

**CITATION:** DBDC Spadina Ltd. v. Walton, 2014 ONSC 2724

**COURT FILE NO.:** CV-13-10280-00CL

**DATE:** 201405012

**SUPERIOR COURT OF JUSTICE – ONTARIO**

**COMMERCIAL LIST**

**RE:** 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

**BEFORE:** D. M. Brown J.

**COUNSEL:** P. Griffin and S. Roy, for the Applicants

N. Walton, in person

H. Cohen, for the Respondents, Ronauld Walton, The Rose & Thistle Group Ltd. and Eglinton Castle Inc.

B. Empey and J. LaBine, for Schonfeld Inc., Manager and Inspector

E. Park, for Canada Revenue Agency (65 Front Street East)

G. Benchetrit, for Laurentian Bank of Canada (30/30A Hazelton Avenue) and the Business Development Bank of Canada (2454 Bayview Avenue)

R. Fisher, for the DeJongs (2454 Bayview Avenue; 3270 American Dr.; 777 St. Clarens Avenue; 260 Emerson Ave.; 324 Prince Edward Drive)

L. Wallach, for E. Manson Investments Limited and B & M Handelman Investments Limited (1 William Morgan Drive; 30/30A Hazelton Avenue; 44 Park Lane; 346 Jarvis St.) and for Martha Sorger and 1363557 Ontario Limited (777 St. Clarens Ave.; 260 Emerson Ave.)

D. Michaud, for Equitable Bank (4 Schedule "C" Properties; 19 Tennis Crescent; 346 Jarvis St., Suite 2; 646 Broadview Ave.; 1 William Morgan Drive) and Trez Capital (65 Front St. East)

C. Lax, Q.C. and P. Fruitman, for 2313798 Ontario (14 College St.; 66 Gerrard St. East)

D. Brooker, for Collins Barrow, Receiver of Global Mills Inc. and Wynford Professional Centre

**HEARD:** April 29, 2014

### **REASONS FOR DECISION**

#### **I. Case management directions**

[1] Newbould J. had been case managing this proceeding. Last month he advised the parties that his hearing commitments prevented his continued involvement for the foreseeable future. This case requires on-going case management by a single judge. I will now perform that role.

[2] At the hearing on April 29, 2014, I canvassed counsel and the parties with a view of gaining an understanding of which outstanding matters required immediate adjudication and which other issues needed attention.

#### **II. The hearing of urgent matters**

[3] In terms of urgent matters, at the hearing I made the following endorsement:

On Tuesday, May 6 @ 8 am I will hear argument on the issues relating to 65 Front St East and 66 Gerrard St/14 College. I allocate a total of 1.5 hours for that hearing.

By 5 pm on Thursday, May 1, parties to send letter to me via CLO to identify the materials I should read for the May 6 hearing. Any further materials to be filed no later than 12 noon on Monday, May 5/14.

I will also hear Mgr's motions at that time. Mgr MRs to be delivered by tomorrow (450 Pape) and Thursday @ 5 pm (Tisdale). Any responding materials re 450 Pape to be delivered by 5 pm on Friday, May 2/14.

[4] I understand that the issue of the respondents' request for access to \$180,000 of the proceeds from the sale of 66 Gerrard in order to fund certain professional fees will be argued on May 6. As well, I understand that the Manager's proposed sale of the Tisdale property will not be opposed, but its proposed sale of the 450 Pape property will be by the respondents.

#### **III. The plan for the remaining matters**

[5] From the information provided in the parties' submissions, I have identified two key dates which have informed my approach to setting a plan and a timetable for the adjudication of all other outstanding matters:

- (i) On May 21, 2014, the Court of Appeal will hear the respondents' appeal from the order of Newbould J. made November 5, 2013;

- (ii) Next, the respondents anticipate a June 14, 2014 closing date for the sale of the 66 Gerrard Street East property. One of the March 21, 2014 orders of Newbould J. (the “Properties Freezing Order”) provided that the respondents could not deal with a number of properties – what the applicants described as the “Schedule C Properties” in their proposed Fresh as Amended Notice of Application - “out of the ordinary course, including any transactions involving the equity of the legal or beneficial owner of the lands, without further Order of this Court.” One of the Schedule C Properties is 66 Gerrard. The respondents seek to sell the 66 Gerrard property and access \$180,000 of the net sale proceeds to pay the accounts of their cost consultant and forensic accountant so that they will release expert reports which the respondents can use in these proceedings.

[6] The applicants have brought a Consolidated Notice of Cross-Motion/Notice of Motion dated February 14, 2014. In broad terms, the applicants’ motion seeks: (i) leave to issue the Fresh as Amended Notice of Application; (ii) the cancellation of the respondents’ shares in certain Schedule B companies; (iii) declarations of trust interests in Schedule C Properties and 44 Park Lane Circle; and (iv) the appointment of Schonfeld Inc. as Manager for the purposes of selling 44 Park Lane Circle and the Schedule C Properties.

[7] On her part the respondent, Norma Walton, supported by the other respondents, has served a notice of motion dated March 31, 2014 which seeks, *inter alia*, to set aside the March 21, 2014 Properties Freezing Order or to remove several properties from the ambit of that order. In addition, Ms. Walton has served a notice of motion dated April 23, 2014 seeking, *inter alia*, authorization from the Court to sell certain of the Schedule C Properties.

[8] At the hearing on April 29, 2014, I advised the parties that I would hear, on **July 16 and 17, 2014**, the applicants’ February 14, 2014 Consolidated Notice of Cross-Motion, as well as Ms. Walton’s March 31, 2014 notice of motion and some of the relief sought in her April 23 notice of motion, specifically that sought in paragraphs 1(i)(ii), (iii) and (j)(i) of the April 23 notice of motion.

[9] I will not schedule a hearing date for the relief sought in paragraphs 1(b), (c), (d) or (f) of Ms. Walton’s April 23 notice of motion. In my view, the issue of whether expanded relief should be granted in respect of the Schedule C Properties and 44 Park Circle or whether the Properties Freezing Order should be set aside should be decided before considering whether any further Schedule C Properties can be sold.

[10] The applicants have already filed materials in support of their February 14 notice of motion and have filed a 2-volume responding record to Ms. Walton’s April 23 notice of motion. Ms. Walton has filed her two motion records; I am not aware of what, if any, materials she has filed in respect of the applicants’ February 14 notice of motion. I appreciate that earlier this year Newbould J. set down a timetable for the filing of materials and the conducting of cross-examinations in respect of the applicants’ motion which was not adhered to. Whatever may have gone on months passed, my focus is to set a timetable for the July motions hearing. Accordingly, I order the following timetable for the July hearing:

- (i) I will not require the filing of any further materials in respect of the July hearings before June 1, 2014. It may well be that by that time the Court of Appeal will have released its decision on the appeal from the November 5, 2013 order of Newbould J.;
- (ii) If either party intends to rely on any further evidence in support of its motion or in response to the other party's motion, such evidence must be served no later than June 19, 2014;
- (iii) Either party may file brief reply evidence to such further evidence no later than June 26, 2014;
- (iv) Any such additional evidence served by the parties must be filed with the Court no later than June 30, 2014;
- (v) Any cross-examinations must be completed no later than July 9, 2014. Each side is allowed up to a total maximum of 10 hours of cross-examination of the affiants or experts tendered by the other side. There will be no refusals motions. I may well draw adverse inferences at the hearing in respect of any proper questions refused by any affiant;
- (vi) Transcripts of any cross-examinations upon which the parties intend to rely at the hearing must be filed with the Court no later than 12 noon on Monday, July 14, 2014;
- (vii) The parties shall exchange their main factums at 12 noon on Monday, July 14, 2014. Brief (no more than 10 pages) reply factums may be served and filed no later than 4 p.m. on July 16, 2014.

Although this might appear to be an ambitious timetable, I am proceeding on the assumption that each side has already filed the bulk of the affidavit evidence upon which it intends to rely at the July motions hearing.

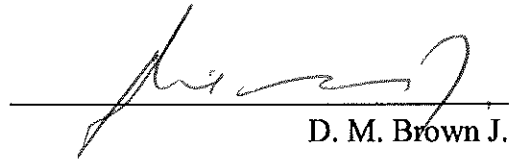
[11] Ms. Walton requested hard copies of the 36,000-odd documents delivered by the applicants on a CD-ROM. Applicants' counsel advised that the documents can be accessed easily through a web-based program about which they have already informed Ms. Walton. Given that circumstance, I see no need to require the applicants to deliver hard copies of those documents.

[12] Ms. Walton seeks the production of certain information regarding 368230 Ontario Limited, a company owned by the applicants, as specified in paragraph 1(l) of her April 23, 2014 notice of motion. I will entertain that request by way of motion in writing. Ms. Walton has addressed that request in paragraph 26 of her April 23, 2014 affidavit. The applicants made submissions on the point in paragraph 117 of their April 28, 2014 factum. If Ms. Walton wishes to make written submissions in support of her requested relief, she must serve and file (to my attention through the Commercial List Office) written legal argument not exceeding 10 pages in length on or before May 9, 2014. The applicants may serve and file responding written legal argument not exceeding 10 pages in length on or before May 16, 2014. Ms. Walton may file a reply submission of up to 5 pages no later than May 21, and I will release my decision after that date.

[13] The Manager indicated that it might bring further sale approval motions, as well as a claims process motion. The Manager should arrange any such motion dates through a 9:30 attendance before me.

[14] For purposes of further scheduling, the parties should be aware that I will not be available during the week of May 26, so any 9:30 appointments must be set around my availability.

[15] As I am now case managing this proceeding, my Standard Case Management Directions – attached as Appendix “A” – apply, with modifications as appropriate.



D. M. Brown J.

**Date:** May 2, 2014

**Appendix "A"**

**STANDARD CASE MANAGEMENT DIRECTIONS FOR PROCEEDINGS CASE-  
MANAGED BY D.M. BROWN J.**

**The objective of case management**

1/ The case management of this proceeding will focus on the key question in any civil case: what means will best ensure that the merits of this particular case, with its particular facts, and its particular simplicity or complexity, will be determined fairly, quickly and cost-effectively?

**The conduct of case-managed litigation**

2/ Counsel and self-represented parties are expected to practise the "3 Cs" of the Commercial List: Co-operation, Communication and Common Sense. While communication amongst counsel by email may be convenient, often to resolve difficult issues there is no substitute for "live" communications between counsel, such as picking up the phone or chatting over a coffee.

**Pleadings brief**

3/ Five days before the first case conference counsel for the plaintiff/applicant shall file with the Commercial List Office, to my attention, a brief containing (i) all pleadings in the action or (ii) the notice of application, main applicant's affidavit and main respondent's affidavit, where available.

**Standing agenda items for any case conference**

4/ At each case conference in a proceeding, counsel always should be prepared to discuss three issues:

- (i) What do the parties require in order to begin meaningful settlement discussions?
- (ii) Applying the principle of "*viva voce* evidence when necessary, but only as much as *viva voce* evidence as is necessary", what form of final hearing on the merits is best suited to the characteristics of this case – Summary judgment motion? Hybrid trial? Full trial?
- (iii) Can a date for the final hearing on the merits now be set?

**9:30 appointments and case conferences**

4/ 9:30 appointments and case conferences can be conducted by teleconference, as well as by Skype or GoToMeeting if those services are available to all involved. 9:30 appointments can start as early as 8 a.m., at counsel's request. The day before any 9:30 appointment, counsel should send the Commercial List Office a very short email or fax identifying the issue(s) that counsel wish to discuss.

6/ Case conferences usually take a minimum of 30 minutes. They may be held from 8:00 a.m. to 9:30 a.m., or after 3:00 p.m. through to 6 p.m. Materials to be filed for a case conference will usually be identified in the Case Conference Memorandum from the previous conference.

### **Discovery issues**

7/ **E-discovery:** Counsel must explore creative ways to ensure that e-discovery costs remain proportionate to the complexity of the issues and the amount of money at stake in the case. Those creative ways can include (i) limiting the number of issues on which initial documentary discovery can be made, (ii) delaying e-mail documentary discovery until after core documents related to the limited issues have been exchanged, and then (iii) limiting the scope of e-mail documentary discovery.

8/ **Undertakings:** Each party must deliver answers to undertakings no more than 60 days following the date of the examination on which the undertaking was given.

9/ **Refusals/Under Advisements:** Parties are strongly encouraged to use Rule 34.12(2) of the *Rules of Civil Procedure*. If they do not, the parties must select one of the following options for refusals:

**Option A:** I am prepared to write an endorsement stating that the parties have agreed to refrain from bringing refusals motions, but on the clear understanding that by so doing they will not be faced at trial with the submission by an opposite party that their failure to move on refusals should work against them. If, at trial, an issue arises about a question refused, then the trial judge can consider the matter. If the trial judge concludes that the refusal was proper, so be it. If the trial judge concludes that the refusal was improper, then an adverse inference would be drawn against the refusing party for failing to disclose material evidence;

**Option B:** I will deal with a motion involving up to eight (8) key refusals (not categories, but actual refusals) at a 30-minute "Friday Morning Discovery Hearing" – see paragraph 10 below. However, parties must understand that if they proceed by way of motion, I shall approach the costs of that motion on an "amount per refusal" basis, specifically \$1,500.00 per refusal, payable within 30 days. That is to say, if a party moves on 8 refusals, but succeeds only on two, it may risk adverse cost consequences of up to \$6,000 (i.e. success on 2 refusals (+\$3,000) less failure on 6 refusals (-\$9,000), or a "net" adverse cost award of \$6,000). In addition, in assessing the costs of the motion I shall take into account the refusal of a moving party to have accepted an offer by the other side to use Rule 34.12(2) on the examinations. By communicating my approach to costs to the parties in advance of bringing a refusals motion, I wish to afford parties an opportunity to take a sober look at exactly how many refusals are material for a fair determination of the issues at trial or final hearing and therefore require adjudication by this Court. If a refusals motion will involve more than eight (8) refusals, it most likely will be referred to a Commercial List Master for hearing.

**Option C:** The parties may identify those refusals in respect of which they wish to use Option A and those in respect of which they wish to proceed with a motion under Option

B. I offer this third option recognizing that in some actions important, proper questions may well be wrongfully refused on an examination and that fairness requires an adjudication of those refusals in advance of the trial so that the actual disclosure of specific information occurs before trial, rather than simply relying on the drawing of an adverse inference. The number of such material refusals in any action usually is quite small and the cost consequences outlined in Option B should operate to confine the number of argued refusals only to very material issues.

### **Friday Morning Discovery Hearings**

10/ Each Friday morning, from 8:30 a.m. until 9:30 a.m. (except for my Judgment Writing Weeks), I will hold brief, 30-minute hearings on any discovery-related disputes arising in cases which I am case-managing – e.g. scope of e-discovery; scheduling of examinations; identity of person to be examined; refusals; etc. Counsel shall schedule a Friday Morning Discovery Hearing through the Commercial List Office.

11/ If the hearing will deal with refusals, no more than 8 refusals in aggregate will be dealt with at the hearing. All motion materials must be delivered no later than 5 p.m. on the Tuesday preceding the hearing date.

12/ For all other discovery-related matters, counsel must submit a joint letter, no later than 12 noon on the Thursday preceding the hearing date, describing the issue(s) and the parties' respective positions. The letter shall not exceed five (5) pages in length.

### **Motions generally**

13/ In my view, the ability to prepare a case for a final hearing on the merits without resorting to any process-related interlocutory motion represents the gold standard for hearing preparation.

14/ No date for the hearing of an interlocutory motion will be set in this proceeding without an initial discussion of the procedural problem at a 9:30 attendance. At the 9:30 attendance: (i) the moving party must present a draft of the notice of motion and a draft of the order which will be sought on the motion; and, (ii) the responding party must present, in writing, its proposed resolution to the procedural problem which would obviate the need for the motion.

15/ If a scheduled motion will involve a hearing of three or more hours, it would be my preference to conduct a "paperless" hearing. Counsel must prepare electronic copies of the motions materials in accordance with the *Toronto Region Commercial List e-Delivery Pilot Project Guidelines for Preparing and Delivering Electronic Documents requested by Judges* found at: <http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/electronic-documents/> Counsel must ensure that their staff perform Optical Character Recognition (OCR) with the pdf copies to enable text searching; imaged copies are not acceptable. Ideally counsel should cooperate and file, through the Commercial List Office, one USB key that contains the motion materials for all parties at least three (3) days before the hearing of the motion.



### Summary judgment motions

16/ When requesting a date for a summary judgment motion, counsel must demonstrate that they have engaged in the discussions contemplated by paragraph 73 of the decision of the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7:

A motion for summary judgment will not always be the most proportionate way to dispose of an action. For example, an early date may be available for a short trial, or the parties may be prepared to proceed with a summary trial. Counsel should always be mindful of the most proportionate procedure for their client and the case.

17/ In *Hryniak* the Supreme Court of Canada stated that the summary judgment process would enable a judge to reach a fair and just determination on the merits when, *inter alia*, the process “is a proportionate, more expeditious and less expensive means to achieve a just result” (para. 49). Consequently:

- (i) A party seeking a date for a summary judgment motion should file, in advance of the request, a copy of the proposed notice of motion together with the information to perform the sort of cost/benefit or proportionality analysis described in Schedule “A” to *George Weston Ltd. v. Domtar Inc.*, 2012 ONSC 5001;
- (ii) A party which opposes the setting of a summary judgment motion date must file a brief letter proposing a means by which to determine the case on the merits which would be more proportionate, expeditious and less expensive than a summary judgment motion.

### Service

18/ The *Commercial List E-Service Protocol* applies to this proceeding. It can be found at: <http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/e-service-protocol/>