkable paradox if the mere breach of [fiduciary] duties by doing an illegal act adverse to the company’s interest was enough to make the duty unenforceable at the suit of the company to whom it is owed.”¹⁶² Moreover, the DBDC Companies are in no different position; Ms. Walton played the same role in respect to the DBDC Companies as she did the DeJong Companies, breaching the same fiduciary duties, all in pursuit of the Waltons’ larger fraudulent scheme. If the DeJong Companies are impressed with Ms. Walton’s knowledge, so too must the DBDC Companies, who would then be barred from suing Ms. Walton, the fiduciary who stole from them. This cannot be the result equity intends.

The effect on innocent third parties makes the Court of Appeal’s remedy unjust

131. In the alternative, if, as Justice Blair held, the nature of their corporate acts requires the DeJong Companies be held liable for knowing assistance, then the Court of Appeal erred by not exercising its discretion and refusing to award a remedy. Remedies for equitable wrongs are always discretionary and a “court can withhold them in the interests of fairness.”¹⁶³ In past cases,

¹⁶⁰ *Deloitte & Touche v. Livent Inc. (Receiver of)*, [2017 SCC 63](#), paras. 98-105.

¹⁶¹ *British Columbia v. Zastowny*, [2008 SCC 4](#), para. 15.

¹⁶² *Jetivia SA v. Bilt (UK) Limited (in liquidation)*, [\[2015\] UKSC 23](#), para. 89.

¹⁶³ *Wewaykum Indian Band v. Canada*, [2002 SCC 79](#), paras. 107-108; *Strother v. 3464920 Canada Inc.*, [2007 SCC 24](#), para. 74.

this Court has refused to grant equitable remedies where they would be “grossly disproportionate” and an “unjust response” to the breach of fiduciary duty alleged.¹⁶⁴

132. The \$22.6 million awarded against the DeJong Companies is both unjust *and* grossly disproportionate. Its sole effect is to punish innocent investors, the DeJongs. The Waltons will be unaffected because they have no remaining economic interest in the DeJong Companies. It is the DeJongs who will be doubly harmed: first by the fraud itself and the destructive effect of Ms. Walton’s breach of fiduciary duty on the DeJong Companies, and second by those same companies being branded as knowing participants in the very fraud that victimized them.

133. A comparison between the treatment of Dr. Bernstein and the DeJongs is striking. Both were victims of the Waltons’ fraud and breach of fiduciary duty. Both the DBDC Companies and the DeJong Companies had net outflows to Rose & Thistle in the Net Transfer Analysis (even before including the losses of Emerson and St. Clarens, which post-dated the analysis), and both traced a portion of their defrauded monies to the other.¹⁶⁵ The major difference between them is that Dr. Bernstein had unclean hands, working with the Waltons to deceive third party lenders.¹⁶⁶ Nonetheless, Dr. Bernstein has recovered 40% of his investments,¹⁶⁷ obtained various constructive trusts, and now has a \$22.6 million claim against each of the DeJong Companies. These claims would “overwhelm[] the claims for losses of the investors” and the DeJongs would get nothing—the very definition of an “unjust result.”¹⁶⁸

134. Moreover, the measure of damages is disproportionate. The DBDC Applicants seek to use the Net Transfer Analysis to hold the Respondent Companies responsible for transfers made to *all* the non-DBDC Companies (\$22.6 million), when the Respondent Companies received only \$4,367,204 and the DeJong Companies together received nothing at all. If “equity is not so rigid

¹⁶⁴ *Sun Indalex Finance, LLC v. United Steelworkers*, [2013 SCC 6](#), paras. 239-240.

¹⁶⁵ Brown J. Reasons, para. 287, AR, Vol. IV, Tab 32, p. 168; DeJong October 7, 2015 Affidavit, paras. 21-22, AR, Vol. VIII, Tab 49, pp. 189-190; Froese Forensic Report, para. 2.63-2.64, Exhibit “J”, Walton July 4, 2014 Affidavit, AR, Vol. XII, Tab 58J, p. 20.

¹⁶⁶ See para. 30, above.

¹⁶⁷ Application Judge’s Reasons, para. 19, AR, Vol. I, Tab 4, p. 73.

¹⁶⁸ Court of Appeal Reasons, para. 247, AR, Vol. II, Tab 7, p. 110.

as to be susceptible to being used as a vehicle for punishing defendants with harsh damage awards out of all proportion to their actual behavior,”¹⁶⁹ then the DeJong Companies should only be liable for the amount they actually received, after accounting for the constructive trust: *nil*.

135. In sum, the damages award does not reflect the culpability of the DeJong Companies. It does not reflect their fault or their wrongdoing. Indeed, “[t]o the extent that any ‘fault’ could be found here, it results from being caught up in ... the wrongdoer’s fraudulent scheme.”¹⁷⁰ There is no need here to punish or deter the innocent investors for being duped. As Justice van Rensburg held, these are “exceptional circumstances – where one group of defrauded investors seeks to obtain judgment sounding in knowing assistance against another group that has been defrauded in a similar manner.”¹⁷¹ The Court need not encourage such litigation. It should hold that a remedy for the claim of knowing participation has no place here.


PART IV – COSTS

136. DeJong PC requests its costs on this appeal and in the proceedings below.


PART V – ORDER SOUGHT

137. DeJong PC requests an order allowing this appeal, setting aside the judgment of the Court of Appeal for Ontario, and granting DeJong PC costs in this appeal and the proceedings below.


ALL OF WHICH IS RESPECTFULLY SUBMITTED

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Jeremy R. Opolsky

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Jonathan Silver

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Alicja Puchta

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Rosemary A. Fisher

Counsel for the Appellant,
Christine DeJong Medicine Professional Corporation

¹⁶⁹ *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, para. 81 (WL).

¹⁷⁰ Court of Appeal Reasons, para. 246, AR, Vol. II, Tab 7, pp. 109-110.

¹⁷¹ Court of Appeal Reasons, para. 248, AR, Vol. II, Tab 7, pp. 110-111.

PART VI – TABLE OF AUTHORITIES

Authority		Paragraph(s)
CASES		
1	<i>101082401 Saskatchewan Ltd. v. Tunnels of Little Chicago Association Inc.</i> , 2018 SKQB 271	83
2	<i>4 Star Courier & Logistics Inc. v. Domino's Pizza Canadian Distribution ULC</i> (2012), 6 B.L.R. (5th) 132 (Ont. Sm. Cl. Ct.)	83
3	<i>864401 Ontario Ltd. v. McGill</i> , 2018 ONSC 6440	82
4	<i>A.I. Enterprises Ltd. v. Bram Enterprises Ltd.</i> , 2014 SCC 12	82
5	<i>Air Canada v. M & L Travel Ltd.</i> , [1993] 3 S.C.R. 787 (WL)	75, 79, 82, 111
6	<i>Austeville Properties Ltd. v. Josan</i> , 2016 BCSC 1963	116, 117
7	<i>Baden v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA</i> (1983), [1992] 4 All ER 161 (Eng. Ch.), ABOA, Tab 1, aff'd, [1985] BCLC 258 (Eng. C.A.) (QL)	85
8	<i>Bank of China v. Fan</i> , 2015 BCSC 590	82
9	<i>Bare Land Condominium Plan 8820814 (Owners) v. Birchwood Village Greens Ltd.</i> , 1998 ABQB 1023	83
10	<i>BCE Inc. v. 1976 Debentureholders</i> , 2008 SCC 69	81
11	<i>Brinks Ltd. v. Abu-Saleh</i> (No. 3), [1996] C.L.C. 133 (Eng. Ch.) (WL), ABOA, Tab 2	85
12	<i>British Columbia v. Zastowny</i> , 2008 SCC 4	130
13	<i>Bronson v. Hewitt</i> , 2010 BCSC 169 , var'd on other grounds, 2013 BCCA 367	83
14	<i>Brown v. Bennett</i> [1999] B.C.C. 525 (Eng. C.A.) (WL), ABOA, Tab 3	80, 85, 108
15	<i>Canadian Dredge and Dock Co. v. The Queen</i> , [1985] 1 S.C.R. 662 (WL)	113, 116, 121, 125
16	<i>Canson Enterprises Ltd. v. Boughton & Co.</i> , [1991] 3 S.C.R. 534	81
17	<i>Citadel General Assurance Co. v. Lloyds Bank Canada</i> , [1997] 3 S.C.R. 805	75, 79, 94
18	<i>Commercial Union Life Assurance Co. of Canada v. John Ingle Insurance Group Inc.</i> (2002), 61 O.R. (3d) 296 (C.A.)	82
19	<i>Cromer Finance Ltd. v. Berger</i> , 137 F. Supp. 2d 452 (S.D. N.Y. 2001) (WL), ABOA, Tab 4	87

20	<i>Deloitte & Touche v. Livent Inc. (Receiver of)</i> , 2017 SCC 63	111, 128, 129
21	<i>Eastern Chrysler Plymouth Inc. v. Manitoba Public Insurance Corp.</i> , 2000 MBQB 66 , aff'd 2000 MBCA 128	113, 117
22	<i>Enbridge Gas Distribution Inc. v. Marinaccio</i> , 2012 ONCA 650	82
23	<i>Gold v. Rosenberg</i> , [1997] 3 S.C.R. 767	75, 76
24	<i>Golden Oaks Enterprises Inc. (Trustee of) v. Lalonde</i> , 2016 ONSC 5313	123, 125
25	<i>Hodgkinson v. Simms</i> , [1994] 3 S.C.R. 377 (WL)	134
26	<i>HSBC Bank Canada v. Lourenco</i> , 2012 ABQB 380	82
27	<i>Imperial Parking Canada Corp. v. Anderson</i> , 2016 BCSC 468	83
28	<i>JD Wetherspoon plc v. Van de Berg & Co Ltd</i> , [2009] EWHC 639 (Ch)	85
29	<i>Jetivia SA v. Bilta (UK) Limited (in liquidation)</i> , [2015] UKSC 23	130
30	<i>Lax Kw'alaams Indian Band v. Canada (Attorney General)</i> , 2011 SCC 56	94
31	<i>Locking v. McCowan</i> , 2016 ONCA 88	82
32	<i>Neilson v. Union Bank of California, N.A.</i> , 290 F. Supp. 2d 110 (C.D. Cal. 2003) (WL), ABOA, Tab 5	87
33	<i>Northland Bank v. Willson</i> , 1999 ABQB 659 , var'd on other grounds, 2001 ABCA 137	82
34	<i>OBG Ltd. v. Allan</i> , [2007] UKHL 21	85
35	<i>Oger v. Chiefscope Inc.</i> (1996), 29 O.R. (3d) 215 (Gen. Div.) (WL), aff'd (1998), 113 O.A.C. 373	125
36	<i>R. v. Fercan Developments</i> , 2013 ONCJ 826 , aff'd 2016 ONCA 269	117
37	<i>Re-Engine Pty Ltd. v. Fergusson</i> , [2007] VSC 57	86
38	<i>Richards v. Air India Ltd.</i> , 2011 BCSC 1171	83
39	<i>Rodaro v. Royal Bank</i> (2002), 59 O.R. (3d) 74 (C.A.)	94
40	<i>SPV Osus Ltd. v. UBS AG</i> , 882 F. 3d 333 (2d. Cir. 2018) (WL), ABOA, Tab 6	87
41	<i>Strother v. 3464920 Canada Inc.</i> , 2007 SCC 24	131
42	<i>Sun Indalex Finance, LLC v. United Steelworkers</i> , 2013 SCC 6	131
43	<i>Tableau Holdings Pty Ltd. v. Joyce</i> , [1999] WASCA 49	86

44	<i>Treaty Group Inc. v. Simpson</i> , 2001 CarswellOnt 617 (Sup. Ct.) (WL)	83
45	<i>Wewaykum Indian Band v. Canada</i> , 2002 SCC 79	131
46	<i>Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)</i> , 2018 SCC 4	81
SECONDARY SOURCES		
47	Darcy L. MacPherson, “Emaciating the Statutory Audit – A Comment on <i>Hart Building Supplies Ltd. v. Deloitte & Touche</i> ”, (2005) 41 Can. Bus. L. J. 471 (HeinOnline)	112, 114, 128
48	Darcy L. MacPherson, “Reforming the doctrine of attribution: a Canadian solution to British concerns?”, in Stephen Tully, ed., <i>Research Handbook on Corporate Legal Responsibility</i> (Cheltenham, UK: Edward Elgar Publishing Limited, 2005) 194, ABOA, Tab 7	111, 124, 125
49	Darcy L. MacPherson, “The Civil and Criminal Applications of the Identification Doctrine: Arguments for Harmonization” (2007) 45 Alta. L. Rev. 171 (HeinOnline)	112, 113, 121
50	David J. Hayton, <i>Underhill and Hayton: Law Relating to Trusts and Trustees</i> , 16th ed. (London: Butterworths LexisNexis, 2003), ABOA, Tab 8	108
51	Deborah A. Demott, “Accessory Disloyalty: Comparative Perspectives on Substantial Assistance to Fiduciary Breach” in Paul S. Davies & James Penner, eds., <i>Equity, Trusts and Commerce</i> (Oxford: Hart Publishing, 2017) 253, ABOA, Tab 9	87
52	John McGhee, ed., <i>Snell’s Equity</i> , (London: Sweet & Maxwell, 2015), ABOA, Tab 10	80
53	Leonard I. Rotman, <i>Fiduciary Law</i> , (Toronto: Thomson Canada Ltd, 2005), ABOA, Tab 11	75
54	Paul M. Perell, “Intermeddlers of Strangers to the Breach of Trust on Fiduciary Duty” (1998) 21 Advoc. Q. 94 (HeinOnline)	79
55	Paul S. Davies, <i>Accessory Liability</i> (Oxford: Hart Publishing, 2015), ABOA, Tab 12	80, 85, 90
56	<i>Restatement (Second) of Torts</i> § 876 (2018), ABOA, Tab 13	87
57	S. Elliott and C. Mitchell “Remedies for Dishonest Assistance” (2004) 67 Mod. L. Rev. 16 (HeinOnline)	80, 85

SCHEDULE A – LIST OF RESPONDENTS (APPELLANTS)*

1. Dr. Bernstein Diet Clinics Ltd.
2. 2272551 Ontario Limited
3. DBDC Investments Atlantic Ltd.
4. DBDC Investment Pape Ltd.
5. DBDC Investments Highway 7 Ltd.
6. DBDC Investments Trent Ltd.
7. DBDC Investments St. Clair Ltd.
8. DBDC Investments Tisdale Ltd.
9. DBDC Investments Leslie Ltd.
10. DBDC Investments Lesliebrook Ltd.
11. DBDC Fraser Properties Ltd.
12. DBDC Fraser Lands Ltd.
13. DBDC Queen's Corner Inc.
14. DBDC Queen's Plate Holdings Inc.
15. DBDC Dupont Developments Ltd.
16. DBDC Red Door Developments Inc.
17. DBDC Red Door Lands Inc.
18. DBDC Global Mills Ltd.
19. DBDC Donalda Developments Ltd.
20. DBDC Salmon River Properties Ltd.
21. DBDC Cityview Industrial Ltd.
22. DBDC Weston Lands Ltd.
23. DBDC Double Rose Developments Ltd.
24. DBDC Skyway Holdings Ltd.
25. DBDC West Mall Holdings Ltd.
26. DBDC Royal Gate Holdings Ltd.
27. DBDC Dewhurst Developments Ltd.
28. DBDC Eddystone Place Ltd.
29. DBDC Richmond Row Holdings Ltd.

* Companies are numbered in accordance with the Schedule A to the Reasons of the Court of Appeal for Ontario, dated January 25, 2018.

SCHEDULE B – LIST OF SCHEDULE “B” COMPANIES

1. Twin Dragons Corporation
2. Bannockburn Lands Inc. / Skyline — 1185 Eglinton Avenue Inc.
3. Wynford Professional Centre Ltd.
4. Liberty Village Properties Ltd.
5. Liberty Village Lands Inc.
6. Riverdale Mansion Ltd.
7. Royal Agincourt Corp.
8. Hidden Gem Developments Inc.
9. Ascalon Lands Ltd.
10. Tisdale Mews Inc.
11. Lesliebrook Holdings Ltd.
12. Lesliebrook Lands Ltd
13. Fraser Properties Group
14. Fraser Lands Ltd.
15. Queen's Corner Corp.
16. Northern Dancer Lands Ltd.
17. Dupont Developments Ltd.
18. Red Door Developments Inc. and Red Door Lands Ltd.
19. Global Mills Inc.
20. Donalda Developments Ltd.
21. Salmon River Properties Ltd.
22. Cityview Industrial Ltd.
23. Weston Lands Ltd.
24. Double Rose Developments Ltd.
25. Skyway Holdings Ltd.
26. West Mall Holdings Ltd.
27. Royal Gate Holdings Ltd.
28. Royal Gate Nominee Inc.
29. Royal Gate (Land) Nominee Inc.
30. Dewhurst Development Ltd.
31. Eddystone Place Inc.

- 32. Richmond Row Holdings Ltd.
- 33. El-Ad (1500 Don Mills) Limited
- 34. 165 Bathurst Inc.

SCHEDULE C – LIST OF SCHEDULE “C” COMPANIES

1. 3270 American Drive, Mississauga, Ontario
2. 0 Luttrell Ave., Toronto, Ontario
3. 2 Kelvin Avenue, Toronto, Ontario
4. 346 Jarvis Street, Suites A, B, C, E and F, Toronto, Ontario
5. 1 William Morgan Drive, Toronto, Ontario
6. 324 Price Edward Drive, Toronto, Ontario
7. 24 Cecil Street, Toronto, Ontario
8. 30 and 30A Hazelton Avenue, Toronto, Ontario
9. 777 St. Clarens Avenue, Toronto, Ontario
10. 252 Carlton Street and 478 Parliament Street, Toronto, Ontario
11. 66 Gerrard Street East, Toronto, Ontario
12. 2454 Bayview Avenue, Toronto, Ontario
13. 319-321 Carlaw, Toronto, Ontario
14. 260 Emerson Ave., Toronto, Ontario
15. 44 Park Lawn Circle, Toronto, Ontario
16. 19 Tennis Crescent, Toronto, Ontario
17. 646 Broadview Avenue, Toronto, Ontario

SCHEDULE D – GLOSSARY OF TERMS IN APPELLANT’S FACTUM

Term used in factum	Term used in courts below	Definition
DeJong Companies	N/A	4 project-specific companies in which DeJong had invested with the Waltons as equal shareholders: (1) United Empire Lands Ltd. (2) Prince Edward Properties Ltd. (3) St. Clarens Holdings Ltd. (4) Emerson Developments Ltd.
DBDC Applicants	DBDC Applicants	Investment companies owned and controlled by Dr. Bernstein, through which he invested with the Waltons. These are DBDC Spadina Ltd. and the companies listed on Schedule A to this factum.
DBDC Companies	Schedule B Companies	Project-specific companies in which the DBDC Applicants had invested with the Waltons as equal shareholders. These companies are listed on Schedule B to this factum.
Non-DBDC Companies	Schedule C Companies	Companies included in the Net Transfer Analysis in which the DBDC Applicants had no interest. These are included in Schedule C to this factum.
Non-DBDC Accounts	N/A	Accounts belonging to the Non-DBDC Companies, as considered by the Net Transfer Analysis.
Innocent Investor Companies	N/A	Companies in which both the Waltons and innocent investors had an interest.
Walton Companies	N/A	Companies solely owned by the Waltons, in which no innocent investors had any interest.
Walton Respondents	Walton Respondents	The respondents named in the DBDC Applicants’ original application in these proceedings: Norma Walton, Ronauld Walton, Rose & Thistle Group Ltd., and Eglinton Castle Inc.
Respondent Companies	Listed Schedule C Companies	10 project-specific companies that the DBDC Applicants named in their Third Fresh as Amended Application and against which they advanced claims of knowing assistance and knowing receipt. These include the 4 DeJong Companies and are listed at Schedule C to this factum.

I

COURT OF APPEAL FOR ONTARIO

CITATION: DBDC Spadina Ltd. v. Walton, 2015 ONCA 628

DATE: 20150917

DOCKET: C59822

Gillese, Lauwers and Benotto JJ.A.

BETWEEN

DBDC Spadina Ltd. and those corporations listed on Schedule A hereto

Applicants (Respondents)

and

Norma Walton, Ronauld Walton, The Rose & Thistle Group Ltd. and Eglinton
Castle Inc.

Respondents

and

Those corporations listed on Schedule B hereto, to be bound by the result

Rosemary A. Fisher, for the appellants Christine DeJong, Michael DeJong,
Christine DeJong Medical Professional Corporation, C2M2S Holding Corp. and
DeJong Homes Inc.Peter H. Griffin and Danielle Glatt, for the respondents DBDC Spadina Ltd. and
those corporations listed on Schedule A hereto

Mark Dunn, for Schonfeld Inc., Manager and Inspector

Heard: September 10, 2015

On appeal from the judgment of Justice David M. Brown of the Superior Court of
Justice, dated August 12, 2014.

ENDORSEMENT

OVERVIEW

[1] This appeal is part of a complex, multi-party insolvency proceeding.

[2] DBDC Spadina Ltd. and those corporations listed on Schedule A (the “Bernstein applicants”) are in ongoing litigation in which Norma Walton, Ronauld Walton, The Rose & Thistle Group Ltd., and Eglinton Castle Inc. (the “Waltons”), among others, are the respondents. Within this litigation, the Bernstein applicants brought a motion seeking an order for, among other things, a constructive trust over certain properties and the cancellation of the Waltons’ shares in certain corporations.

[3] Christine DeJong, Michael DeJong and related entities (the “DeJong appellants”) brought a cross-motion that was heard at the same time as the Bernstein applicants’ motion. In their cross-motion, the DeJong appellants alleged that they were similarly situated to the Bernstein applicants – they, too, had invested funds with the Waltons which the Waltons had wrongfully diverted. The DeJong appellants contended that some of their monies had been diverted into properties over which the Bernstein applicants sought constructive trusts.

[4] The DeJong appellants sought, among other things, an order cancelling the Waltons’ shares in United Empire Lands Ltd. (“UEL”). In the alternative, the DeJong appellants sought an order approving a proposed settlement agreement

between them and the Waltons, in which the Waltons agreed to transfer a property (“3270 American Drive”) to them.

[5] Based on tracing principles, the motions judge ordered constructive trusts over certain properties, including 3270 American Drive, in favour of the Bernstein applicants. By order dated August 12, 2014 (the “Order”), he dismissed the DeJong appellants’ cross-motion.

[6] The DeJong appellants appeal.

[7] For the reasons that follow, the appeal is dismissed.

THE ISSUES

[8] The DeJong appellants raise a number of grounds of appeal which can be summarized as follows. They submit that the motions judge erred by failing:

1. to adjudicate on their requested relief that the Waltons’ shares in UEL be cancelled and on their request for directions on their tracing rights;
2. to correctly apply the test for a constructive trust and in finding that the Bernstein applicants were entitled to constructive trusts over certain properties; and
3. to apply the correct legal test when finding that the settlement agreement constituted a preference under the *Assignments and Preferences Act*, R.S.O. 1990, c. A.33.

[9] The court called on counsel for the respondents only in respect of one aspect of the second issue, namely, the allegation that the tracing relied on by the motions judge when he ordered the constructive trusts was flawed.

ANALYSIS

Issue #1 Did the motions judge err by failing to adjudicate on the DeJong appellants' requested relief that the Waltons' shares in UEL be cancelled and on their request for directions on their tracing rights?

[10] The DeJong appellants acknowledge that the motions judge referred to their request for an order cancelling the Waltons' shares in UEL. They submit, however, that although the motions judge dismissed their cross-motion, he failed to adjudicate this head of relief.

[11] We do not accept this submission. We see no error in the motions judge's result or reasoning on this matter.

[12] At para. 281 of his reasons, the motions judge notes the DeJong appellants' request that the Waltons' shares in UEL be cancelled. At para. 289 he deals with that request, stating:

I am not prepared to grant the relief sought by the [DeJong appellants]. The proposed settlement agreement would prefer the [DeJong appellants'] interests as creditors of the Waltons over other creditors in respect of 3270 American Drive and, in the circumstances, I conclude that such a preference would be unfair to other creditors including, but not limited to, Dr. Bernstein. The legal entitlement, if any, of the [DeJong appellants], as preferred shareholders, to the proceeds from the sale of 3270 American Drive should be dealt with in the claims process for that property.

[13] Read in context, in para. 289 the motions judge addressed both the DeJong appellants' request for cancellation of the Waltons' shares in UEL and

their request in relation to the proposed settlement agreement. In respect of both, the motions judge refused to grant the relief requested because he was concerned that it would prefer the DeJong appellants over other claimants. In his view, the claims process was the appropriate mechanism for determination of the DeJongs appellants' claims.

[14] The DeJong appellants' complaint about the motions judge's failure to give directions on their tracing rights is related to the work of the Inspector. They contend that the Inspector was obliged to do a full tracing of all monies, as opposed to focusing on tracing the Bernstein applicants' funds.

[15] The Bernstein applicants are paying for the Inspector. He is tracing their funds. Of course, in fulfilling his obligations, the Inspector must be mindful that he was appointed by the court. However, those obligations do not require the Inspector to trace the monies of all parties into and out of the various companies and properties. As the motions judge indicated, the DeJong appellants can assert their rights in the claims process. It is up to them to take such steps as are necessary to assert their rights in that process.

Issue #2 Did the motions judge fail to correctly apply the test for a constructive trust or in finding that the Bernstein applicants were entitled to constructive trusts over certain properties?

[16] The essence of the DeJong appellants' submission on this issue is that the Bernstein applicants "got what they bargained for", therefore, they suffered no

deprivation and the court could not grant a constructive trust based on unjust enrichment.

[17] We do not accept this submission.

[18] In rejecting this same submission, the motions judge found, at para. 265 of his reasons, that the Bernstein applicants and the Waltons agreed that the funds invested by the Bernstein applicants in a given property would be used only for the development of that property. He found that, contrary to their contractual obligations, the Waltons took the Bernstein applicants' funds and used them in an unauthorized fashion which benefitted the Waltons. On the record, this finding is unassailable.

[19] We also reject the submission that the motions judge erred in his tracing analysis. The motions judge was entitled to accept the Inspector's analysis and prefer it over that of Mr. Froese, the Waltons' expert. Moreover, the motions judge made no error in terms of commingling. As we explain in the companion appeal *DBDC Spadina Ltd. v. Walton*, 2015 ONCA 624, at para. 6, in which a similar attack was made on tracing accepted by the motions judge, the motions judge imposed constructive trusts on only those properties in which commingling was not an issue.

Issue #3 Did the motions judge fail to apply the correct legal test when finding that the settlement agreement constituted a preference under the *Assignments and Preferences Act*?

[20] As we have explained in relation to the first issue, the motions judge was concerned that enforcement of the proposed settlement agreement between the DeJong appellants and the Waltons would constitute a preference over the interests of other creditors in respect of 3270 American Drive. Although the motions judge did not explicitly refer to the *Assignments and Preferences Act*, that omission “could have had no appreciable influence on the result” that he reached: *Canadian Broadcasting Corp. Pension Plan v. BF Realty Holdings Ltd.* (2002), 214 D.L.R. (4th) 121 (Ont. C.A.), at para. 64. The motions judge’s reasons are sufficient to permit the parties (and this, the reviewing court) to know why he found that the proposed settlement agreement would constitute a preference within the meaning of that Act.

[21] It appears incontrovertible that the intent and effect of the proposed settlement agreement was to prefer the interests of the DeJong appellants over other creditors. When the proposed settlement agreement was reached, the DeJong appellants had notice that the Bernstein applicants were seeking a certificate of pending litigation and a blanket charge over 3270 American Drive; the Bernstein applicants were unquestionably creditors of the Waltons; and, the DeJong appellants knew, or ought to have known, that the Waltons were insolvent or on the eve of insolvency.

DISPOSITION

[22] For these reasons, the appeal is dismissed. If the parties are unable to agree on costs, they may make written submissions to a maximum of two pages in length, such submissions to be filed with the court no later than 10 days from the date of the release of this endorsement.

“E.E. Gillese J.A.”

“P. Lauwers J.A.”

“M.L. Benotto J.A.”

Schedule “A” Companies

1. Dr. Bernstein Diet Clinics Ltd.
2. 2272551 Ontario Limited
3. DBDC Investments Atlantic Ltd.
4. DBDC Investment Pape Ltd.
5. DBDC Investments Highway 7 Ltd.
6. DBDC Investments Trent Ltd.
7. DBDC Investments St. Clair Ltd.
8. DBDC Investments Tisdale Ltd.
9. DBDC Investments Leslie Ltd.
10. DBDC Investments Lesliebrook Ltd.
11. DBDC Fraser Properties Ltd.
12. DBDC Fraser Lands Ltd.
13. DBDC Queen’s Corner Inc.
14. DBDC Queen’s Plate Holdings Inc.
15. DBDC Dupont Developments Ltd.
16. DBDC Red Door Developments Inc.
17. DBDC Red Door Lands Inc.
18. DBDC Global Mills Ltd.
19. DBDC Donalda Developments Ltd.
20. DBDC Salmon River Properties Ltd.
21. DBDC Cityview Industrial Ltd.
22. DBDC Weston Lands Ltd.
23. DBDC Double Rose Developments Ltd.
24. DBDC Skyway Holdings Ltd.
25. DBDC West Mall Holdings Ltd.
26. DBDC Royal Gate Holdings Ltd.
27. DBDC Dewhurst Developments Ltd.
28. DBDC Eddystone Place Ltd.
29. DBDC Richmond Row Holdings Ltd.

Schedule “B” Companies

1. Twin Dragons Corporation
2. Bannockburn Lands Inc. / Skyline – 1185 Eglinton Avenue Inc.
3. Wynford Professional Centre Ltd.
4. Liberty Village Properties Inc.
5. Liberty Village Lands Inc.
6. Riverdale Mansion Ltd.
7. Royal Agincourt Corp.
8. Hidden Gem Development Inc.
9. Ascalon Lands Ltd.
10. Tisdale Mews Inc.
11. Lesliebrook Holdings Ltd.
12. Lesliebrook Lands Ltd.
13. Fraser Properties Corp.
14. Fraser Lands Ltd.
15. Queen’s Corner Corp.
16. Northern Dancer Lands Ltd.
17. Dupont Developments Ltd.
18. Red Door Developments Inc. and Red Door Lands Ltd.
19. Global Mills Inc.
20. Donalda Developments Ltd.
21. Salmon River Properties Ltd.
22. Cityview Industrial Ltd.
23. Weston Lands Ltd.
24. Double Rose Developments Ltd.
25. Skyway Holdings Ltd.
26. West Mall Holdings Ltd.
27. Royal Gate Holdings Ltd.
28. Dewhurst Developments Ltd.
29. Eddystone Place Inc.
30. Richmond Row Holdings Ltd.
31. El-Ad Limited
32. 165 Bathurst Inc.

J

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

CHRISTINE DEJONG MEDICINE PROFESSIONAL CORPORATION

APPELLANT
(Respondent)

- and -

DBDC SPADINA LTD. and THOSE CORPORATIONS LISTED ON
SCHEDULE A HERETO

RESPONDENTS
(Appellants)

[style of cause continued on Schedule A]

**MEMORANDUM OF ARGUMENT OF THE APPELLANT,
CHRISTINE DEJONG MEDICINE PROFESSIONAL CORPORATION,
IN RESPONSE TO THE MOTION TO BE ADDED
AS A RESPONDING PARTY OF SCHONFELD INC.**

(Rules 18, 49, 55-59 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156)

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ORIGINAL TO THE SUPREME COURT OF CANADA

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PART I – OVERVIEW AND STATEMENT OF FACTS

Overview

1. Schonfeld Inc. brings this motion to seek to be added as a party to this appeal or, in the alternative, be granted leave to intervene in this appeal. The appellant, Christine DeJong Medicine Professional Corporation (“DeJong PC”), opposes Schonfeld’s participation.
2. Schonfeld’s proposed participation will not assist this Court. Schonfeld’s role as a receiver-manager was to provide information to the application judge. It confirms that its submissions before this Court will be limited to this factual nature. Such submissions will not help this Court resolve the jurisprudential issues before it. Nor is it necessary or appropriate for a receiver to make submissions on its own evidence; there are no disputed issues of fact before this Court and the respondents, who rely on Schonfeld’s evidence, are capable of describing it here.
3. On the basis of its proposed submissions, there is no basis for Schonfeld to participate as a party or an intervener. This Court has already determined that a court officer is not a proper party on appeal. And, given that Schonfeld will not be making any submissions on the broader legal issues on appeal, its purported submissions would be inconsistent with that of an intervener. Instead, Schonfeld’s participation would only impose unnecessary costs on the parties and risk expanding the scope of this appeal.

Facts

4. The background of this matter is fully explored in DeJong PC’s appellant factum. Essentially this appeal involves a dispute between Dr. Stanley K. Bernstein and Dr. Christine and Michael DeJong. Dr. Bernstein (through his investment companies, DBDC Spadina Ltd. and the Schedule A Corporations (the “DBDC Applicants”¹)) and the DeJongs (through Dr. DeJong’s professional corporation, DeJong PC) invested in project-specific real estate companies with Norma and Ronauld Walton. As it turned out, the Waltons were running a fraud.
5. The appeal arises out of proceedings initially started by Dr. Bernstein to recoup his investments from the Waltons. The appeal concerns a claim by the DBDC Applicants that four

¹ A glossary of the identity of the parties and other entities and terms relevant to this appeal is appended as Schedule D to this memorandum.

companies that the DeJongs invested in with the Waltons (the “DeJong Companies”) knowingly assisted the Waltons’ fraud, entitling the DBDC Applicants to damages from those companies.

6. Schonfeld has been involved since the beginning, when it was engaged by Dr. Bernstein to support his efforts against the Waltons. Its mandate throughout the proceedings remained primarily to assist Dr. Bernstein in recovering his investments. Schonfeld’s focus was not to seek recovery on behalf of all victims of the fraud or to be a neutral arbiter of their interests. Rather, Schonfeld’s role was DBDC-centric.

Schonfeld’s involvement in Dr. Bernstein’s recovery

7. Schonfeld’s involvement in assisting Dr. Bernstein’s recovery dates back to at least September 2013, when Dr. Bernstein hired Schonfeld to gather information on his investments in real estate projects with the Waltons.² In October 2013, the DBDC Applicants successfully moved to appoint Schonfeld as an Inspector, with a mandate dedicated to investigating the affairs and financial position of companies in which the DBDC Applicants had invested with the Waltons (the “DBDC Companies”).³

8. In November 2013, at the DBDC Applicants’ request, Schonfeld was appointed Manager of the DBDC Companies.⁴ In August 2014, again at the DBDC Applicants’ request, Schonfeld was appointed Manager of the all other companies owned by the Waltons, including those co-owned by innocent investors (the “non-DBDC Companies”), four of which are the DeJong Companies.⁵ The DeJong Companies are the only non-DBDC Companies at issue in this appeal.

9. At Dr. Bernstein’s request and for the purpose of assisting Dr. Bernstein’s recovery, Schonfeld conducted an analysis tracing the DBDC Applicants’ funds into other accounts

² Endorsement of Newbould J., dated October 7, 2013 (“Newbould J. October 7, 2013 Reasons”), para. 9, Appeal Record (“AR”), Vol. III, Tab 21, pp. 114.

³ Order of Newbould J., dated October 7, 2013, paras. 3-4, AR, Vol. III, Tab 20, pp. 102-103; Newbould J. October 7, 2013 Reasons, paras. 2-3, 32, AR, Vol. III, Tab 21, pp. 119.

⁴ Order of Newbould J., dated November 5, 2013, paras. 3-5 AR, Vol. III, Tab 24, pp. 146-150; Endorsement of Newbould J., dated November 5, 2013, paras. 2-3, 53 AR, Vol. III, Tab 23, pp. 127, 143.

⁵ Order of Brown J., dated August 12, 2014, paras. 14-15, AR, Vol. IV, Tab 33, p. 180.

implicated in the Walton's scheme. This analysis became known as the "Net Transfer Analysis". At no point was a similar transfer analysis done to show the transfer of the funds of the other investors, such as the DeJongs. The DBDC Applicants relied on the Net Transfer Analysis as evidence of the non-DBDC Companies' alleged participation in the Waltons' fraud.⁶

10. When Schonfeld assembled the Net Transfer Analysis, it was not the receiver-manager over the non-DBDC Companies. Rather, Schonfeld was acting solely in its capacity as Inspector, a role to which it had been appointed exclusively for the purpose of assisting Dr. Bernstein to investigate and recover his investments.

11. It is in this capacity that Schonfeld drafted the Net Transfer Analysis as a one-sided inquiry. The analysis examines the flow of funds between the Waltons' Rose & Thistle Group Inc. "clearing house" account and two groups of accounts: (1) those of DBDC Companies, and (2) all other accounts to which the Waltons had access,⁷ which were grouped together solely on the basis that they were not DBDC Company accounts. The analysis therefore indiscriminately pools the accounts belonging to companies co-owned by innocent investors, including the DeJong Companies, with accounts belonging to the fraudsters themselves.

12. Justice Brown, below, had concerns about the many roles Schonfeld was asked to play, remarking that "a court officer, such as a receiver, should only be allowed to wear so many hats, otherwise unworkable conflicts of interest inevitably arise." Further observing that "Dr. Bernstein is not the only creditor of the Waltons", Justice Brown dismissed a request to install Schonfeld as a permanent receiver of the Waltons' property.⁸ Nonetheless, Schonfeld currently finds itself as receiver-manager of both the DBDC Companies and the DeJong Companies, whose respective creditors are directly adverse in this proceeding.

⁶ Cash Transfer Analysis of the Inspector, circulated February 21, 2014, Exhibit "A", Fourth Interim Report of the Inspector, dated April 23, 2014, AR, Vol. XIV, Tab 68A, pp. 148-158.

⁷ Reasons of Brown J., August 12, 2014 ("Brown J. Reasons"), paras. 17-20, AR, Vol. IV, Tab 32, pp. 83-85.

⁸ Brown J. Reasons, para. 233, AR, Vol. IV, Tab 32, p. 151.

Schonfeld's conduct in this appeal

13. Schonfeld was not a named party before the application judge or the Court of Appeal. Nor did it seek to become added as a party in either court. The first time Schonfeld requests party status is in this Court.

14. On December 17, 2018, Schonfeld was, as a courtesy, served with the notice of appeal. Schonfeld waited over three months to seek leave to be added as a party, serving this motion one month after the appellant filed its factum and record in this appeal.

PART II – THE ISSUES

15. The two issues on this motion are whether Schonfeld should be:

- (1) granted an order adding it as a party; or
- (2) granted leave to intervene.

PART III – STATEMENT OF ARGUMENT

16. Schonfeld does not meet the criteria to participate in this appeal as an added party or as an intervener. Schonfeld's participation will not assist this Court. Furthermore, Schonfeld has not met the standards to be added as a party or to be granted leave to intervene. Finally, granting Schonfeld's late-stage motion would cause unwarranted prejudice to the appellant.

Schonfeld's participation in this appeal will not assist the Court

17. Schonfeld is not in a position to make a contribution to this appeal, either as a party or an intervener.

18. This appeal concerns issues of law and principle. In particular, the Court is asked to address (i) the elements of the equitable claim of knowing assistance of breach of fiduciary duty and (ii) the corporate attribution doctrine as developed by this Court in *Canadian Dredge*⁹ and *Deloitte v. Livent*.¹⁰

19. In the context of this appeal, Schonfeld has not shown that it can assist this Court.

⁹ *Canadian Dredge and Dock Co. v. The Queen*, [1985] 1 S.C.R. 662 (WL).

¹⁰ *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63.

20. First, while this appeal is jurisprudential in nature, Schonfeld takes no position on the legal questions at issue on this appeal. It offers nothing to assist the Court's analysis of the legal principles before it and it intends to make no legal argument.

21. Second, Schonfeld represents that its submissions will be restricted to the facts of its prior investigations. Such assistance would be unusual and wholly unnecessary. The factual record at this stage is set and this Court is not a fact-finding court. Finding and weighing the evidence—or drawing inferences from the evidence—is the role of the judge of first instance. The facts, as found by the application judge, are not in dispute. Schonfeld has not alleged that the application judge made any palpable and overriding errors of fact, or indeed any factual errors at all, in his interpretation of the Net Transfer Analysis, nor would it be permissible for it to do so.

22. If Schonfeld's submissions are proposed merely to assist this Court in understanding its prior investigation and analysis, then its submissions are unnecessary. This analysis, including the Net Transfer Analysis, was undertaken to assist the recovery of the DBDC Applicants. It was heavily relied on by the DBDC Applicants below. The DBDC Applicants, represented by sophisticated counsel here, require no assistance in explaining the factual record to this Court. Nor is Schonfeld's status as the "author" of the Net Transfer Analysis availing. Appeal courts neither require nor allow witnesses—even experts who author important expert reports—to retain counsel to explain their evidence. Doing so would circumvent the role of the trier of fact.

23. If, instead, Schonfeld's submissions are intended to gloss or expand upon its written reports and analysis, then its submissions are improper. Absent an application for fresh evidence, the record on appeal must remain the same as it was before the application judge.

24. Third, this appeal is a private dispute between Dr. Bernstein and the DeJongs. In addition to taking no position on broader legal principles, Schonfeld's proclaimed neutrality means that it will not assist the Court in the determination of the merits of the appeal itself.

Schonfeld is not a necessary party to this appeal

25. Schonfeld was not a party on this application below. It seeks to be added as a party to this appeal based on its roles as a court officer, both as an inspector and as a manager-receiver. It argues that because of these roles it is a necessary party to this appeal.

26. This Court has already determined that court officers are not necessary or proper parties on an appeal. While a court officer may provide information to parties and the Court below, it is generally not involved in a particular *lis*. As such, a court officer is not adverse to the appellant, has no personal interest¹¹ and is not joined as a party before this Court.

27. The Court confirmed this practice in *AbitibiBowater*.¹² In that case, a CCAA Monitor sought to be added as a party before this Court on the basis that its reports were central to the issues on appeal. This Court refused. As explained in commentary on this Court's decision:

The status of officers of the court in proceedings below raises a number of issues. Some make recommendations to the court that may then become subject to challenge by the parties actually involved in the particular *lis* ... A Monitor under the CCAA has not appeared as a party in any appeal before the Court in the modern times (since 1971), although there have been some 37 CCAA proceedings in the Court. **The practice that Monitors are not proper parties was confirmed in *The Queen in Right of Newfoundland and Labrador v. AbitibiBowater Inc.* (May 27, 2011), Doc. 33797 ...** The Monitor moved to be added as a party respondent, noting the decision under challenge was based on the Monitor's recommendation, albeit that the actual parties were before the Court on the *lis* in question. The motion was opposed. Fish J., rejected the request for party status but added the Monitor as an intervener.¹³

28. As Schonfeld conceded, its role is similar to the Monitor in *AbitibiBowater*.¹⁴ Its role as court officer does not make it a necessary party on this appeal.

29. Finally, it is irrelevant that the appeal would affect Schonfeld because it holds the funds of the DeJong Companies. Its role is effectively custodian of those funds. By its own admission it takes no position on their distribution.¹⁵ The parties who are truly affected are those with an economic interest: Dr. Bernstein, the DeJongs, and their respective companies.

¹¹ *Alliance for Marriage and Family v. A.A.*, [2007 SCC 40](#), para. 10.

¹² *AbitibiBowater Inc., Re*, [2010 CarswellQue 8859](#) (WL).

¹³ Henry S. Brown, [Supreme Court of Canada Practice](#) (Toronto: Thomson Reuters, 2018), SCR 18 – Commentary (WL).

¹⁴ Memorandum of Argument of the Proposed Respondent (“Schonfeld Memorandum”), Schonfeld Inc, para. 25, Motion to be Added as a Respondent Party (“Schonfeld Motion”), Tab 3, pp. 115-116.

¹⁵ Notice of Motion, para. 8, Schonfeld Motion, Tab 1, p. 3.

Schonfeld should not be granted leave to intervene

30. Leave to intervene is granted only where a proposed intervenor demonstrates it can provide the Court with a different perspective on the law before it: intervenors must be “able to bring a unique perspective to the legal issues.”¹⁶ Further, to be granted intervenor status, a party must show it both has “an interest” in the appeal and will make “submissions which will be useful and different from those of the other parties.”¹⁷ The interest must be specific, unique, and not represented by the existing parties.¹⁸

31. Schonfeld has not met the test for intervention: (i) it has not attempted to describe its submissions and (ii) it does not have any perspective on the legal issues.

32. First, Rule 57(2) requires Schonfeld, on a motion for leave to intervene to (a) to “identify the position” it will take on the appeal; and (b) “set out the submissions to be advanced” and “the reasons for believing that the submissions will be useful to the Court and different from those of the other parties.” Schonfeld fails to abide by either the spirit or the letter of rule 57(2).

33. Schonfeld provides no detail about the submissions it intends to make, noting only that it is “uniquely positioned to provide this Court with submissions regarding its investigation and analysis that is pertinent to the issues relevant to the appeal.”¹⁹ Nor does Schonfeld identify any position it will advance; it repeatedly affirms it is not interested in taking any position at all. This deficiency is disqualifying. Where a party refuses to set out the arguments it intends to make, this Court has refused leave to intervene because it (and the other parties) cannot ascertain whether its submissions would meet the intervention standard.²⁰

¹⁶ Henry S. Brown, *Supreme Court of Canada Practice* (Toronto: Thomson Reuters, 2018), SCR 59 – Case Law (WL), citing *Township of Bexley v. Public School Boards’ Assn. (Alberta)*, (March 8, 2000), Doc. 26701.

¹⁷ *Reference Re Workers’ Compensation Act, 1983 (Newfoundland)*, [1989] 2 S.C.R. 335, para. 8 (WL).

¹⁸ Henry S. Brown, *Supreme Court of Canada Practice* (Toronto: Thomson Reuters, 2018), SCR 59 – Commentary (WL), citing *Dumont v. Canada (Attorney General)*, (July 21, 1989).

¹⁹ Schonfeld Memorandum, para. 26, Schonfeld Motion, Tab 3, pp. 116.

²⁰ Henry S. Brown, *Supreme Court of Canada Practice* (Toronto: Thomson Reuters, 2018), SCR 59 – Case Law (WL), citing *Township of Bexley v. Public School Boards’ Assn. (Alberta)*, (March 8, 2000), Doc. 26701.

34. Second, despite an intervener being required to bring a unique perspective to legal issues, Schonfeld proposes to make no submissions on the legal issues at all. Instead, it seeks to provide its perspective on the evidence before the Court. In so doing, Schonfeld misunderstands the role of an intervener. Interveners are expected to take the appeal as they find it²¹ and to make submissions on how the law should be interpreted in light of those fixed facts:

[T] he intervener must take the case between the parties as they chose to frame it.
... [T]he proposed intervener intends to make submissions on matters that must be left to the parties, and this cannot be permitted.²²

35. An intervener has no role to play if all it seeks to do is comment on the facts. The parties are fully capable of addressing the facts in the context of the issues on this appeal.

36. Schonfeld relies on *AbitibiBowater* for the proposition that it is appropriate for a court officer to be granted intervener status. But this is no answer for Schonfeld's lack of unique legal submissions. In *AbitibiBowater*, the Monitor proposed to make specific submissions with respect to the constitutional questions at issue in that appeal.²³ After this Court refused the Monitor party status, the Monitor was granted leave to intervene on the basis of its unique legal submissions.

37. Schonfeld's insistence on addressing the facts threatens to expand the scope of this appeal. Schonfeld argues that not all of the stakeholders affected by the appeal are before the Court. This is not so. All that is at issue here is whether the four DeJong Companies can be held liable to the DBDC Applicants for knowingly participating in Ms. Walton's fraud. No other innocent investor has commenced an appeal. Any context that Schonfeld would offer on the Walton companies is irrelevant. Worse, it threatens to raise new issues, impermissibly complicating the appeal before this Court.²⁴

²¹ *Supreme Court Rules*, r. 59(1)(b).

²² Henry S. Brown, [*Supreme Court of Canada Practice*](#) (Toronto: Thomson Reuters, 2018), SCR 59 – Case Law (WL), citing *Osoyoos Indian Band v. Oliver (Town)* (November 11, 2000), Doc. 27408.

²³ Memorandum of Argument (Ernst & Young Inc., as Monitor, Applicant), Appendix 1, p. 18.

²⁴ *Supreme Court Rules*, r. 59(3); Henry S. Brown, [*Supreme Court of Canada Practice*](#) (Toronto: Thomson Reuters, 2018), SCR 59 – Case Law (WL), citing *Commission de la santé et de la sécurité du travail, et al. v. Nutribec Ltée, et al.* (March 10, 2003), Doc. 29480.

DeJong would be prejudiced if Schonfeld is allowed to participate in this appeal

38. The prejudice caused by the addition of a new party or intervener is a relevant consideration to refuse the motion.²⁵ The prejudice raised by Schonfeld's motion is twofold.

39. First, Schonfeld inappropriately delayed bringing this motion. Schonfeld filed its motion for leave to participate as a party three months after it received the appellant's Notice of Appeal and one month after the appellant filed its factum. At no point did Schonfeld inform the appellant of its intention to seek to be added as a party. In contrast, in *AbitibiBowater*, the motion to add a new party was filed a month before the appellant's factum was to be filed. Schonfeld provides no reason for its delay.

40. Had Schonfeld given the appellant notice of its intention to participate as a party in a timely manner, the appellant would have had the opportunity to prepare its record and factum accordingly before this Court. For example, the appellant would have been able to include evidence in the record addressing the purported neutrality of Schonfeld.

41. This prejudice is heightened by the fact that Schonfeld provides no details in its motion as to what issues its proposed submission will address. Without such information, it is difficult to say how the appellant would have supplemented the record or its argument to address Schonfeld's submissions.

42. Second, Schonfeld's participation in this appeal is not only unnecessary and unhelpful, it will be costly to the parties. As a receiver-manager, it is inevitable that it will seek the full cost of such participation from the already depleted reserves earmarked for victims of fraud. Even if they are successful on this appeal, the DeJongs will recover less than half of what they invested with the Waltons. To risk spending substantial sums on Schonfeld's unnecessary participation on this appeal would only further the gravity of their losses.

43. Moreover, despite the potentially substantial cost of bringing this motion and participating in this appeal as a party, it is noteworthy that Schonfeld did not notify the DeJongs nor seek direction from its supervising Court to bring this motion. The supervising Court's direction on Schonfeld's mandate in this regard is particularly crucial where, as here,

²⁵ *Cartaway Resources Corp. (Re)*, [2004 SCC 26](#), para. 42.

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Schonfeld's participation runs the risk of placing it directly in conflict with the investors and creditors of the various companies it manages.

In the alternative, any right of participation should be limited

44. The appellant submits that Schonfeld should be given no rights to participate in this appeal because its motion is procedurally deficient and its participation will not assist the Court. However, if this Court permits Schonfeld to participate in this appeal either as a party or an intervener, it should be permitted to file no more than 10 pages of written submissions.

45. If Schonfeld is permitted to participate, the appellant may need to address its submissions. The DBDC Applicants have requested 10 pages and 14 days to respond to the Canadian Chamber of Commerce, in the event it is granted leave to intervene. The appellant requests the same rights if Schonfeld is added as a party or granted leave to intervene.


PART IV – COSTS

46. The appellant requests its costs in responding to this motion. Schonfeld's motion was untimely and procedurally deficient, which have added costs to this appeal.

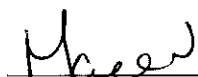
PART V – ORDER SOUGHT

47. The appellant requests Schonfeld's motion be dismissed. In the alternative, Schonfeld should be limited to written submissions of no more than 10 pages and the appellant should be given a right of reply, of no more than 10 pages, to be filed 14 days after the receipt of Schonfeld's materials.


ALL OF WHICH IS RESPECTFULLY SUBMITTED



Jeremy R. Opolsky



Jonathan Silver



Alicja Puchta



Rosemary A. Fisher

Counsel for the Appellant,
Christine DeJong Medicine Professional Corporation

PART VI – TABLE OF AUTHORITIES

Authority		Paragraph(s)
CASES		
1	<i>Alliance for Marriage and Family v. A.A.</i> , 2007 SCC 40	26
2	<i>AbitibiBowater Inc., Re</i> , 2010 CarswellQue 8859 (WL)	27
3	<i>Canadian Dredge and Dock Co. v. The Queen</i> , [1985] 1 S.C.R. 662 (WL)	18
4	<i>Cartaway Resources Corp. (Re)</i> , 2004 SCC 26	39
5	<i>Deloitte & Touche v. Livent Inc. (Receiver of)</i> , 2017 SCC 63	18
SECONDARY SOURCES		
6	Henry S. Brown, Supreme Court of Canada Practice (Toronto: Thomson Reuters, 2018), SCR 18 – Commentary (WL)	27
7	Henry S. Brown, Supreme Court of Canada Practice (Toronto: Thomson Reuters, 2018), SCR 59 – Case Law (WL)	30, 33, 34, 37
8	Henry S. Brown, Supreme Court of Canada Practice (Toronto: Thomson Reuters, 2018), SCR 59 – Commentary (WL)	30

SCHEDULE A – LIST OF RESPONDENTS (APPELLANTS)*

1. Dr. Bernstein Diet Clinics Ltd.
2. 2272551 Ontario Limited
3. DBDC Investments Atlantic Ltd.
4. DBDC Investment Pape Ltd.
5. DBDC Investments Highway 7 Ltd.
6. DBDC Investments Trent Ltd.
7. DBDC Investments St. Clair Ltd.
8. DBDC Investments Tisdale Ltd.
9. DBDC Investments Leslie Ltd.
10. DBDC Investments Lesliebrook Ltd.
11. DBDC Fraser Properties Ltd.
12. DBDC Fraser Lands Ltd.
13. DBDC Queen's Corner Inc.
14. DBDC Queen's Plate Holdings Inc.
15. DBDC Dupont Developments Ltd.
16. DBDC Red Door Developments Inc.
17. DBDC Red Door Lands Inc.
18. DBDC Global Mills Ltd.
19. DBDC Donalda Developments Ltd.
20. DBDC Salmon River Properties Ltd.
21. DBDC Cityview Industrial Ltd.
22. DBDC Weston Lands Ltd.
23. DBDC Double Rose Developments Ltd.
24. DBDC Skyway Holdings Ltd.
25. DBDC West Mall Holdings Ltd.
26. DBDC Royal Gate Holdings Ltd.
27. DBDC Dewhurst Developments Ltd.
28. DBDC Eddystone Place Ltd.

* Companies are numbered in accordance with the Schedule A to the Reasons of the Court of Appeal for Ontario, dated January 25, 2018.

29. DBDC Richmond Row Holdings Ltd.

SCHEDULE B – LIST OF SCHEDULE “B” COMPANIES

1. Twin Dragons Corporation
2. Bannockburn Lands Inc. / Skyline — 1185 Eglinton Avenue Inc.
3. Wynford Professional Centre Ltd.
4. Liberty Village Properties Ltd.
5. Liberty Village Lands Inc.
6. Riverdale Mansion Ltd.
7. Royal Agincourt Corp.
8. Hidden Gem Developments Inc.
9. Ascalon Lands Ltd.
10. Tisdale Mews Inc.
11. Lesliebrook Holdings Ltd.
12. Lesliebrook Lands Ltd
13. Fraser Properties Group
14. Fraser Lands Ltd.
15. Queen's Corner Corp.
16. Northern Dancer Lands Ltd.
17. Dupont Developments Ltd.
18. Red Door Developments Inc. and Red Door Lands Ltd.
19. Global Mills Inc.
20. Donalda Developments Ltd.
21. Salmon River Properties Ltd.
22. Cityview Industrial Ltd.
23. Weston Lands Ltd.
24. Double Rose Developments Ltd.
25. Skyway Holdings Ltd.
26. West Mall Holdings Ltd.
27. Royal Gate Holdings Ltd.
28. Royal Gate Nominee Inc.
29. Royal Gate (Land) Nominee Inc.
30. Dewhurst Development Ltd.

- 31. Eddystone Place Inc.
- 32. Richmond Row Holdings Ltd.
- 33. El-Ad (1500 Don Mills) Limited
- 34. 165 Bathurst Inc.

SCHEDULE C – LIST OF SCHEDULE “C” COMPANIES

1. 3270 American Drive, Mississauga, Ontario
2. 0 Luttrell Ave., Toronto, Ontario
3. 2 Kelvin Avenue, Toronto, Ontario
4. 346 Jarvis Street, Suites A, B, C, E and F, Toronto, Ontario
5. 1 William Morgan Drive, Toronto, Ontario
6. 324 Price Edward Drive, Toronto, Ontario
7. 24 Cecil Street, Toronto, Ontario
8. 30 and 30A Hazelton Avenue, Toronto, Ontario
9. 777 St. Clarens Avenue, Toronto, Ontario
10. 252 Carlton Street and 478 Parliament Street, Toronto, Ontario
11. 66 Gerrard Street East, Toronto, Ontario
12. 2454 Bayview Avenue, Toronto, Ontario
13. 319-321 Carlaw, Toronto, Ontario
14. 260 Emerson Ave., Toronto, Ontario
15. 44 Park Lawn Circle, Toronto, Ontario
16. 19 Tennis Crescent, Toronto, Ontario
17. 646 Broadview Avenue, Toronto, Ontario

SCHEDULE D – GLOSSARY OF TERMS IN APPELLANT’S FACTUM

Term used in factum	Term used in courts below	Definition
DeJong Companies	N/A	4 project-specific companies in which DeJong had invested with the Waltons as equal shareholders: (1) United Empire Lands Ltd. (2) Prince Edward Properties Ltd. (3) St. Clarens Holdings Ltd. (4) Emerson Developments Ltd.
DBDC Applicants	DBDC Applicants	Investment companies owned and controlled by Dr. Bernstein, through which he invested with the Waltons. These are DBDC Spadina Ltd. and the companies listed on Schedule A to this factum.
DBDC Companies	Schedule B Companies	Project-specific companies in which the DBDC Applicants had invested with the Waltons as equal shareholders. These companies are listed on Schedule B to this factum.
Non-DBDC Companies	Schedule C Companies	Companies included in the Net Transfer Analysis in which the DBDC Applicants had no interest. These are included in Schedule C to this factum.
Non-DBDC Accounts	N/A	Accounts belonging to the Non-DBDC Companies, as considered by the Net Transfer Analysis.
Innocent Investor Companies	N/A	Companies in which both the Waltons and innocent investors had an interest.
Walton Companies	N/A	Companies solely owned by the Waltons, in which no innocent investors had any interest.
Walton Respondents	Walton Respondents	The respondents named in the DBDC Applicants’ original application in these proceedings: Norma Walton, Ronauld Walton, Rose & Thistle Group Ltd., and Eglinton Castle Inc.
Respondent Companies	Listed Schedule C Companies	10 project-specific companies that the DBDC Applicants named in their Third Fresh as Amended Application and against which they advanced claims of knowing assistance and knowing receipt. These include the 4 DeJong Companies and are listed at Schedule C to this factum.

APPENDIX 1 – MEMORANDUM OF ARGUMENT (*Ernst & Young Inc., as Monitor, Applicant*)

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File Number: 33797

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC)**

BETWEEN:

**HER MAJESTY THE QUEEN IN RIGHT OF THE
PROVINCE OF NEWFOUNDLAND AND LABRADOR**

**APPELLANT
(Appellant)**

and

**ABITIBIBOWATER INC., ABITIBI-CONSOLIDATED INC.,
BOWATER CANADIAN HOLDINGS INC., THE AD HOC COMMITTEE OF
BONDHOLDERS, THE AD HOC COMMITTEE OF SENIOR SECURED
NOTEHOLDERS, and U.S. BANK NATIONAL ASSOCIATION
(INDENTURE TRUSTEE FOR THE SENIOR SECURED NOTEHOLDERS)**

**RESPONDENTS
(Respondents)**

**MEMORANDUM OF ARGUMENT
(Ernst & Young Inc., as Monitor, Applicant)
(Pursuant to Rule 47 of the *Rules of the Supreme Court of Canada*)**

Counsel for the Applicant:

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John T. Porter
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PART I: OVERVIEW AND STATEMENT OF FACTS

A. OVERVIEW

1. On April 17, 2009, AbitibiBowater Inc., Abitibi-Consolidated Inc. and Bowater Canadian Holdings Inc. (together with certain of their subsidiaries and affiliates) (collectively (“**Abitibi**”)) filed for and obtained protection from their creditors under the *Companies’ Creditors Arrangement Act*¹ (the “**CCAA**”) and Ernst & Young Inc. was appointed as the monitor (the “**Monitor**”) pursuant to the order issued (the “**Initial Order**”) that same day by the Quebec Superior Court.²
2. Ernst & Young Inc., as Monitor, is named as a party in the title of proceedings in the Initial Order. Since its appointment, the Monitor has been involved extensively in Abitibi’s CCAA restructuring efforts and has participated actively in the court proceedings associated with such efforts, including, in this matter, at the Court of first instance and the Quebec Court of Appeal.
3. The Appellant, the Government of Newfoundland and Labrador (also referred to herein as “**Newfoundland**”), chose not to include the Monitor as a respondent in its application for leave to appeal filed with this Honourable Court on August 13, 2010. As a result, the Registry docket showed Ernst & Young Inc. as a “retired party”.
4. Had leave to appeal been denied, this omission would have been of no consequence. However, as leave to appeal was granted by this Honourable Court on November 25, 2010, it is important that the Monitor be recognized as being a respondent party so it may fully participate in the hearing of the appeal that is tentatively scheduled for November 16, 2011.
5. Accordingly, the Monitor has filed this motion requesting that the Monitor be added as a respondent party to this appeal and that the style of cause be amended to show Ernst &

¹ R.S.C. 1985, c. C-36.

² The Second Amended Initial Order dated May 6, 2009 at para. 70, attached to the Affidavit of Alex F. Morrison sworn April 28, 2011 (“**Affidavit**”) as Exhibit “A”.

Young Inc. as “Respondent (Impleaded Party – Monitor)” with full rights to participate in this appeal.

B. STATEMENT OF FACTS

6. On November 12, 2009, Newfoundland, acting through the Minister of Environment and Conservation, issued five Ministerial Orders pursuant to Section 99 of the *Environmental Protection Act*³ against the Abitibi Respondents herein (the “**EPA Orders**”). The EPA Orders relate to several locations in Newfoundland, all of which were then either no longer owned by Abitibi or no longer used by Abitibi in its business.⁴
7. On November 12, 2009, Newfoundland also served a motion (as amended on February 15, 2010) seeking a declaration that, among other things, the Claims Procedure Order issued by the Quebec Superior Court on August 26, 2009 (the “**Claims Procedure Order**”) shall not bar, extinguish or otherwise affect the enforceability of the EPA Orders on the basis that the EPA Orders are in respect of matters involving the environment that do not necessarily require payments to be made to Newfoundland and, therefore, are not “claims” as that term is defined in the CCAA.⁵

The Superior Court of Quebec

8. On March 31, 2010, the Superior Court of Quebec issued its judgment (the “**Trial Judgment**”) wherein the Court concluded that the EPA Orders are claims which are financial or monetary in nature and, therefore, are claims that may be compromised in the CCAA proceedings.⁶
9. Ernst & Young Inc., as Monitor, is named as a party in the title of proceedings in the Trial Judgment.

³ S.N.L. 2002, c. E-14.02.

⁴ Affidavit at para. 8.

⁵ Affidavit at para. 9. A copy of the motion (without Exhibits) is attached to the Affidavit as Exhibit “B”.

⁶ Affidavit at para. 10. A copy of the Trial Judgment is attached to the Affidavit as Exhibit “C”.

10. At the hearing of the Appellant's motion at first instance, the Monitor participated by filing the Thirty-Fourth Report of the Monitor dated February 19, 2010 (the "**Thirty-Fourth Report**") and by making oral submissions.⁷ In the Thirty-Fourth Report, the Monitor described the adverse consequences to Abitibi and its stakeholders in the event the Court granted the relief sought by Newfoundland, including the Monitor's view that the granting of the relief sought would negatively affect Abitibi's ability to successfully restructure. For the reasons described in the Thirty-Fourth Report, the Monitor, in its submissions, supported the Respondents in opposing the relief being sought by the Appellant. Both the Thirty-Fourth Report and the Monitor's submissions are referred to in the Trial Judgment.⁸
11. The Appellant did not raise any issue with the Monitor's role or the Monitor's ability to oppose the relief sought by the Appellant at the Quebec Superior Court.⁹

The Quebec Court of Appeal

12. The Appellant sought leave to appeal the Trial Judgment from the Quebec Court of Appeal. On May 18, 2010, the Quebec Court of Appeal issued its judgment (the "**Appeal Judgment**") in which it dismissed the Appellant's motion.¹⁰
13. The Monitor is named as an "impleaded" party in the Appeal Judgment.
14. The Monitor's support for the Respondents' opposition to the relief sought by the Appellant was again made clear in the course of oral submissions in the Quebec Court of Appeal. The Monitor also filed written submissions with the Quebec Court of Appeal wherein it confirmed that it opposed the relief sought by the Appellant.¹¹

⁷ A copy of the Thirty-Fourth Report is attached to the Affidavit as Exhibit "E".

⁸ Affidavit at para. 16; Trial Judgment at paras. 7, 42 and 306.

⁹ Affidavit at para. 19.

¹⁰ A copy of the Appeal Judgment is attached to the Affidavit as Exhibit "D".

¹¹ Affidavit at paras. 14, 17. A copy of the Monitor's written submissions in the Quebec Court of Appeal is attached to the Affidavit as Exhibit "F"; at para. 9.

15. The Appellant did not raise any issue with the Monitor's role or the Monitor's ability to oppose the relief sought by the Appellant at the Quebec Court of Appeal.¹²
16. Further, the Appellant has acknowledged that the Monitor opposed the relief requested by the Appellant in the courts below.¹³

PART II: STATEMENT OF POSITION

A. The Monitor is a party adverse to the Appellant

17. The Monitor has opposed the relief sought by the Appellant throughout these proceedings and, in particular, the Monitor opposed the relief sought by the Appellant in the court appealed from.
18. Although the Monitor does not have a pecuniary interest that is at odds with the Appellant, the Monitor represents the interests of all of the stakeholders in Abitibi's CCAA proceedings. Given the Monitor's opposition and participation in the courts below, the Monitor is of the view that it is a party "adverse in interest" within the meaning of Rule 22 of the *Rules of the Supreme Court of Canada*.¹⁴

B. This is the first instance in which the Appellant has raised the issue of "standing"

19. The Appellant did not raise any issue with respect to the Monitor's role or the position it took during the proceedings before the courts below. The Appellant should not be permitted now, on this second appeal, to raise any new issue with respect to the participation of the Monitor in these proceedings.

¹² Affidavit at para. 19.

¹³ Correspondence from David R. Wingfield of WeirFoulds LLP to Robert I. Thornton of Thornton Grout Finnigan LLP dated March 2, 2011 and attached to the Affidavit as Exhibit "J", at para. 3.

¹⁴ SOR/2002-156 as amended by SOR/2006-203, SOR/2011-74.

C. The Monitor should be restored to active status in connection with this appeal

20. The Monitor has been involved extensively in Abitibi's CCAA restructuring efforts and all of the court proceedings associated with such efforts throughout the CCAA proceedings.
21. The Monitor has an important role in the restructuring of the Respondents under the CCAA and, as a matter of fairness, should be permitted to continue to participate given its active involvement as a full party in the courts below and its statutory mandate to advise the court on the reasonableness and fairness of any compromise or arrangement that is proposed between a debtor company and its creditors.

PART III: STATEMENT OF ARGUMENT

A. The Monitor is a party adverse in interest to the Appellant

22. Pursuant to Rule 22(3)(b) of the *Rules of the Supreme Court of Canada* (and akin to Rule 22(2)(b) at the leave stage), the style of cause in an appeal shall name, followed by their status in the court appealed from, as a respondent, each party against whom the appellant brings the appeal - including, in Quebec, a mis-en-cause - and who was adverse in interest to the appellant in the court appealed from.
23. The Appellant has taken the position that the Monitor is not "adverse in interest" and that, in the courts below, the Monitor simply took a "me too" approach in support of the position of the Respondents and did not address the merits of the legal issues that would have been considered by those courts. The Monitor disagrees with this position.¹⁵
24. The Monitor supported the Respondents in opposing the relief being sought by the Appellant both at first instance and in the Court of Appeal. The Monitor's position with respect to the relief sought by the Appellant was made clear in the course of oral submissions both at first instance and in the Quebec Court of Appeal. In addition, the

¹⁵ Correspondence from Henry S. Brown, Agent for the Appellant, Her Majesty the Queen in Right of the Province of Newfoundland and Labrador to Roger Bilodeau, Registrar of the Supreme Court of Canada, dated April 4, 2011 and attached to the Affidavit as Exhibit "G".

Monitor's opposition to the relief sought by the Appellant in the courts below has been acknowledged by the Appellant in recent correspondence.¹⁶

25. Pursuant to Rule 18(1), a person may be added as a party on a motion that sets out the reasons for the requested addition. In addition, Rule 18(5) specifically provides that, in any proceeding, the Court or a judge may order that a party be added or substituted where, in the opinion of the Court or the judge, such addition or substitution is necessary to enable the Court to adjudicate the questions in issue. Further, Rule 22(4) permits the addition of a party in order to give effect to a judgment of this Honourable Court.
26. This Honourable Court has observed that the Court's procedure is "flexible" in respect of adding parties to proceedings before it.¹⁷
27. In granting motions to add a party to proceedings before this Honourable Court, regard has been given to the fact that a particular applicant was accorded full status as a party in the courts below and was dealt with as such.¹⁸
28. In addition, in a situation where parties had been granted leave to intervene as added parties in the Ontario Superior Court and participated fully as parties in the courts below, this Honourable Court confirmed that such parties were entitled to be added as respondents to a leave to appeal application and to file a response.¹⁹
29. Further, in substituting a party under Rule 18(5), this Honourable Court has stated that a procedural irregularity may be cured under Rule 8(1) and, in this respect, it also considers whether the other parties will suffer any prejudice.²⁰
30. The Monitor is of the view that, not only is it appropriate to add the Monitor as a party to this appeal, the Appellant will not be prejudiced by such addition.

¹⁶ *Supra*, footnote 13.

¹⁷ *Alliance for Marriage and Family v. A. (A.)*, 2007 SCC 40 at para. 9, 3 S.C.R. 124.

¹⁸ *Schachter v. Canada* (unreported, March 13, 1991, S.C.C., Docket No. 21889).

¹⁹ *ING Canada Inc v. Aegon Canada Inc.* (unreported, April 1, 2004, S.C.C., Docket No. 30170).

²⁰ *Cartaway Resources Corp., Re*, 2004 SCC 26 at para. 42, 1 S.C.R., 672. Rule 8(1) permits the Court to, on a motion or on its own initiative, excuse a party from complying with any of these Rules.

B. This is the first instance in which the Appellant has raised the issue of “standing”

31. The Monitor actively participated in the courts below and the Appellant did not raise the issue of the Monitor’s standing at either court level. It is now too late, on this second appeal, to take issue with the participation of a party to the proceedings.
32. The Appellant could have raised the issue of standing squarely at the first (or second) instance. It failed to do so and should not now be permitted to preclude the Monitor from participating as a Respondent party in this appeal.
33. Regardless, the Monitor is of the view that it does have standing to participate in this appeal. Monitors appointed in CCAA restructuring proceedings routinely participate in hearings before the Supreme Court of Canada. Further, Monitors are often named as parties in the title of proceedings. See, for example, *Nortel Networks Corp., Re*, 2011 CarswellOnt 303 (S.C.C.); *Nortel Networks Corp., Re*, 2010 CarswellOnt 1760 (S.C.C.); *Ted Leroy Trucking Ltd., Re*, 2009 CarswellBC 2993 (S.C.C.); *Ivaco Inc., Re*, 2008 CarswellOnt 1497 (S.C.C.); and *Ivaco Inc., Re*, 2007 CarswellOnt 2855 (S.C.C.).

C. The Monitor should be restored to active status in connection with this appeal

34. The Monitor is an officer of the court and has had an important role in the restructuring of Abitibi under the CCAA. As a matter of fairness, the Monitor should be permitted to continue to participate given its active involvement as a full party in the courts below and its statutory mandate to advise the court on the reasonableness and fairness of any compromise or arrangement that is proposed between a debtor company and its creditors. The Monitor has been involved extensively in Abitibi’s CCAA restructuring efforts and all of the court proceedings associated with such efforts throughout the CCAA proceedings.²¹
35. Although Abitibi’s Plan of Reorganization and Compromise, as amended, supplemented and restated (the “**CCAA Plan**”), was implemented on December 9, 2010, the Monitor remains a party in the CCAA proceedings. The Monitor’s role is not complete and as a

²¹ Affidavit at para. 20.

result it has not been discharged by the Quebec Superior Court. Abitibi and the Monitor continue to deal with various ongoing restructuring matters including, among others, the resolution of claims filed in the CCAA proceedings.²²

36. The outcome of this appeal has the potential to negatively affect the recovery of all stakeholders other than the Appellant under Abitibi's now implemented CCAA Plan.²³
37. The Monitor should be restored to active status as a respondent in this appeal.

D. The Broader Perspective of the Monitor

38. On March 25, 2011, this Honourable Court issued an order stating three constitutional questions in relation to this matter, all of which relate to the CCAA.²⁴ The outcome of the constitutional questions will set a Canada-wide precedent in restructuring proceedings. As an officer of the court, the Monitor is uniquely positioned to address the implications of these issues in restructuring proceedings generally and in this case specifically.²⁵
39. Further, the Monitor notes that the outcome of this appeal could have far reaching consequences in other large, heavy industry restructurings where potential environmental obligations are of concern.²⁶
40. While the Monitor recognizes the need in all Court supervised CCAA restructurings to strike a balance between various stakeholders affected by particular decisions, all operating within the established federal and provincial legislative schemes, if the Appellant is successful and the EPA Orders are exempt from the definition of "claim" under the CCAA, the ability of debtor companies, generally, to effect a successful

²² Affidavit at para. 20.

²³ Affidavit at para. 21.

²⁴ A copy of the Constitutional Order is attached to the Affidavit as Exhibit "H".

²⁵ Affidavit at para. 22.

²⁶ Affidavit at para. 21.

restructuring, obtain exit financing and implement a plan of arrangement may be negatively affected.²⁷

PART IV: COSTS SUBMISSIONS

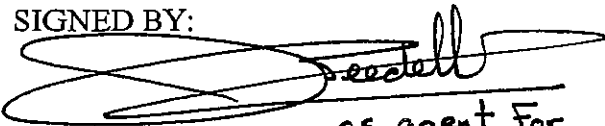
41. The Monitor submits that there should be no costs awarded for or against the Monitor in respect of this motion.

PART V: ORDER SOUGHT

42. The Monitor respectfully requests that an Order be made, without costs, adding the Monitor as a respondent party to this appeal and amending the style of cause to show Ernst & Young Inc., as Monitor, as "Respondent (Impleaded Party – Monitor)" with full rights to participate in this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of April, 2011.

SIGNED BY:



as agent for

Robert I. Thornton
John T. Porter
Rachelle F. Moncur

Counsel for the Applicant,
Ernst & Young Inc., as Monitor

²⁷ Affidavit at para. 20.

PART VI: TABLE OF AUTHORITIES

<u>Tab</u>	<u>Cases</u>	<u>Paragraph References</u>
A.	<i>Alliance for Marriage and Family v. A. (A.)</i> , 2007 SCC 40 at para. 9, 3 S.C.R. 124.	- at paragraph 26
B.	<i>Cartaway Resources Corp., Re</i> , 2004 SCC 26 at para. 42, 1 S.C.R., 672.	- at paragraph 29
C.	<i>ING Canada Inc v. Aegon Canada Inc.</i> (unreported, April 1, 2004, S.C.C., Docket No. 30170).	- at paragraph 28
D.	<i>Ivaco Inc., Re</i> , 2008 CarswellOnt 1497 (S.C.C.).	- at paragraph 33
E.	<i>Ivaco Inc., Re</i> , 2007 CarswellOnt 2855 (S.C.C.).	- at paragraph 33
F.	<i>Nortel Networks Corp., Re</i> , 2011 CarswellOnt 303 (S.C.C.).	- at paragraph 33
G.	<i>Nortel Networks Corp., Re</i> , 2010 CarswellOnt 1760 (S.C.C.).	- at paragraph 33
H.	<i>Schachter v. Canada</i> (unreported, March 13, 1991, S.C.C., Docket No. 21889).	- at paragraph 27
I.	<i>Ted Leroy Trucking Ltd., Re</i> , 2009 CarswellBC 2993 (S.C.C.).	- at paragraph 33

PART VII: STATUTORY PROVISIONS

Nil.

K

Goodmans^{LLP}

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April 8, 2019

Delivered via facsimile

Roger Bilodeau, QC
Registrar, Supreme Court of Canada
301 Wellington Street
Ottawa, Ontario K1A 0J1

Dear Mr. Bilodeau:

Re: Christine DeJong Medicine Professional Corporation v. DBDC Spadina Ltd. et al.
SCC File No. 38051

We are counsel to Schonfeld Inc., in its capacity as court-appointed Inspector and Receiver/Manager in these proceedings (“**Schonfeld**”). We write in reply to the Memorandum of Argument of the Appellant, filed in response to Schonfeld’s motion to be added as a Respondent Party or, in the alternative, for leave to intervene.

Schonfeld participated extensively in these proceedings before the Application Judge and the Ontario Court of Appeal without any objection from the Appellant. The Appellant now alleges, for the first time, that Schonfeld’s participation is neither necessary nor helpful. The Appellant’s primary arguments, and Schonfeld’s response to them, are set out below.

Schonfeld takes no position on the legal questions at issue in this appeal.¹ Schonfeld appeared before the Application Judge and Ontario Court of Appeal, without taking a position on the legal dispute between the Appellant and Respondents and without any objection from the Appellant. If its motion is granted, Schonfeld will play a similar role before this Court.

Schonfeld’s submissions will be restricted to the facts and must be confined to the evidentiary record as it currently stands. The Appellant asserts that the evidentiary record cannot be expanded on appeal absent a motion for fresh evidence.² Schonfeld agrees. Its submissions will be limited to the existing evidentiary record, as they were in the courts below.

The Appellant also alleges that factual submissions are unnecessary because the facts are not in dispute.³ However, the majority decision at the Ontario Court of Appeal found the application judge made factual errors and both the dissenting and majority decisions address the evidentiary record in some detail. This Court may also find that an examination of the factual record is relevant to its analysis.

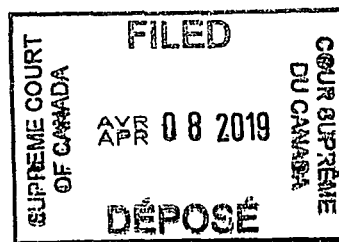
This is a private dispute between the Appellant and the Respondents.⁴ This assertion by the Appellant is not entirely correct. Schonfeld is currently holding approximately \$2.6 million in trust

¹ Memorandum of Argument of the Appellant at para. 20.

² Memorandum of Argument of the Appellant at para. 23.

³ Memorandum of Argument of the Appellant at paras. 21-22.

⁴ Memorandum of Argument of the Appellant at para. 24.



pending the outcome of this appeal. Only \$1.9 million relates directly to the DeJong Companies. The outcome of this appeal will determine how all of the funds held by Schonfeld are distributed, not just the funds the Appellant, is or may be, entitled to.

Schonfeld, as a court officer, is not a necessary or proper party. Respectfully, the authorities cited by the Appellant do not establish a rule that court officers are not necessary or proper parties on appeal.⁵ In *Abitibi*,⁶ this Court dismissed the Monitor's motion to be added as a party but granted leave to intervene. There were no reasons given, and so *Abitibi* does not establish the broad principle advanced by the Appellant.

The Appellant's attack on Schonfeld. The Appellant seeks to bolster its new opposition to Schonfeld's participation by attacking Schonfeld's conduct and neutrality. Some of the Appellant's criticisms are so vague that no response is possible.⁷ Another criticism was specifically rejected by the Ontario Court of Appeal, in a decision that was not appealed.⁸ Its other criticisms are both irrelevant to this motion and based on a misapprehension of the facts.

For example, the Appellant asserts that Schonfeld was appointed "exclusively" to assist Dr. Bernstein.⁹ This is not correct. Schonfeld was appointed by the Court, and it is responsible to the Court. Its mandate is clearly articulated in the court orders appointing it.¹⁰ Schonfeld's activities have been closely supervised by experienced Commercial List judges over the course of more than 200 court appearances, without any criticism of its conduct by any judge of any court.

The Appellant also implies that Justice Brown expressed concern about Schonfeld acting as receiver-manager of both the DBDC Companies and the DeJong Companies. In fact, Justice Brown appointed Schonfeld as receiver-manager of the DeJong Companies in the *very* decision relied on by the Appellant. The concerns cited by the Appellant related only to the length of Schonfeld's appointment as receiver of the Waltons' personal property and are not relevant to the issues before this Court.¹¹

The Appellant has itself participated actively in these proceedings since early 2014, with the assistance of capable and experienced counsel. If it had legitimate concerns about Schonfeld's conduct, or its participation in these proceedings, then it could have and should have raised those concerns below. Schonfeld respectfully submits that these concerns are not appropriately addressed on this motion.

Yours truly,



Mark Dunn

⁵ Memorandum of Argument of the Appellant at paras. 26-27.

⁶ *AbitibiBowater Inc. Re*, 2010 CarswellQue 8859 [*Abitibi*].

⁷ The Appellant asserts, for example, at paragraph 40 of its Memorandum of Argument that it would have tendered an affidavit addressing Schonfeld's neutrality if it had more time to respond to this motion but it does not explain what the affidavit would have said, why it could not be tendered in the time provided or how the evidence would have been relevant to the motion.

⁸ The Appellant criticizes the scope of the Inspector's tracing analysis, but that very criticism was rejected by the Ontario Court of Appeal.

⁹ Memorandum of Argument of the Appellant at para. 10.

¹⁰ Order of Justice Newbould dated October 4, 2013, AR, Vol. III, Tab 20, pp. 102-106; Order of Justice Newbould dated November 5, 2013, AR, Vol. III, Tab 24, pp. 146-155.

¹¹ Reasons for Decision of Justice D.M. Brown dated August 12, 2014 at para. 233, AR, Vol. IV, Tab 32, p. 151.

cc: Carlie Fox
Jeremy Opolosky and Rosemary Fisher
Peter Griffin, Shara Roy, Paul-Erik Veel and Madison Robins
Geoff Hall and Anu Koshal

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SUPREME COURT OF CANADA / COUR SUPRÊME DU CANADA

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April 10, 2019

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38051 Christine DeJong Medicine Professional Corporation v. DBDC Spadina Ltd., et al.
(Ont.) (Civil) (By Leave)

COMMENTS/REMARQUES :

Please find attached an Order by Justice Côté dated April 10, 2019.

Please call the number below if any problems
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Supreme Court of Canada



Cour suprême du Canada

April 10, 2019

Le 10 avril 2019

ORDER
MOTION**ORDONNANCE**
REQUÊTE

CHRISTINE DEJONG MEDICINE PROFESSIONAL CORPORATION v. DBDC SPADINA LTD., DR. BERNSTEIN DIET CLINICS LTD., 2272551 ONTARIO LIMITED, DBDC INVESTMENTS ATLANTIC LTD., DBDC INVESTMENT PAPE LTD., DBDC INVESTMENTS HIGHWAY 7 LTD., DBDC INVESTMENTS TRENT LTD., DBDC INVESTMENTS ST. CLAIR LTD., DBDC INVESTMENTS TISDALE LTD., DBDC INVESTMENTS LESLIE LTD., DBDC INVESTMENTS LESLIEBROOK LTD., DBDC FRASER PROPERTIES LTD., DBDC FRASER LANDS LTD., DBDC QUEEN'S CORNER INC., DBDC QUEEN'S PLATE HOLDINGS INC., DBDC DUPONT DEVELOPMENTS LTD., DBDC RED DOOR DEVELOPMENTS INC., DBDC RED DOOR LANDS INC., DBDC GLOBAL MILLS LTD., DBDC DONALDA DEVELOPMENTS LTD., DBDC SALMON RIVER PROPERTIES LTD., DBDC CITYVIEW INDUSTRIAL LTD., DBDC WESTON LANDS LTD., DBDC DOUBLE ROSE DEVELOPMENTS LTD., DBDC SKYWAY HOLDINGS LTD., DBDC WEST MALL HOLDINGS LTD., DBDC ROYAL GATE HOLDINGS LTD., DBDC DEWHURST DEVELOPMENTS LTD., DBDC EDDYSTONE PLACE LTD. AND DBDC RICHMOND ROW HOLDINGS LTD.

(Ont.) (38051)

CÔTÉ J.:

UPON APPLICATION by Schonfeld Inc., in its capacity as the court-appointed Inspector and Manager of Twin Dragons Corporation, et al., for an order to be added as a respondent in the above appeal or, in the alternative, an order granting leave to intervene in the above appeal;

AND UPON APPLICATION by the Canadian Chamber of Commerce for leave to intervene in the above appeal;

AND THE MATERIAL FILED having been read;

IT IS HEREBY ORDERED THAT:

The motion to be added as a respondent by Schonfeld Inc., in its capacity as the court-appointed Inspector and Manager of Twin Dragons Corporation, et al., is dismissed.

The alternative request for leave to intervene by Schonfeld Inc., in its capacity as the court-appointed Inspector and Manager of Twin Dragons Corporation, et al., is granted and the said intervener shall be entitled to serve and file a factum not exceeding ten (10) pages in length on or before May 1, 2019.

-2-

The motion for leave to intervene by the Canadian Chamber of Commerce is granted and the said intervener shall be entitled to serve and file a factum not exceeding ten (10) pages in length on or before May 1, 2019.

The said two (2) interveners are each granted permission to present oral argument not exceeding five (5) minutes at the hearing of the appeal.

The respondents are permitted to serve and file a factum not exceeding ten (10) pages in response to these interventions on or before May 7, 2019.

The interveners are not entitled to raise new issues or to adduce further evidence or otherwise to supplement the record of the parties.

Pursuant to Rule 59(1)(a) of the *Rules of the Supreme Court of Canada*, the interveners shall pay to the appellant and respondents any additional disbursements resulting from their interventions.



J.S.C.C.
J.C.S.C.

M

Court File No.: CV-13-10280-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
 (Commercial List)

B E T W E E N:

DBDC SPADINA LTD.,
 and THOSE CORPORATIONS LISTED ON SCHEDULE “A” HERETO

Applicants

- and -

NORMA WALTON, RONAULD WALTON, THE ROSE & THISTLE GROUP LTD.
 and EGLINTON CASTLE INC.

Respondents

- and -

THOSE CORPORATIONS LISTED IN SCHEDULE “B” HERETO,
 TO BE BOUND BY THE RESULT

FIFTY-SIXTH REPORT OF THE MANAGER, SCHONFELD INC.
 (Motion by the Manager for *inter alia*, Approval of Allocation
 Methodology and Fees, Authorization to Distribute Schedule “C” Funds
 and approval of a claims process for preferred shareholders of Schedule “C” Properties
 returnable July 3, 2019)

I. Introduction**A. Overview and Relevant Background**

1. This is the Fifty-Sixth Report of Schonfeld Inc. in its capacity as Manager of certain companies listed at Schedule “B” to the Order of Justice Newbould dated November 5, 2013¹ and attached as Schedule “B” (the “**Schedule B Companies**”),² together with the properties

¹ The Waltons (as defined below) appealed the November 5, 2013 order. The Court of Appeal dismissed that appeal.

² Schedule “B” was amended by Order dated January 16, 2014.

owned by the Schedule “B” Companies (the “**Schedule B Properties**”)³ and of the Properties listed at Schedule “C” to the Order of Justice Brown dated August 12, 2014 and attached as Schedule “C” (the “**Schedule C Properties**”).

B. Purpose of this Report

2. The Manager has brought a motion for various relief, including an Order:
 - (a) approving the fee allocation methodology proposed by the Manager (the “**Fee Allocation Methodology**”) in respect of the fees of the Manager and its counsel, Goodmans LLP, applicable to the Schedule B Companies and the Schedule C Properties;
 - (b) approving the fees of the Manager for the period from January 1, 2019 to May 31, 2019 and those of its counsel, Goodmans LLP (“**Goodmans**”), for the period from December 21, 2018 to May 31, 2019;
 - (c) authorizing the Manager to make an interim distribution to Christine DeJong Medicine Corporation (“**DeJong**”) in respect of certain Schedule C Properties; and
 - (d) authorizing the Manager to conduct a claims process to identify and assess claims of shareholders of the Schedule C Properties.
3. This Fifty-Sixth Report contains a summary of the facts relevant to the Manager’s motion and a recommendation that the relief sought by the Manager in its Notice of Motion be granted.

C. Terms of reference

4. Based on its review and interaction with the parties to date, nothing has come to the Manager’s attention that would cause it to question the reasonableness of the information presented herein. However, the Manager has not audited, or otherwise attempted to independently verify, the accuracy or completeness of any financial information of the Schedule B Companies or of the companies that own the Schedule C Properties (the “**Schedule C**”).

³ The Manager was discharged from certain responsibilities with respect to certain of the Properties pursuant to an Order dated April 1, 2014.

Companies”, and collectively with the Schedule B Companies, the “**Companies**”). The Manager therefore expresses no opinion or other form of assurance in respect of any of the Companies’ financial information that may be in this Report.

D. Background and history of this proceeding

(i) The appointment of the Manager

5. This proceeding was commenced in October 2013. Since that time, the parties have appeared before this Court more than 200 times. More than 200 orders and endorsements have been granted. The lengthy history of this matter has been summarized below, to the extent that it is relevant to the relief sought in this proceeding. The facts set out below are all based on the findings of this Court.

6. This proceeding begins with a business relationship between Dr. Stanley Bernstein and Norma and Ronald Walton (the “**Waltons**”). Dr. Bernstein is the owner of a chain of diet clinics. The Waltons were trained as lawyers and were members of the Law Society of Upper Canada but, during the period relevant to this proceeding, they were operating as real estate developers. The Waltons operated their business through numerous corporate vehicles, but the primary operating entity was The Rose & Thistle Group Ltd. (“**Rose & Thistle**”).

7. Pursuant to a series of joint venture agreements (the “**Agreements**”), Dr. Bernstein and the Waltons were to each hold a 50% interest in the Schedule B Companies. Dr. Bernstein’s interest was held through a series of single purpose holding companies (collectively, “**Bernstein**” or the “**Applicants**”). Each of the Schedule B Companies was to own one real estate property (the “**Schedule B Properties**”). Between 2010 and 2013, Dr. Bernstein invested approximately \$110 million in 34 Schedule B Companies through the Applicants.

8. The Agreements required that each Company be used solely for matters related to the Property it owned. Before Dr. Bernstein invested in any Schedule B Property, he was provided with a *pro forma* statement that showed the funds that would be required to purchase and, in some cases, redevelop and/or renovate the property. Dr. Bernstein provided his share of the anticipated budget when the Agreement was executed and the Waltons agreed to provide the balance of the funding once Dr. Bernstein’s funds were exhausted.

9. In addition to the Schedule B Properties, the Waltons were the beneficial owners of a separate portfolio of properties, the Schedule C Properties, which Dr. Bernstein did not invest in. The Waltons issued shares in the companies that owned the Schedule C Properties (the “**Schedule C Companies**”) to various individuals and entities (the “**Schedule C Investors**”).

10. The Waltons were responsible for operating the Schedule B Properties. As a result, they controlled the Schedule B Companies’ bank accounts (the “**Schedule “B” Accounts**”). But they did not manage the Schedule B Companies’ financial affairs in the manner required by the Agreements. Instead, they transferred Dr. Bernstein’s investment in the Schedule B Companies, and any revenue derived from those companies, into Rose & Thistle’s bank account (the “**Rose & Thistle Account**”). From there, funds were transferred to other Schedule B Companies, Schedule C Companies and the Waltons’ personal accounts.

11. This proceeding began in October 2013, when the Manager was appointed Inspector pursuant to the OBCA and authorized to investigate the affairs of the Schedule B Companies. The Inspector discovered the co-mingling of funds described above, as well as several other issues relating to the management of the Schedule B Companies. These findings are described in detail in the Endorsement of Justice Newbould dated November 5, 2013 (the “**November 5 Endorsement**”), which is attached as **Appendix “A”**.

(ii) Further investigation of the Schedule B Companies

12. By Order of Justice Newbould dated November 5, 2013 (the “**November 5 Order**”), the Manager was appointed to provide independent management to the Schedule B Companies in the interest of all stakeholders. The November 5 Order is attached as **Appendix “B”**.

(iii) Sale of Schedule B Properties and Continued Investigation of the Schedule B Companies

13. When the Manager was appointed, the Schedule B Properties were in various stages of development. Some properties had appreciated in value since they were purchased and were sold for amounts significantly higher than the debt secured by them. Other properties, however, suffered from very substantial issues. Significant construction and development work would have been required to recover Dr. Bernstein’s investment in these properties. No funds were available to conduct this work and, in any event, recovery might have been impossible.

14. After its appointment, the Manager, with assistance of N. Barry Lyons Consultants Limited (“**Lyons**”, a leading real-estate consulting firm) and CBRE (a leading real estate brokerage)⁴ developed a plan to market and sell the Schedule B Properties.

15. The Manager ultimately sold 20 Schedule B Properties. Each of these sales was approved by the Court, on notice to affected stakeholders. The Waltons’ appeal of the November 5 Order was dismissed by reasons for decision dated May 21, 2014, which are attached as **Appendix “C”**. The remaining Schedule B Properties were sold in enforcement proceedings commenced by mortgagees. Some of these sales generated proceeds in excess of what was owed on the relevant mortgage. In such cases, the excess proceeds were paid to the Manager.

16. During the period from November 5, 2013 to July 16, 2014, the Manager (in its capacity as Inspector) undertook a further investigation into the Schedule B Companies’ affairs. The results of this investigation confirmed the Inspector’s initial conclusions. The Inspector concluded that almost every time Dr. Bernstein invested funds into one Schedule B Company, the Waltons transferred such funds to the Rose & Thistle Account. From the Rose & Thistle Account, Dr. Bernstein’s funds were disbursed into various Schedule B Companies, Schedule C Companies and other accounts controlled by the Waltons.

17. Throughout the period examined by the Manager (in its capacity as Inspector), there was a constant transfer of funds between the Schedule B Companies, the Schedule C Companies and the Rose & Thistle Account. However, there was a consistent pattern of the Schedule C Companies receiving more from Rose & Thistle than they paid to Rose & Thistle. Conversely, there was a consistent pattern of the Schedule B Companies paying more to Rose & Thistle than they received from Rose & Thistle.

18. In all, the Inspector concluded that the Schedule B Companies suffered a net transfer out of approximately \$23 million as a result of transactions with Rose & Thistle, and the Schedule C Companies received a net benefit of approximately \$25 million as a result of such transactions. These conclusions were accepted by Justice D.M. Brown (as he then was) in Reasons for Decision dated August 12, 2014 (the “**August 12 Reasons**”).

⁴ Before selecting CBRE, the Manager conducted a competitive tender process.

(iv) Appointment of the Manager in respect of the Schedule C Companies

19. The August 12 Reasons, which are attached as **Appendix “D”**, were an important step in the litigation between the Applicants and the Respondents. Justice Brown concluded that the Waltons had breached their contracts with Dr. Bernstein and acted oppressively by co-mingling funds and failing to make the equity contributions required of them by the Agreements. The Waltons were, therefore, not entitled to the 50% interest they claimed to own in each Schedule B Company. Instead, Justice Brown ordered that the Waltons were entitled to “one share for each dollar invested,”⁵ and ordered that:

the Waltons’ shareholder interests in each of the Schedule B Companies be calculated by reference to the contribution provisions contained in each Schedule “B” Company Agreement and that the shares issued to the Waltons be limited to those for which they have actually paid and that any other shares be cancelled.

20. In addition, as part of the August 12 Judgement, Justice Brown also ordered that the Manager’s mandate be extended over the Schedule C Properties.

21. This relief was incorporated into the Judgment of Justice Brown dated August 12, 2014 (the “**August 12 Judgment**”). The August 12 Judgment, which is attached as **Appendix “E”**, also appointed the Manager as receiver/manager of the Schedule C Properties.

(v) The Applicants’ Claim against the Schedule C Companies

22. The August 12 Judgment was upheld by the Court of Appeal on September 17, 2015, pursuant to reasons attached as **Appendix “F”**. The Manager sold a number of Schedule C Properties and, where appropriate, conducted claims processes to identify creditors of the Schedule C Company that owned each property. The Manager then sought and obtained approval to distribute funds to creditors with valid claims against the Schedule C Companies.

23. The Applicants’ claim for, among other things, damages from the Waltons and the Schedule C Companies was the subject of an application before Justice Newbould heard June 3,

⁵ August 12 Reasons, para. 230.

2016. By Reasons for Decision dated September 23, 2016 (the “**September 2016 Decision**”), a copy of which is attached as **Appendix “G”**, Justice Newbould found that:

- (a) the Waltons were liable to Dr. Bernstein for damages in the amount of \$66,951,021.85 for fraudulent misrepresentation;
- (b) the Waltons’ liability to Dr. Bernstein would survive bankruptcy, if the Waltons declared bankruptcy;
- (c) the Schedule C Companies were not liable to Dr. Bernstein for knowing assistance in breach of fiduciary duty and knowing receipt of trust money.

24. These findings were reflected in the Order of Justice Newbould dated September 23, 2016 (the “**September 23 Order**”).

25. The Waltons and Bernstein both appealed the Order. The Waltons did not perfect their appeal on time and it was dismissed.

26. The Applicants’ appeal was heard June 2, 2017. By Reasons for Decision dated January 25, 2018 (the “**Appeal Reasons**”), which are attached as **Appendix “H”**, Blair and Cronk, J.J.A. set aside parts of the September 23 Order and found that certain Schedule C Companies are jointly and severally liable to the Applicants in the amount of \$22,680,852, less any amounts recovered on account of the constructive trusts granted pursuant to the August 12 Judgment. The constructive trusts awarded to the Schedule “C” Investors, Christine and Michael DeJong (together, the “**DeJongs**”), in the September 23 Order were also set aside.

27. Justice van Rensburg, writing in dissent, found that the Applicants’ appeal should be dismissed as it related to the damages claim, but agreed that the constructive trusts awarded to the DeJongs should be set aside.

28. The findings set out in the Appeal Reasons were incorporated into an Order dated January 25, 2018, which is attached as **Appendix “I”**.

29. On March 22, 2018, the DeJongs served a Notice of Application for leave to appeal to the Supreme Court. The Applicants opposed the DeJongs’ application, and the Manager obtained leave to intervene in the appeal though it did not take a position on the legal issue.

30. The Supreme Court of Canada heard and unanimously allowed the DeJongs' appeal on May 14, 2019. In reasons published on May 17, 2019, and attached hereto as **Appendix "J"**, Justice Brown agreed with Justice van Rensburg that Bernstein's claim for knowing assistance against the Schedule C Companies must fail and adopted her reasons.

E. Completed Claims Procedures

31. As noted, all of the Schedule B Properties were sold and some of these sales resulted in net proceeds following payment of transaction costs and repayment of any valid mortgages. The Manager held these proceeds in trust pending completion of a Claims Process in respect of each such Schedule B Property. Since each Schedule B Company has its own creditors, a separate Claims Process was required for each Schedule B Company.

32. By Order dated June 18, 2014, a copy of which is attached as **Appendix "K"**, the Court authorized the Manager to commence and conduct a Claims Process following the completion of the sale of a Schedule B Company's Property, without further Order of the Court, upon determination by the Manager that such a Claims Process is appropriate in the circumstances (the **"Creditor Claims Procedure Order"**).

33. The form of claims process approved pursuant to the 2014 Claims Procedure Order was designed as a template so that a specific Claims Process can be run for any Schedule B Company in respect of which the sale of its Schedule B Property generates, or has generated, net proceeds available for potential distribution to creditors.

34. The 2014 Claims Procedure Order sets out procedures for, among other things, (i) the provision of notice to creditors; (ii) the distribution of Proof of Claim forms and related materials to creditors; (iii) the review of Proofs of Claim submitted by creditors and the determination of creditors' claims (including claims to priority) by the Manager; (iv) the resolution of any disputes in respect of creditors' claims; and (v) establishing a claims bar date for the filing of claims against a particular Company. The 2014 Claims Procedure Order also includes forms of notices, proofs of claim and related materials to be used for each Claims Process. The distribution of any proceeds to creditors following the determination of their claims pursuant to the 2014 Claims Procedure Order is subject to further Order of this Court.

35. Since the issuance of the 2014 Claims Procedure Order, the Manager has completed a separate Claims Process in respect of 17 Schedule B Companies.

36. The Manager determined that a Claims Process was not required in respect of the balance of the Schedule B Companies because the sales of their respective Properties did not result in any net proceeds following payment of transaction costs and repayment of any valid mortgages.

37. The Manager has also completed a separate Claims Process for creditors of each of the following Schedule C Companies:

- (a) 30A Hazelton Inc.;
- (b) 6195 Cedar Street Ltd.;
- (c) 1780355 Ontario Inc.;
- (d) Atala Investments Inc.;
- (e) Bible Hill Holdings Ltd.;
- (f) Cecil Lighthouse Ltd.;
- (g) Emerson Developments Ltd.;
- (h) Prince Edward Properties Ltd.;
- (i) St. Clarens Holdings Ltd.;
- (j) The Old Apothecary Building Inc.; and
- (k) United Empire Lands Ltd.

38. The 2014 Claims Procedure Order is explicitly limited to creditor claims. The Manager did not conduct, or have authority to conduct, a claims process for equity claims. It now seeks that authority in respect of the Schedule C Companies.

II. Proposed distribution to the DeJongs

A. Relevant Findings of the Courts

39. In the September 2016 Decision, Justice Newbould made the following findings regarding the companies in which the DeJongs claim an interest:

(a) United Empire Lands Ltd. (“UEL”)

- (i) The DeJongs invested \$992,750 in UEL for 50% of the shares in the company. The Waltons were supposed to invest the same amount, but invested nothing. The Waltons breached their fiduciary duties to the DeJongs. Accordingly, Newbould J. cancelled the Walton’s shares in UEL and granted the DeJong’s a constructive trust in the amount of \$769,543.60 (being the amount held by the Manager in excess of a constructive trust previously awarded to Bernstein) in respect of the property owned by UEL – 3270 American Drive.
- (ii) Justice van Rensburg in dissent, whose reasoning and conclusions were adopted by the Supreme Court of Canada, would have set aside the constructive trust granted to the DeJongs and directed that the priorities over funds held in respect of UEL be determined by the Manager without regard to any claim to such proceeds by the Applicants, except to the extent of their constructive trust.

(b) Prince Edward Properties Ltd. (“**Prince Edward**”)

- (i) The DeJongs advanced a shareholder loan to Prince Edward in the amount of \$816,019 for the purchase and development of 324 Prince Edward Drive. The Waltons breached their fiduciary duties to the DeJongs. Newbould J. cancelled the Waltons’ shares in Prince Edward and granted the DeJongs a constructive trust in respect of Prince Edward’s property and its proceeds in the amount of \$640,812.73, being the amount held by the Manager. Newbould J. held that if he had not granted a constructive trust, he would have declared that the DeJong’s \$741,501.97 investment

was a shareholder loan and that the DeJongs would be entitled to be a creditor of Prince Edward for that amount.

- (ii) Justice van Rensburg in dissent, whose reasoning and conclusions were adopted by the Supreme Court of Canada, would have set aside the constructive trust granted to the DeJongs and directed that the priorities over funds held in respect of Prince Edward be determined by the Manager without regard to any claim to such proceeds by the Applicants.
- (c) St. Clarens Holdings Limited (“**St. Clarens**”) and Emerson Developments Ltd. (“**Emerson**”)
 - (i) The DeJongs advanced \$665,000 to St. Clarens. The Waltons contributed \$80,000, but breached their fiduciary duties to the DeJongs. Newbould J. cancelled 88 of the 100 shares issued to the Waltons in each of St. Clarens and Emerson. He also granted the DeJongs a constructive trust in respect of the properties’ proceeds in the amount of \$665,000 plus interest and held that if he had not granted a constructive trust, he would have declared that the DeJong’s investment was a shareholder loan and that the DeJongs would be entitled to be a creditor of St. Clarens and Emerson for that amount.
 - (ii) Justice van Rensburg in dissent, whose reasoning and conclusions were adopted by the Supreme Court of Canada, would have set aside the constructive trust granted to the DeJongs and directed that the priorities over funds held in respect of St. Clarens and Emerson be determined by the Manager without regard to any claim to such proceeds by the Applicants.

B. The Manager’s Recommendation

40. **UEL.** To the Manager’s knowledge, the DeJongs seek to recover as shareholders of UEL. The Manager has not conducted a claims process for shareholders and is therefore not in a position to recommend making a distribution to the DeJongs from the proceeds of UEL’s Property because it does not know whether there are other shareholders that rank *pari passu* with

the DeJongs. However, the Waltons shares were cancelled in the September 2016 Decision and the Manager has no reason to believe that there are any other UEL Shareholders. The Manager is holding \$779,800.00 in respect of UEL. In the event the Manager receives no other claims in respect of UEL, the Manager recommends distributing \$779,800.00, less allocated professional fees, to the DeJongs following the Claims Bar Date (as defined below) without further order of the Court.

41. **Prince Edward.** The Manager considered and allowed a claim from the DeJongs in respect of an \$816,019 shareholder loan to Prince Edward. Following a claims process for creditors that was conducted pursuant to the June Claims Procedure Order, distributions to trade creditors of Prince Edward was approved by the Court in 2015. The distributions to those creditors were less than 100 cents on the dollar. The Manager is holding \$596,500 and recommends distributing that amount, less allocated professional fees, to the DeJongs.

42. **St. Clarens and Emerson.** The Manager previously considered and allowed a claim from the DeJongs in respect of a \$665,000 shareholder loan to St. Clarens/Emerson, but deferred payment because of opposition by Bernstein. Payment to trade creditors in both St. Clarens and Emmerson was approved in 2016 and those creditors received less than 100 cents on the dollar in respect of their claims. The Manager is holding \$430,000 and \$155,700 in St. Clarens and Emerson, respectively, and recommends distributing those amounts, less allocated professional fees, to the DeJongs.

III. Proposed Claims Procedure for Shareholders of Schedule C Properties

(i) Background

43. The Manager is also holding a total of \$667,784 in respect of six other Schedule C Companies. The DeJongs do not have an interest in these companies, and neither the Court nor the Manager has previously analyzed or assessed who the shareholders are. The relevant companies (the “**Schedule C Distribution Companies**”), and the funds that shareholders may be entitled to, are listed below:⁶

⁶ These amounts are subject to allocated professional fees.

Company	Bank	GIC	Total
6195 Cedar Street Ltd.	\$2,162		\$2,162
1780355 Ontario Inc.	\$79	\$87,400	\$87,479
Atala Investments Inc.	\$54	\$6,800	\$6,854
Cecil Lighthouse Ltd.	\$51	\$496,600	\$496,651
Gerrard Church 2006 Inc.	\$83	\$9,200	\$9,283
The Old Apothecary Building Inc.	\$355	\$65,000	\$65,355
TOTAL	\$2,784	\$665,000	\$667,784

44. The 2014 Claims Procedure Order did not authorize a claims process to identify equity claimants. The Manager did not seek such authorization earlier in its mandate because, until the Applicants' claim against the Schedule C Companies was determined, it was unclear whether such a claims process would be required.

45. As noted above, the Applicants' claim was finally determined by the Supreme Court of Canada in May 2019.

46. The Manager now recommends conducting a claims process similar to that authorized by the 2014 Claims Procedure Order for certain of the above-noted companies. A draft Schedule C Shareholder Claims Procedure Order, together with a blackline to the 2014 Claims Procedure Order, is attached hereto as **Appendix "L"**.

47. The Manager notes that, in some cases, the funds available to Schedule C Companies may not be enough to satisfy professional fees previously allocated to those companies in these proceedings. The amounts currently owed by Schedule C Companies is illustrated in the chart below:

Company	Funds held by Manager	Fees allocated but unpaid
6195 Cedar Street Ltd.	\$2,162	\$6,892
1780355 Ontario Inc.	87,479	\$16,169
Atala Investments Inc.	\$6,854	\$6,609
Cecil Lighthouse Ltd.	\$496,651	\$0
Gerrard Church 2006 Inc.	\$9,283	\$0

Company	Funds held by Manager	Fees allocated but unpaid
The Old Apothecary Building Inc.	\$65,355	\$7,451
TOTAL	\$667,784	

(ii) The Schedule C Investors

48. The identification of shareholders in the Schedule C Companies was complicated by how the shares were issued by the Waltons. Schedule C Investors were sometimes issued “Preferred Shares” in one Schedule C Company initially, and then encouraged to “roll over” their investment from whatever company they invested, plus the “profit” earned on that investment, to a new Company. The relevant Schedule C Investor would then be granted shares in a new Schedule C Company with a value equal to his, her or its original investment plus “profits” earned on that investment. Many Schedule C Investors did not provide cash consideration for the shares they now own. As a result of the Waltons’ failure to keep proper accounting records, it is also difficult to ascertain whether the shares that were “rolled over” from one Company to another had any value.

49. Additionally, the Manager does not have full visibility into the original investments into the Schedule C Companies because its mandate is limited to Schedule C Properties that the Waltons owned when the Manager was appointed. It does not, at this stage, have access to the books and records of any companies that sold properties before the Manager was appointed. Accordingly, the Manager seeks authority to access bank records from companies beneficially owned by the Waltons to the extent that such information is relevant to the evaluation of claims.

50. The circumstances of the “roll-over” transactions varied. In some instances, Ms. Walton convinced investors to use “profits” from one Company (which may or may not have actually existed) to purchase shares in another Company. In other instances, investors were moved from one Company to another without their knowledge or consent.

51. In light of the foregoing, a process is required to identify claimants who may be entitled to an equity distribution from the Schedule C Distribution Companies. Based on its review of

the Schedule C Distribution Companies' books and records, the Manager is aware of the following individuals and entities who are listed as shareholders in those records:

Company	Shareholder per Books	Common	Preferred
6195 Cedar Street Ltd.	Norma Walton Ron Walton	\$50 \$50	
1780355 Ontario Inc.	Norma Walton Ron Walton	Appears that Norma and Ron Walton own all common shares, but GL (\$45,867) does not equal shareholder register (\$100)	Preferred shares cancelled prior to 2012
Atala Investments Inc.	Not stated 1607544 Ontario Gideon & Irene Levytam	\$100	\$79,750 \$85,701
Cecil Lighthouse Ltd.	Norma Walton Ron Walton	\$50 \$50	
Gerrard Church 2006 Inc.	Unknown		
The Old Apothecary Building Inc.	Ron and Norma Walton	\$39,750	Preferred shares retired or transferred in 2012
United Empire Lands	DeJongs	\$666,677	\$260,134 (transferred in)

52. Because the Schedule C Companies' books may not provide a reliable or accurate record of equity ownership, the Manager is of the view that a process is required to identify shareholders. Accordingly, it proposes a claims procedure modeled on the 2014 Claims Procedure Order to gather information with respect to share ownership. The proposed claims procedure order also provides for (among other things) a claims bar date to provide certainty that all claims have been identified or extinguished as part of the claims process before funds are distributed. The proposed form of order is attached hereto as **Appendix "L"**.

(iii) The Applicants claim as judgment creditors of the Waltons

53. As noted above, the Applicants have a judgment against the Waltons in the amount of approximately \$66 million. To the extent that the Waltons are entitled to any equity distributions from the Schedule C Distribution Companies, the Manager expects that the Applicants will take steps to garnish the payment. A similar approach was approved by Order dated February 22, 2018, and funds that the Waltons were entitled to as shareholders of certain companies were paid to the Applicants in partial satisfaction of the Waltons' debt to them.

IV. Fee Allocation Methodology

54. A methodology for the allocation of fees incurred by the Manager and its counsel from the Manager's appointment on November 5, 2013 to November 30, 2014 (the "**First Period**") was approved by Order dated April 20, 2015 (the "**First Methodology**"). A methodology for the allocation of fees incurred by the Manager and its counsel from December 1, 2014 to December 31, 2015 (the "**Second Period**") was approved by Order dated September 16, 2016 (the "**Second Methodology**"). The Second Methodology was utilized by the Manager for the allocation of fees relating to the period from January 1, 2016 to December 31, 2016 (the "**Third Period**"), and was approved by Order dated April 12, 2017; for the allocation of fees relating to the period from January 1, 2017 to August 31, 2017 (the "**Fourth Period**"), and was approved by Order dated November 16, 2017; for the allocation of fees relating to the period from September 1, 2017 to May 31, 2018 (the "**Fifth Period**") and was approved by Order dated July 27, 2018; and for the period from June 1, 2018 to December 31, 2018 (the "**Sixth Period**") by Order dated January 28, 2019. This Report relates to the allocation of the Manager's fees relating to the period from January 1, 2019 to May 31, 2019 and Goodmans' fees relating to the period from December 21, 2018 to May 31, 2019 (the "**Seventh Period**"), for which the Manager proposes using the Second Methodology.

55. The fee allocation for the Second Period, which used the Second Methodology, was approved by Order dated September 16, 2016, which is attached as **Appendix "M"**. No stakeholder opposed the Second Methodology at the hearing.⁷ The Second Methodology was

⁷ Two groups of stakeholders did raise concerns about the Second Methodology and obtained an adjournment of the original return date to investigate these concerns. These concerns were addressed before the ultimate return date for the motion.

also approved for the Third, Fourth, Fifth and Sixth Periods by Orders dated April 12, 2017, November 16, 2017, July 27, 2018 and January 28, 2019, respectively, which Orders are attached collectively as **Appendix “N”**.

56. In light of the foregoing, and similarities between the Second, Third, Fourth, Fifth, Sixth and Seventh periods, the Manager determined that the Second Methodology should be used to allocate fees incurred during the Seventh Period.

57. The allocation process began with the Manager and its counsel, Goodmans, each conducting a review of the docket descriptions entered in respect of fees incurred during the Seventh Period, as they had done in respect of fees incurred during the Second to Sixth Periods. Based on this review, the Manager determined that it was feasible to allocate a significant portion of the time spent based on docket descriptions.

58. This allocation was performed in accordance with the following principles:

- (a) As a general rule, where dockets referenced multiple properties, the relevant time was divided evenly among the properties unless either the docket itself or contemporaneous notes or correspondence indicated that time should be divided unevenly among the properties.
- (b) Where a docket did not relate to any particular property, the relevant docket was categorized as “general”. General allocations are spread evenly over all Companies that the Manager worked on during the Seventh period.⁸

59. The allocation described above is summarized in Appendix **“O”**.

60. Based on this methodology, a total of 67% of the fees incurred by the Manager and its counsel were allocated to specific properties.

⁸ The Manager’s management of the general allocation properties consisted of, among other things, addressing accounting issues, preparing and filing tax returns, addressing any remaining disputes relating to some Companies, distribution of available funds after seeking court approval for same, responding to various requests for information from the Applicants and the Waltons in connection with the criminal proceedings against the Waltons, and preparing to testify and testifying in those criminal proceedings. The Manager’s activities are described below and in the other reports filed in this matter.

V. Reallocation of Fees

61. The Manager incurred fees during the Fifth and Sixth Periods to obtain an order granting it contingent authority to distribute funds from the Schedule C Companies to Bernstein in the event the DeJongs' appeal to the Supreme Court was not successful. The DeJongs and another Schedule C Investor, Dennis Condo, reserved their rights to challenge the Manager's allocation of those fees to the Schedule C Companies in the event the DeJongs' appeal succeeded.

62. Given the DeJongs' success at the Supreme Court of Canada, the Manager recognizes that a reallocation of the fees may be required. Given the amount of fees in issue, the Manager is hopeful that a consent resolution to this issue can be achieved and will provide a supplemental report in the event consensus can be reached with the Applicants and the DeJongs.

VI. The Manager's Activities

A. Involvement in the Criminal Proceedings against the Waltons

63. Harlan Schonfeld and James Merryweather of Schonfeld Inc. were both summonsed by the Crown to testify at the criminal proceedings against the Waltons in respect of knowledge gained solely as a result of their participation in the Inspector-Manager's mandate in these proceedings. Messrs. Schonfeld and Merryweather both attended meetings with Crown counsel and reviewed materials dating back to October 2013 in preparation for giving testimony. Mr. Merryweather also met with counsel to the Manager, and counsel to the Manager provided various information to assist Mr. Merryweather and Mr. Schonfeld with the preparation for testimony. Mr. Merryweather testified on May 22, 2019 and was accompanied by the Manager's counsel. Mr. Schonfeld was not ultimately called to testify.

64. In advance of the trial, the Manager also responded to requests for information from the Toronto Police Services. These requests, and the Manager's responses, are attached hereto as **Appendix "P"**.

B. Intervening in the DeJongs' Appeal to the Supreme Court of Canada

65. The Manager has previously reported that it attended the hearing of Dr. Bernstein's appeal from the September 2016 decision. Although the Manager did not take a position on the legal dispute that was the focus of that appeal, the appeal focused primarily on the Manager's investigation and reports. As a result, Manager's counsel made extensive submissions at the

hearing of the appeal in response to questions from the Court about the Manager's investigation and its related reporting. When the DeJongs were granted leave to appeal to the Supreme Court of Canada, the Manager considered whether it would be appropriate to participate in the appeal so that it could provide similar assistance to the Supreme Court.

66. On March 1, 2019, the DeJongs served their factum in support of their appeal to the Supreme Court of Canada. In their factum, a copy of which is attached as **Appendix "Q"**, the DeJongs criticized the Manager for not having undertaken a further tracing analysis into funds transferred into the Schedule C Companies and alleged that the Manager had conducted itself in a manner that favoured the Bernstein Applicants.⁹

67. In the circumstances, the Manager filed a motion to be added as a party respondent to, or leave to intervene in, the DeJongs' appeal. The Manager's Notice of Motion is attached as **Appendix "R"**. By decision dated April 10, 2019 and attached as **Appendix "S"**, the Manager was granted leave to intervene on the appeal over the opposition of the DeJongs.

C. Tax and Accounting Issues

68. During the Seventh Period, the Manager maintained accounting records for the Schedule B Companies and the Schedule C Properties, filed GST returns for each as required and dealt with numerous audits and information requests from CRA. To date, the Manager has obtained GST refunds in the amount of \$2.9 million in respect of the Schedule B Companies and \$300,000 in respect of the Schedule C Companies.

D. Banking and Investing

69. In addition to the foregoing, the Manager has managed the financial affairs of the Schedule B Companies and Schedule C Companies and has invested net proceeds realized from the sale of properties.

E. Other Matters

70. In addition to the foregoing, during the Seventh Period, the Manager sought and obtained an Order:

⁹ Factum of the Appellant at para. 128, **Appendix "Q"**.

- (a) approving the fee allocation methodology proposed by the Manager in respect of fees of the Manager and its counsel, Goodmans LLP, applicable to the Schedule B Companies and Schedule C Properties for the Sixth Period;
- (b) approving the fees of the Manager and its counsel, Goodmans LLP, for the Sixth Period;
- (c) authorizing the Manager to allocate to the Schedule C Companies the interest paid to the Applicants on account of a loan advanced by the Applicants on September 10, 2014 and repaid on September 24, 2015;
- (d) authorizing the Manager to reallocate the repayment of certain funds advanced by the Applicants to the Schedule B Companies; and
- (e) authorizing the Manager to transfer funds held in trust in respect of 65 Front Street to a general trust account.

VII. Fee Approval

71. Attached hereto as **Appendix “T”** is the Affidavit of Harlan Schonfeld sworn June 25, 2019 (the “**Schonfeld Affidavit**”), attesting to the fees and disbursements of the Manager for the Seventh Period in the amount of \$104,447.78 inclusive of HST and disbursements.

72. Attached hereto as **Appendix “U”** is the Affidavit of Brian Empey, a partner at Goodmans, sworn June 21, 2019 (the “**Empey Affidavit**”), attesting to the fees and disbursements of Goodmans acting on behalf of the Manager for the Sixth Period in the amount of \$80,808.32 inclusive of HST. The Manager has received and reviewed Goodmans’ invoices and concluded that (i) the fees and disbursements set out in Goodmans’ invoices relate to advice sought by the Manager; and (ii) in the Manager’s view, Goodmans’ fees and disbursements are reasonable.

VIII. Data Breach of Schonfeld’s Email Server

73. On June 11, 2019, Schonfeld Inc.’s email server was compromised and the culprit attempted to defraud a client of Schonfeld Inc. in respect of a matter unrelated to these

proceedings. Schonfeld Inc. continues to investigate the cause of the breach and the nature and extent of the information that may have been obtained by the hacker.

74. In accordance with the *Digital Privacy Act*, Schonfeld Inc. has reported the incident to the Office of the Privacy Commissioner of Canada and given notice to individuals whose personal information may have been compromised.

75. Schonfeld Inc. is not aware of any specific risk to the parties involved in this matter caused by the data breach, however, it has given notice to Meridian (the credit union at which the Companies' and the Manager's accounts are held) and has put in place additional layers of security. The Manager does not intend to publically disclose these security measures, because such disclosure would risk undermining their efficacy.

IX. Conclusions and Recommendations

76. For the reasons set out in this Fifty-Sixth Report, the Manager respectfully recommends granting the relief sought in its Notice of Motion.

All of which is respectfully submitted this 25th day of June, 2019.

SCHONFELD INC.

In its capacity as Manager pursuant to the Order of Newbould, J. dated November 5, 2013 and the Judgment and Order of Brown, J. dated August 12, 2014

Per:


Harlan Schonfeld, CPA, CIRP

SCHEDULE “A”**COMPANIES**

1. Dr. Bernstein Diet Clinics Ltd.
2. 2272551 Ontario Limited
3. DBDC Investments Atlantic Ltd.
4. DBDC Investments Pape Ltd.
5. DBDC Investments Highway 7 Ltd.
6. DBDC Investments Trent Ltd.
7. DBDC Investments St. Clair Ltd.
8. DBDC Investments Tisdale Ltd.
9. DBDC Investments Leslie Ltd.
10. DBDC Investments Lesliebrook Ltd.
11. DBDC Fraser Properties Ltd.
12. DBDC Fraser Lands Ltd.
13. DBDC Queen’s Corner Ltd.
14. DBDC Queen’s Plate Holdings Inc.
15. DBDC Dupont Developments Ltd.
16. DBDC Red Door Developments Inc.
17. DBDC Red Door Lands Inc.
18. DBDC Global Mills Ltd.
19. DBDC Donalda Developments Ltd.
20. DBDC Salmon River Properties Ltd.
21. DBDC Cityview Lands Ltd.
22. DBDC Weston Lands Ltd.
23. DBDC Double Rose Developments Ltd.
24. DBDC Skyway Holdings Ltd.
25. DBDC West Mall Holdings Ltd.
26. DBDC Royal Gate Holdings Ltd.
27. DBDC Dewhurst Developments Ltd.
28. DBDC Eddystone Place Ltd.
29. DBDC Richmond Row Holdings Ltd.

SCHEDULE “B”**COMPANIES**

1. Twin Dragons Corporation
2. Bannockburn Lands Inc. / Skyline – 1185 Eglinton Avenue Inc.
3. Wynford Professional Centre Ltd.
4. Liberty Village Properties Ltd.
5. Liberty Village Lands Inc.
6. Riverdale Mansion Ltd.
7. Royal Agincourt Corp.
8. Hidden Gem Development Inc.
9. Ascalon Lands Ltd.
10. Tisdale Mews Inc.
11. Lesliebrook Holdings Ltd.
12. Lesliebrook Lands Ltd.
13. Fraser Properties Corp.
14. Fraser Lands Ltd.
15. Queen’s Corner Corp.
16. Northern Dancer Lands Ltd.
17. Dupont Developments Ltd.
18. Red Door Developments Inc. and Red Door Lands Ltd.
19. Global Mills Inc.
20. Donalda Developments Ltd.
21. Salmon River Properties Ltd.
22. Cityview Industrial Ltd.
23. Weston Lands Ltd.
24. Double Rose Developments Ltd.
25. Skyway Holdings Ltd.
26. West Mall Holdings Ltd.
27. Royal Gate Holdings Ltd.
28. Royal Gate Nominee Inc.
29. Royal Gate (Land) Nominee Inc.
30. Dewhurst Development Ltd.

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31. Eddystone Place Inc.
32. Richmond Row Holdings Ltd.
33. El-Ad (1500 Don Mills) Limited
34. 165 Bathurst Inc.

SCHEDULE “C”**PROPERTIES**

1. 3270 American Drive, Mississauga, Ontario
2. 0 Luttrell Ave., Toronto, Ontario
3. 2 Kelvin Avenue, Toronto, Ontario
4. 346 Jarvis Street, Suites A, B, C, E and F, Toronto, Ontario
5. 1 William Morgan Drive, Toronto, Ontario
6. 324 Prince Edward Drive, Toronto, Ontario
7. 24 Cecil Street, Toronto, Ontario
8. 30 and 30A Hazelton Avenue, Toronto, Ontario
9. 777 St. Clarens Avenue, Toronto, Ontario
10. 252 Carlton Street and 478 Parliament Street, Toronto, Ontario
11. 66 Gerrard Street East, Toronto, Ontario
12. 2454 Bayview Avenue, Toronto, Ontario
13. 319-321 Carlaw, Toronto, Ontario
14. 260 Emerson Ave., Toronto, Ontario
15. 44 Park Lane Circle, Toronto, Ontario
16. 19 Tennis Crescent, Toronto, Ontario
17. 646 Broadview, Toronto, Ontario

N

Court File No.: CV-13-10280-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

B E T W E E N:

DBDC SPADINA LTD.,
and THOSE CORPORATIONS LISTED ON SCHEDULE “A” HERETO

Applicants

- and -

NORMA WALTON, RONAULD WALTON, THE ROSE & THISTLE GROUP
LTD. and EGLINTON CASTLE INC.

Respondents

- and -

THOSE CORPORATIONS LISTED IN SCHEDULE “B” HERETO, TO BE
BOUND BY THE RESULT

**SUPPLEMENTAL REPORT TO THE FORTIETH REPORT OF THE
MANAGER, SCHONFELD INC.**

(Applications returnable June 3, 2016)

Contents

I.	Introduction.....	1
II.	Purpose of this Report.....	1
III.	The Manager's Involvement in the Investigation	1

I. Introduction

1. This is the Supplemental Report to the 40th Report of Schonfeld Inc. (the “**Manager**”) in its capacity as Manager of (i) certain companies listed at Schedule “B” to the Order of Justice Newbould (the “**November 5 Order**”) dated November 5, 2013 (the “**Schedule B Companies**”),¹ together with the properties owned by those companies (the “**Schedule “B” Properties**”); and (ii) the properties listed at Schedule “C” to the Judgment and Order of Justice Brown dated August 12, 2014 (the “**Schedule “C” Properties**” and together with the Schedule “B” Properties, the “**Properties**”).

II. Purpose of this Report

2. On April 29, 2016, the Waltons served a factum in support of their so-called “Counter-Application”.² The Waltons have alleged that the Manager acted improperly by cooperating with a Toronto Police investigation (the “**Investigation**”) into their activities without disclosing this cooperation to them. The Waltons received a detailed description of the Manager’s interactions with the police but their factum makes no reference to this description, or any other evidence. The purpose of this Supplemental Report is to clarify the Manager’s activities with respect to the Investigation.

III. The Manager’s Involvement in the Investigation

3. At a chambers attendance before Justice Newbould on April 19, 2016, the Waltons’ counsel alleged that the Manager may have improperly induced the police to lay charges against

¹ Schedule “B” was amended by Order dated January 16, 2014.

² The Manager has been advised by its counsel that a “Counter-Application” is not a document contemplated by the *Rules of Civil Procedure*.

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the Waltons. The Waltons had not made any attempt at that stage to determine what (if any) interaction the Manager had with the police.

4. Subsequently, on April 22, 2016, the Waltons' counsel wrote to the Manager's counsel requesting that it provide details of any contact or communication between the Manager and the Toronto Police in relation to the Investigation. This correspondence is attached hereto as Appendix "A".

5. The Manager's counsel responded by letter dated April 25, 2016, which is attached hereto as Appendix "B", and provided a detailed and accurate description of all communications that occurred between the Manager and the Toronto Police. More specifically, the Manager advised that it had been contacted by the Toronto Police and asked for certain information about the Manager's work as well as the tracing performed in its capacity as Inspector. The Manager responded to these requests and provided accurate information to the Toronto Police. Almost all of the information provided was publically available.

6. The Waltons' have not responded to this letter and this correspondence is not referenced in the Waltons' factum.

7. The Manager did not discuss the details of its communications with the Toronto Police with the Applicants, nor did it take any steps at the direction of the Applicants.

8. The Waltons' factum also asserts that the Manager should have reported its contact with the Toronto Police to the Court. The Manager does not agree. The Manager was (and is) of the view that the Toronto Police should be left in control of what information about their investigation was disclosed to the Waltons. Given the Manager's limited involvement in, and

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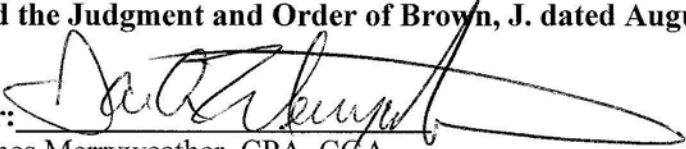
knowledge of, the Toronto Police investigation, any information it could have provided to the Court would have been incomplete in any event.

All of which is respectfully submitted this 18th day of May, 2016.

SCHONFELD INC.

**In its capacity as Manager pursuant to the Order of Newbould, J. dated November 5, 2013
and the Judgment and Order of Brown, J. dated August 12, 2014**

Per:


James Merryweather, CPA, CGA
Authorized Signing Officer

SCHEDULE “A” COMPANIES

1. Dr. Bernstein Diet Clinics Ltd.
2. 2272551 Ontario Limited
3. DBDC Investments Atlantic Ltd.
4. DBDC Investments Pape Ltd.
5. DBDC Investments Highway 7 Ltd.
6. DBDC Investments Trent Ltd.
7. DBDC Investments St. Clair Ltd.
8. DBDC Investments Tisdale Ltd.
9. DBDC Investments Leslie Ltd.
10. DBDC Investments Lesliebrook Ltd.
11. DBDC Fraser Properties Ltd.
12. DBDC Fraser Lands Ltd.
13. DBDC Queen’s Corner Ltd.
14. DBDC Queen’s Plate Holdings Inc.
15. DBDC Dupont Developments Ltd.
16. DBDC Red Door Developments Inc.
17. DBDC Red Door Lands Inc.
18. DBDC Global Mills Ltd.
19. DBDC Donalda Developments Ltd.
20. DBDC Salmon River Properties Ltd.
21. DBDC Cityview Lands Ltd.
22. DBDC Weston Lands Ltd.
23. DBDC Double Rose Developments Ltd.
24. DBDC Skyway Holdings Ltd.
25. DBDC West Mall Holdings Ltd.
26. DBDC Royal Gate Holdings Ltd.
27. DBDC Dewhurst Developments Ltd.
28. DBDC Eddystone Place Ltd.
29. DBDC Richmond Row Holdings Ltd.

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SCHEDULE “B” COMPANIES

1. Twin Dragons Corporation
2. Bannockburn Lands Inc. / Skyline – 1185 Eglinton Avenue Inc.
3. Wynford Professional Centre Ltd.
4. Liberty Village Properties Inc.
5. Liberty Village Lands Inc.
6. Riverdale Mansion Ltd.
7. Royal Agincourt Corp.
8. Hidden Gem Development Inc.
9. Ascalon Lands Ltd.
10. Tisdale Mews Inc.
11. Lesliebrook Holdings Ltd.
12. Lesliebrook Lands Ltd.
13. Fraser Properties Corp.
14. Fraser Lands Ltd.
15. Queen’s Corner Corp.
16. Northern Dancer Lands Ltd.
17. Dupont Developments Ltd.
18. Red Door Developments Inc. and Red Door Lands Ltd.
19. Global Mills Inc.
20. Donalda Developments Ltd.
21. Salmon River Properties Ltd.
22. Cityview Industrial Ltd.
23. Weston Lands Ltd.
24. Double Rose Developments Ltd.
25. Skyway Holdings Ltd.
26. West Mall Holdings Ltd.
27. Royal Gate Holdings Ltd.
28. Dewhurst Development Ltd.
29. Eddystone Place Inc.
30. Richmond Row Holdings Ltd.
31. El-Ad Limited

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32. 165 Bathurst Inc.

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SCHEDULE “C” PROPERTIES

1. 3270 American Drive, Mississauga, Ontario
2. 0 Luttrell Ave., Toronto, Ontario
3. 2 Kelvin Avenue, Toronto, Ontario
4. 346 Jarvis Street, Suites A, B, C, E and F, Toronto, Ontario
5. 1 William Morgan Drive, Toronto, Ontario
6. 324 Prince Edward Drive, Toronto, Ontario
7. 24 Cecil Street, Toronto, Ontario
8. 30 and 30A Hazelton Avenue, Toronto, Ontario
9. 777 St. Clarens Avenue, Toronto, Ontario
10. 252 Carlton Street and 478 Parliament Street, Toronto, Ontario
11. 66 Gerrard Street East, Toronto, Ontario
12. 2454 Bayview Avenue, Toronto, Ontario
13. 319-321 Carlaw, Toronto, Ontario
14. 260 Emerson Ave., Toronto, Ontario
15. 44 Park Lane Circle, Toronto, Ontario
16. 19 Tennis Crescent, Toronto, Ontario
17. 646 Broadview, Toronto, Ontario

6571611

A

Fox, Carlie

Subject: RE: DBDC Spadina Ltd. et al. v. Walton et al.**From:** Lesia J. Lawrence [<mailto:Lesia@cohensabsay.com>]**Sent:** Friday, April 22, 2016 4:20 PM**To:** Dunn, Mark; Peter Griffin**Cc:** Howard Cohen; Jessica Parise**Subject:** DBDC Spadina Ltd. et al. v. Walton et al.

Dear Sirs,

The following is a message delivered on behalf of Mr. Cohen:

"Please provide me with a clear and precise indication, from both of you, as to how, when, where, to what extent and in what form Dr. Bernstein, Harlan Schonfeld, and any and all designates, including those at his law firms, had any contact or communication with the Toronto Police Services—including, particularly, Detective Ruth Moran of the Fraud Squad—in relation to the laying of criminal charges against the Waltons."

Yours truly,

LESIA J. LAWRENCE

Licensed Paralegal



357 Bay Street, Suite 901

Toronto, Ontario M5H 2T7

Tel.: (416) 364-7436 ext. 226

Fax: (416) 364-0083

This communication, including any attachments, is confidential and is intended only for the use of the individual or entity named above. Where the nature of the communication is such as to give rise to privilege, such privilege is asserted. If the reader of this communication is not the intended recipient, or the employee or agent responsible for delivering it to the intended recipient, any dissemination, publication or copying of this communication is prohibited in the absence of the consent of the sender. If you have received this communication in error, please notify the sender forthwith and destroy all copies of this communication. The sender does not accept liability for any loss, disruption or damage that may occur as a result of opening this communication.

B

Goodmans^{LLP}

Barristers & Solicitors

Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, Ontario M5H 2S7Telephone: 416.979.2211
Facsimile: 416.979.1234
goodmans.caDirect Line: 416-849-6895
mdunn@goodmans.ca

April 25, 2016

Delivered via e-mail: cohen@cohensabsay.com

Our File No.: 140074

Cohen, Sabsay LLP
357 Bay Street, Suite 901
Toronto ON
M5H 2T7**Attention: Howard Cohen**

Dear Mr. Cohen:

Re: DBDC Spadina Ltd. et al v. Norma Walton et al
Court File No. 13-10280-00CL

I write further to our attendance before Justice Newbould on April 19, 2016 and your subsequent demand for information relating to my client's contact with the police on April 22, 2016.

Let me begin by saying that the allegations made before Justice Newbould are unfounded and your decision to raise them in Court before making any attempt to discern the underlying facts is unacceptable and unprofessional. My client's reputation for honesty and integrity is hard-earned and valuable. It is a court officer whose actions have been, repeatedly and without exception, approved by the Court in this case. Each and every one of the Waltons' attacks on my client have been unfounded and recognized as such by the Court.

In these circumstances, it is most troubling that you chose to speculate before Justice Newbould that my client had conspired with Dr. Bernstein to use the criminal justice system to accomplish some (unspecified) civil purpose. As you know, this is a very serious allegation to make against a court officer. It should not have been made without evidence. Worse still, you engaged in lengthy speculation about my client's alleged wrongdoing without even asking what it had actually done. Inexplicably, you requested information to support your allegations three days *after* making them in Court.

In any event, and as I advised in Court, my client did not engage in any effort (at the behest of Dr. Bernstein or otherwise) to induce the police to charge the Waltons with fraud. My client was contacted by the police and asked to provide information relating to the Manager's mandate and its investigation in its capacity as Inspector. The information consisted of material that had already been provided to, and accepted by, the Court. It is summarized below:

- Prior to August 5, 2015, the Manager had no contact with the police. On that date, the Manager was contacted by Detective Ruth Moran by telephone;
- On August 6, 2015, Messrs. Schonfeld and Merryweather met with the police regarding the Inspector's tracing methodology and findings and various aspects of the Inspector's Reports;
- On August 11, 2015 Mr. Schonfeld and Mr. Moulton of Duff & Phelps (who, as you know, assisted the Inspector with the forensic aspects of its work) had a telephone call with the police relating to the Inspector's tracing mandate and methodology;
- On August 11, 2015, in response to a request by the police, Mr. Merryweather sent the police an e-mail attaching a listing of bank accounts of the Schedule "B" Companies, the Schedule "C" Companies and other companies owned or controlled by Norma Walton;
- On August 14, 2015, in response to a request by the police, Mr. Merryweather sent the police an e-mail attaching Appendix "A" to the Fourth Report in electronic form;
- On August 14, 2015, in response to a request by the police, Mr. Merryweather sent the police an email attaching Appendix "C" to the Supplemental Report to the First Interim Report of the Inspector (Property Investment Portfolio);
- On August 14, 2015, Mr. Merryweather had a telephone call with the police regarding the Property Investment Portfolio document;
- On September 23, 2015, Mr. Merryweather sent the police an email attaching the Donalda Nominee Agreement and the Otera loan commitment and answering questions related to the loans to and investments in Donalda; and
- On January 28, 2016, Mr. Merryweather sent an email to police responding to questions regarding the total amount of Dr. Bernstein's investments and recovery.

In summary, my client provided accurate information in response to inquiries from the police. This is entirely consistent with its role as an officer of the Court. In light of the foregoing, I trust that no further allegations will be made against my client – and certainly not without you first having sought to obtain accurate information.

Yours truly,

Goodmans LLP



per Mark Dunn
MD/en
6565358.5

DBDC SPADINA LTD. *et al.*

and

NORMA WALTON *et al.*

Applicants

Respondents

Court File No: CV-13-10280-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

Proceeding commenced at Toronto

**RESPONDING MOTION RECORD OF THE
MANAGER, SCHONFELD INC.**

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