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

MOTION RECORD OF THE MANAGER, SCHONFELD INC.
(Motion for Discharge of Manager re: Bannockburn Lands Inc., Richmond Row Holdings Ltd., Hidden Gem Development Inc. and Liberty Village Properties Ltd., returnable December 21, 2015)

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TO: **SERVICE LIST**

Index

I N D E X

1

Court File No.: CV-13-1 0280-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

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

NOTICE OF MOTION
(Motion for Discharge of Manager re: Bannockburn Lands Inc., Richmond Row Holdings Ltd., Hidden Gem Development Inc. and Liberty Village Properties Ltd., returnable December 21, 2015)

Schonfeld Inc., in its capacity as manager (the "**Manager**") of (i) certain companies listed in Schedule "B" to the Order of Justice Newbould dated November 5, 2013 (the "**November 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**") will make a motion to a judge presiding on the Commercial List on December 21, 2015 at 8:30 a.m., or as soon after that time as the motion can be heard, at 330 University Avenue, Toronto.

PROPOSED METHOD OF HEARING: The motion is to be heard orally.

THE MOTION IS FOR:

1. an Order, among other things:

   (a) discharging the Manager of any responsibilities that the Manager may have had under the November Order, the relevant Order of the Honourable Justice Newbould dated January 20, 2014 (the "**January Order**"; together with the November Order, the "**Orders**") or otherwise in respect of Bannockburn Lands Inc. ("**Bannockburn**"), Richmond Row Holdings Ltd. ("**Richmond Row**"), Hidden Gem Development Inc. ("**Hidden Gem**"), Liberty Village Properties Ltd. ("**Liberty Village**" and, collectively, the "**Discharge Companies**");

   (b) excluding the Discharge Companies from the receivership/managership proceedings pursuant the November Order as amended by the January Order effective as of the date of the hearing of this motion, including, without limitation, the stay of proceedings granted pursuant to the November Order;

   (c) releasing, staying, extinguishing and forever barring any claims against the Manager in connection with the performance of its duties as receiver/manager in respect of any of the Discharge Companies and releasing the Manager for all liability thereof;

   (d) deeming any claims, now extant or that could exist, whether discovered or undiscovered as of the date of the hearing of this motion, against any of the Discharge Companies, other than the claims of the Applicants, extinguished and satisfied, and providing that such claims shall not flow through to any successor corporation or amalgamated entity of any of the Discharge Companies;

   (e) that the order requested in subparagraph (d), above, shall not apply to bar or extinguish a claim relating to the use of funds diverted from the reserve fund held by Metropolitan Toronto Condominium Corporation Number 1037 to purchase the real property formerly owned by Liberty Village (the "**Potential MTCC Claim**"), and that the Manager shall retain a total of $160,000 (the "**Liberty Village Holdback**") from the proceeds currently in its possession relating to

Liberty Village pending further Order of the Court. Furthermore, that the MTCC Claim be channeled to and be a claim exclusively against the Liberty Village Holdback.

(f) appointing Dr. Stanley Bernstein as the sole director and president of each of the Discharge Companies;

(g) that Dr. Bernstein, or another entity or person as directed by Dr. Bernstein in his sole discretion, hold all of the issued and outstanding shares of each of the Discharge Companies, including but not limited to any shares which would otherwise be or have been held by Norma Walton or Ronauld Walton, and be deemed to have held all such shares since the date(s) on which those shares were first issued, and cancelling all other shares of the Discharge Companies;

(h) cancelling and eliminating any amounts payable to or receivable from any of the Discharge Companies by any of Norma Walton, Ronauld Walton, the Rose & Thistle Group Limited and/or Eglinton Castle Inc.

THE GROUNDS FOR THE MOTION ARE:

I. The Discharge Companies

2. Justice Brown found in his reasons dated August 12, 2014 (the "**August 12 Reasons**") that the agreements between the Applicants and the Respondents provided that each of the Applicants and the Respondents would be entitled to "one share for each dollar invested." Accordingly, Justice Brown Ordered 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; any other shares should be cancelled.

3. In order to assess the Applicants' and the Respondents' equity interests, it is therefore necessary to quantify the amount invested by each of the Applicants and the Respondents in the relevant company.

4. The Manager has conducted a tracing analysis and concluded that the Applicants are entitled to all of the shares of the Discharge Companies. The Manager's anlysis is summarized on the chart below:

Company	Direct DBDC Contributions	Recorded Contributions	Indirect DBDC Contributions	Other Recorded Contributions[1]	Total DBDC Percentage of contributions
Hidden Gem	$1,166,150	$77,600	$77,600	$0	100%
Liberty Village	$1,980,059	$50,100[2]	$0	$50,100	97.5%
Richmond Row	$3,649,000	$100,000	$100,000	$0	100%
Bannockburn	$1,900,000	$150,000	$150,000	$0	100%

5. The relief sought by the Manager will simply give effect to the order of Justice Brown dated August 12, 2014. Based on that Order, and the Manager's analysis, the Applicants own all or substantially all of the shares of the Discharge Companies. Thus, by transferring management of these companies to the Applicants, the Manager's motion is primarily seeking recognition of the existing ownership of these companies. No change of control is being proposed.

---

[1] The Manager did not trace the source of de minimus contributions in the amount of $100 made by Respondents in and around October 2013.

[2] As discussed in the Manager's 37th Report, a payment of $1,200,000 was transferred from MTCC No. 1037 to Rose & Thistle. It appears these funds were used to pay the second deposit relating to Liberty Village in the amount of $100,000.

II. Limitation of liability of the Manager

6. As part of the Discharge Order, the Manager recommends that it be granted a release from any liability relating to its having acted as a manager/receiver of the Discharge Companies. The Manager is not aware of any claim against it relating to the Discharge Companies (or any other matter relating to its role in these proceedings.

III. Limitation of liability of the Discharge Companies

7. As noted above, a claims process has been conducted in respect of each of the Discharge Companies and the claims bar date in respect of each company has long since passed. Pursuant to Justice Brown's June 18, 2014 Claims Procedure Order (the "**Claims Procedure Order**"), claims against the Discharge Companies other than those raised in the claims process (which have now all been addressed except for one small disputed claim) are barred. The Applicants have requested language, set out in the Draft Order, that will specifically provide that any and all claims against the Discharge Companies shall be deemed to be extinguished and shall not flow through to any successor corporation or amalgamated entity.

8. The Manager is not aware of any specific claim or alleged claim that would be extinguished by the proposed language and is of the view that the protections sought by the Applicants are reasonable. Issues relating to the management of the Schedule "B" Companies before the Manager was appointed are well documented, as is the effect of the Waltons' conduct on various third parties. It is possible (although not likely) that the Respondents' management of the Discharge Companies gave rise to a claim that is outside the scope of the Claims Procedure Order and arguably not barred by it. It is, in the Manager's view, fair and reasonable to protect successor entities from such claims in the (unlikely) event that they exist.

9. The Manager is not aware of any stakeholder that would be adversely affected by the relief that it seeks, which is substantially identical to what was granted on consent in the Donalda Discharge Order.

IV. Retention of Funds with respect to disputed claims

10. A lien claimant has disputed the disallowance of its claim for legal fees against Hidden Gem. The Manager's counsel is presently holding funds in trust to satisfy these claims if the relevant disallowance is set aside and will continue to do so until the issue is resolved.

V. Miscellaneous

11. Rules 2.03, 3.02, 16 and 37 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

12. Such further and other grounds as counsel may advise and this Honourable Court permit.

THE FOLLOWING DOCUMENTARY EVIDENCE WILL BE USED AT THE HEARING OF THE MOTION:

1. The Thirty-Seventh Report of the Manager dated December 14, 2015; and

2. Such further and other material as counsel may advise and this Honourable Court may permit.

Date: December 15, 2015

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Lawyers for the Manager

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

NOTICE OF MOTION

(Motion for Discharge of Manager re: Bannockburn Lands Inc., Richmond Row Holdings Ltd., Hidden Gem Development Inc. and Liberty Village Properties Ltd., returnable December 21, 2015)

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2

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

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Respondents

- and -

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

37th REPORT OF THE MANAGER, SCHONFELD INC.
(Discharge of Manager re: Bannockburn Lands Inc., Richmond Row Holdings Ltd., Hidden Gem Development Inc. and Liberty Village Properties Ltd.)

I. Introduction

A. Overview and Relevant Background

1. This is the 37th 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, 2013 and attached as Appendix "A" (the "**Schedule "B" Companies**"),[1] together with the properties owned by the

[1] Schedule "B" was amended by Order dated January 16, 2014.

Schedule "B" Companies (the "**Schedule "B" Properties**")[2] and of the Properties listed at Schedule "C" to the Order of Justice Brown dated August 12, 2014 and attached as Appendix "B" (the "**Schedule "C" Properties**").

2. As is described in the Endorsement of Justice Newbould dated November 5, 2013 (which is attached as Appendix "C") and the Reasons of Justice Brown dated August 12, 2014 (which is attached as Appendix "D"), the Schedule "B" Companies were each incorporated to hold a specific Schedule B Property. The agreements between Dr. Bernstein and entities he controlled (collectively, "**Bernstein**" or the "**Applicants**") and Norma and Ronauld Walton and entities they controlled (collectively, "**Walton**" or the "**Respondents**") provided that they would each provide half of the equity investment required by each company and own half of the shares of that company.

3. Justice Brown found in his Reasons For Decision dated August 12, 2014 (the "**August 12 Reasons**") that the agreements between the Applicants and the Respondents provided that each of the Applicants and the Respondents would be entitled to "one share for each dollar invested."[3] Accordingly, Justice Brown Ordered 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; any other shares should be cancelled.

4. In order to assess the Applicants' and the Respondents' equity interests, it is therefore necessary to quantify the amount invested by each of the Applicants and the Respondents in the relevant company.

B. Purpose of this Report

5. The Manager has served a motion seeking, among other things, an Order discharging it from all responsibilities in respect of the following Schedule "B" Companies and excluding these companies (the "**Discharge Companies**") from the managership/receivership proceedings:

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

[3] August 12 Reasons, para. 230.

(a) Bannockburn Lands Inc. ("**Bannockburn**");

(b) Richmond Row Holdings Ltd. ("**Richmond Row**");

(c) Hidden Gem Development Inc. ("**Hidden Gem**"); and

(d) Liberty Village Properties Ltd. ("**Liberty Village**")

6. As is described in more detail below, the Manager has conducted a tracing analysis and concluded that the Applicants are entitled to all of the shares of the Discharge Companies. The Manager's motion will give effect to that conclusion by transferring control of the Discharge Companies (and their assets) from the Manager to the Applicants.

7. This Report contains a description of the tracing analysis completed by the Manager and the relief sought by the Manager in its Notice of Motion as well as a recommendation that this relief be granted.

C. Terms of reference

8. 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 Discharge Companies

A. The Manager's Tracing Analysis - Overview

9. Quantification of the Applicants' and Respondents' investments in the Schedule "B" Companies is complicated by the fact that, as is discussed at length in the August 12 Reasons, equity invested by the Applicants in the Schedule "B" Companies was routinely diverted by the Respondents to other Schedule "B" Companies, Schedule "C" Companies and themselves. As a result, payments recorded on the books and records of the Schedule "B" Companies as equity investments made by the Respondents may actually be equity investments made by the Applicants in another Schedule "B" Company and then diverted by the Waltons. Thus, the

Applicants' entitlement to shares in the Discharge Companies was the result of both direct investments (in the form of an equity contribution to the relevant Discharge Company) or indirect investments (in the form of an equity contribution or mortgage advance to another Schedule "B" Company that was diverted by the Waltons to the relevant Discharge Company).

10. In light of the foregoing, the Manager's tracing analysis was comprised of two steps. For the purposes of its initial analysis, the Manager counted any payment to or on behalf of a Discharge Company from the Applicants as a "**Direct DBDC Contribution**". Any payment from the Rose & Thistle Account (or any other account controlled by the Respondents) to or on behalf of a Discharge Company was characterized as a "**Recorded Contribution**" unless the funds used to make the payment were provided directly by Bernstein (ie., deposited directly by Bernstein into the Rose & Thistle Account and then paid from the Rose & Thistle account into a Discharge Company).

11. In other words, if Rose & Thistle paid a deposit for a Property, the deposit was treated as a Recorded Contribution unless Bernstein provided the funds for that deposit directly to Rose & Thistle. In addition, the Recorded Contributions are net of shareholder distributions.[4]

12. In order to determine whether the Recorded Contributions were in fact equity investments by the Waltons, the Manager analyzed the source of the Recorded Contributions. In all but one case, the Manager concluded that it was likely that the Recorded Contributions were funded, in whole or in part, by funds diverted from the Applicants. Funds contributed by the Applicants to one Company and diverted for use in one of the Discharge Companies are referred to below as "**Indirect DBDC Contributions**".

[4] These distributions were accounted for as "return of capital" and the Manager has, for the purpose of its analysis, assumed that each dollar "returned" to a shareholder reduced the number of shares owned by the shareholder by $1.

Company	Direct DBDC Contributions	Recorded Contributions	Indirect DBDC Contributions	Other Recorded Contributions[5]	Total DBDC Percentage of contributions
Hidden Gem	$1,166,150	$77,600	$77,600	$0	100%
Liberty Village	$1,980,059	$50,100[6]	$0	$50,100	97.5%
Richmond Row	$3,649,000	$100,000	$100,000	$0	100%
Bannockburn	$1,900,000	$150,000	$150,000	$0	100%

13. The analysis underlying the foregoing conclusion (except for the conclusion relating to Bannockburn) was set out in the Second and Fourth Supplemental Report to the Managers 22nd Report, which are attached as Appendices "E" and "F". For ease of reference, relevant portions of that analysis are reproduced herein.

14. The Manager notes that the accuracy with which a specific dollar contributed by Bernstein can be matched to a specific use depends primarily on the opening balance and the level of activity in the Rose & Thistle Account (the bank account used as a "clearing house" by the Waltons) when the funds were transferred. When funds contributed to a Company were transferred into the Rose & Thistle Account, funds were also transferred into and/or out of the

[5] The Manager did not trace the source of de minimus contributions in the amount of $100 made by Respondents in and around October 2013.

[6] As discussed below, a payment of $1,200,000 was transferred from MTCC No. 1037 to Rose & Thistle. It appears these funds were used to pay the second deposit relating to Liberty Village in the amount of $100,000.

Rose & Thistle Account by or to other Companies or Walton Companies. In such cases, it is possible to trace funds out of the Rose & Thistle Account into accounts held by the Schedule "B" Companies or the Schedule "C" Companies but it is not possible to match exactly the funds transferred out of the Rose & Thistle Account to the funds transferred as the funds have been comingled in the Rose & Thistle Account.

15. The Manager also notes that the Recorded Contributions that cannot be traced to the Applicants based on the work done to date were not necessarily made using the Waltons' own funds. Since funds provided by Bernstein, as well as funds provided by other investors and revenues from the various Schedule "B" Companies and Schedule "C" Companies, were constantly circulating through the Rose & Thistle Account, accounts relating to the Schedule "C" Companies and the Waltons' accounts, it is not possible to say for certain that any of the Recorded Contributions were made using the Waltons' own funds.

16. In order to determine with certainty how each of the Recorded Contributions were funded, the Manager would need to complete significant further tracing work. In the Manager's view, the cost of a complete tracing exercise would be disproportionate in light of the relatively limited funds available for distribution. In the case of the Discharge Companies, only approximately $150,000 cannot be traced directly or indirectly to Bernstein.

17. The Manager's analysis of the Discharge Companies is set out below.

A. Hidden Gem

18. The Manager has concluded that Bernstein is the owner of 100% of the shares of Hidden Gem. Recorded contributions relating to Hidden Gem totalled $77,600 but all of their funds were Indirect DBDC Contributions.

19. The Recorded Contributions of $77,600 to Hidden Gem are comprised of certain deposits paid from the Rose & Thistle Account in respect of the Property owned by Hidden Gem ($200,000), less the funds provided by Bernstein to Rose & Thistle to fund these deposits ($122,500).

20. According to the Agreement dated January 11, 2012 between Bernstein and the Waltons, the Waltons and Bernstein had each provided $122,500 (total $245,000) to cover due diligence

costs and deposits associated with the purchase of the property owned by Hidden Gem. This is not consistent with Hidden Gem's books and records, which shows only $200,000 worth of deposits.

21. Moreover, as described below, some or all of the Recorded Contributions appear to have been funded by equity contributions by Bernstein to Hidden Gem and other Companies which were transferred to Rose & Thistle and then used to fund the deposits described above.

22. On December 29, 2011, a cheque in the amount of $50,000 was issued from the Rose & Thistle Account to Metropolitan Commercial Realty. The opening balance in the Rose & Thistle Account on December 29, 2011 was $44,229. An amount of $187,500 was deposited to the account from the following:

368230 Ontario Limited equity advance for Ascalon Lands Ltd. ("Ascalon")	$65,000	
368230 Ontario Limited equity advance for Hidden Gem	122,500	(1/2 of $245,000)
	$187,500	

23. Therefore, the $50,000 cheque to Metropolitan Commercial Realty was partially or completely funded by equity funds advanced by Bernstein for Ascalon Lands Ltd. ("**Ascalon**") and Hidden Gem.

24. On January 31, 2012, a cheque in the amount of $150,000 was issued from the account of Hidden Gem payable to Metropolitan Commercial Realty. The cheque was funded by a transfer into the Hidden Gem account on January 30, 2012 in the amount of $150,000 from the Rose & Thistle Account.

25. The opening balance in the Rose & Thistle Account on January 30, 2012 was $5,613. A transfer in the amount of $285,100 was deposited from Ascalon, which was sourced from an equity advance from Bernstein to Ascalon on January 25, 2012. Therefore, the $150,000 cheque to Metropolitan Commercial Realty was funded by equity funds advanced by Bernstein to Ascalon which were transferred to Rose & Thistle.

B. Liberty Village

26. The Manager has concluded that Bernstein is the owner of 97.5% of the shares of Liberty Village. Recorded Contributions relating to Liberty Village totalled $50,100.

27. According to the agreement between Bernstein and the Waltons dated August 19, 2011 with respect to Liberty Village, the Waltons provided the original deposit and Bernstein reimbursed the Waltons such that each party had provided 1/2 of the $300,000 deposit to purchase the property which amount was to form part of the equity contribution. According to the Statement of Adjustments with respect to the purchase of this property, Liberty Village only paid deposits totalling $200,000. In other words, the Agreement overstated the deposits paid by Walton by $100,000.

28. Liberty Village's books and records show Recorded Contributions totalling $50,000. These contributions represent the Waltons' share of a deposit cheque written from the Rose & Thistle Account dated December 24, 2010.

29. A cheque was issued from Rose & Thistle dated December 24, 2010 in the amount of $100,000 payable to Borden Ladner Gervais for deposit on the Liberty Village property. The opening balance in the Rose & Thistle Account on December 24, 2010 was $66,017.35. The following transfers of funds into the account occurred:

From N. Walton	$44,500
From Front Church	$11,200
From Urban Amish	$5,200

30. Thus, the Recorded Contribution of $50,000 appears to be funded by Schedule "C" Companies and from Norma Walton's personal account. However, as noted above, given the consistent pattern of net transfers from the Schedule "B" Companies to the Schedule "C" Companies, it is not possible to determine the ultimate source of these funds.

31. Another cheque was issued from Rose & Thistle dated February 18, 2011 in the amount of $100,000 payable to Borden Ladner Gervais LLP. The opening balance in the Rose & Thistle Account on February 18, 2011 was $20,447. On February 18, 2011, an amount of $1,200,000

was transferred from MTCC No. 1037 to Rose & Thistle. MTCC No. 1037 is the condominium corporation incorporated to manage the property at 18 Wynford Drive. As described in the Manager's Second Report, which is attached as Appendix "G", the Waltons transferred the condominium corporation's reserve fund to Rose & Thistle in early 2011. It appears that these funds were used to pay the second deposit relating to Liberty Village.

32. Since the reserve fund belonged to MTCC No. 1037 (not any entity controlled by the Applicants), the Manager has given notice of this motion to MTCC No. 1037 and has proposed to hold back funds to satisfy a potential claim of MTCC No. 1037. This hold back is not, for greater certainty, an acknowledgement of the validity of a potential claim by MTCC No. 1037. It is merely a device for ensuring that the relief sought herein does not adversely affect MTCC No. 1037.

C. Richmond Row

33. The Manager has concluded that Bernstein is the owner of 100% of the shares of Richmond Row. Recorded Contributions relating to Richmond Row totalled $100,000, but all of the funds were Indirect DBDC Contributions.

34. According to the agreement between Bernstein and the Waltons dated June 27, 2013, Bernstein had provided $650,000 to cover deposit costs, mortgage fees and due diligence expenses to purchase the property as a shareholder loan. Bernstein was to provide on June 27, 2013 a further shareholder loan of $3,200,000 and a remaining shareholder loan of $1,970,388 once a commercial tenant has been secured or building renovations begin. Walton was to provide the sum of $5,820,388 in shareholders loans thereafter as the project required. Bernstein made contributions totalling $3,649,000.

35. According to the Statement of Adjustments, Rose & Thistle paid a first deposit made in respect of the property owned by Richmond Row in the amount of $100,000. On April 15, 2013 a cheque in the amount of $100,000 from Rose & Thistle paid to Morcap Corporation Brokerage ("**Morcap**") cleared the Rose & Thistle Account. The opening balance in the Rose & Thistle Account on April 15, 2013 was $2,437. The account was funded by the following transfers:

Dewhurst (from Bernstein equity investment)	$641,500
Eddystone (from Bernstein equity investment)	866,700
Wynford	2,950
Donalda	8,400
Total	1,519,500

Schedule "C" Companies

Cedar Street	$2,100
Handy Home	8,300
Total	10,400

36. Therefore, the $100,000 payment to Morcap was mainly funded by transfers from Schedule "B" Companies, the largest amounts being from Bernstein equity investments in DBDC Dewhurst Developments Ltd. and DBDC Eddystone Place Ltd.

37. There were no further Recorded Contributions in respect of Richmond Row.

38. Pursuant to the Order of Justice Newbould dated January 27, 2015 (the "**January 27 Order**"), Bernstein's shareholder loans were converted to an equity interest.

D. Bannockburn

39. The Manager has concluded that Bernstein is the owner of 100% of the shares of Bannockburn. Recorded Contributions relating to Bannockburn totalled $150,000, but all of the funds were Indirect DBDC Contributions.

40. According to the agreement between Bernstein and the Waltons dated December 13, 2010 (the "**Bannockburn Agreement**"), each of Bernstein and the Waltons were to provide $2,501,900 for shares in Bannockburn. The purchase was to close on December 17, 2010. The Bannockburn Agreement stated that the Waltons and Bernstein had each provided one half of the $300,000 deposit and the balance of equity would be paid as follows:

(a) Bernstein would provide $1,750,000 on or before December 17, 2010;

(b) The Waltons would provide $1,750,000 in a timely manner, as required;

(c) If a vendor takeback mortgage of $500,000 was required to be paid, each of Bernstein and the Waltons would provide a further $250,000;

(d) If land transfer tax was required to be paid, Bernstein and the Waltons would each contribute the sum of $127,500; and

(e) Bernstein and the Waltons would provide the remaining sum of $224,400 in a timely manner, as required.

41. The Fifth Report of the Inspector, dated July 1, 2014 and attached as Appendix "H" (the "**Inspector's Fifth Report**"), describes in detail the circumstances of the funding of the Bannockburn transaction. For ease of reference, certain relevant portions of that report are set out below.

42. According to the Closing Adjustment Statement related to Bannockburn, as at December 17, 2010, deposits were made totaling $300,000, consisting of three cheques from Rose & Thistle payable to Behar Group Realty as follows:

September 28, 2010	$100,000
November 3, 2010	$100,000
December 8, 2010	$100,000

43. The source of the funds used for the deposit made on September 28, 2010 is not known. However, as is discussed below, Rose & Thistle was reimbursed in full for all of these deposits.

44. On October 10, 2010, Bernstein provided a cheque in the amount of $150,000 to Walton Advocates in Trust, representing one half of the required deposit of $300,000. On December 17, 2010, Bernstein provided a cheque to Walton Advocates in Trust in the amount of $1,750,000 for equity investment, pursuant to the Bannockburn Agreement. Therefore, the total cash provided by Bernstein to Walton Advocates related to Bannockburn was $1,900,000 ($150,000 plus $1,750,000). This was recorded in the accounting records of Bannockburn as Bernstein's equity investment. The accounting records also indicate that the remaining amount to be paid by

Bernstein, $601,900 ($2,501,900 less $1,900,000), was recorded as shares subscription receivable.

45. Bernstein also provided a cheque to Horwitz Finder in Trust in the amount of $6,800,000, which was recorded in the accounting records of Bannockburn as a mortgage payable. Therefore, the total funding that had been provided by Bernstein as at the December 17, 2010 closing date was $8,700,000 ($6,800,000 plus $150,000 plus $1,750,000). After accounting for other costs related to the acquisition and financing, a net amount of $628,630.52 (the "**Excess Funds**") not required at closing, was transferred from Walton Advocates to Rose & Thistle on December 17, 2010.

46. The Excess Funds were recorded in the accounting records of Bannockburn as a decrease in the amount owing from Bannockburn to Rose & Thistle; Rose & Thistle had previously paid $9,691 related to the acquisition as well as the $300,000 deposit. Therefore, immediately before the transfer of Excess Funds paid by Bernstein from Walton Advocates to Rose & Thistle, the intercompany account between Bannockburn and Rose & Thistle indicated that Bannockburn owed Rose & Thistle an amount of $159,691. Just after the transfer of the Excess Funds provided by Bernstein, the intercompany account showed that Rose & Thistle now owed Bannockburn $468,939, calculated as $628,630 minus $159,691. Credits in the amount of $1,219.53 were applied against this balance for other costs paid for by Rose & Thistle related to the acquisition, leaving a balance owing by Rose & Thistle to Bannockburn of $467,719.61.

47. Accounting entries in the books of Bannockburn dated December 31, 2010 eliminate this receivable through recording of an invoice from Rose & Thistle to Bannockburn in the amount of $467,719.61 for "work completed at 1185 Eglinton Avenue East from December 7 to December 31, 2010". The Inspector's Fifth Report observes that the amounts on this invoice appear to be calculated by eliminating the intercompany receivable between Bannockburn and Rose & Thistle, which arose because of the cost transfer from Bannockburn to Rose & Thistle that was funded by the Excess Funds provided by Bernstein, as described above.

48. The net effect of this series of cost transfers and accounting entries was that, even though Rose & Thistle had made $300,000 in payments related to the deposit on Bannockburn, because

of the Excess Funds provided by Bernstein, it was reimbursed in full by Bernstein for the $300,000 deposit.

II. The Schedule C Investors

49. The Waltons solicited investment in the companies that owned the Schedule "C" Properties from a variety of individuals and entities (the "**Schedule C Investors**"). According to Ms. Walton, the Schedule C Investors are entitled to payment of approximately $14 million, which the Waltons have personally guaranteed.

50. The Schedule C Investors, with the limited exception of entities controlled by Christine and Michael DeJong, did not participate in these proceedings until the hearings that occurred on July 16-17, 2014 (the "**July Hearing**") and gave rise to the August 12 Order. In advance of the July Hearing, many Schedule C Investors tendered affidavits in support of the relief sought by the Waltons.

51. After the Manager's appointment in respect of the Schedule "C" Properties, several Schedule C Investors took the position that the Manager was obliged to conduct a tracing analysis to determine how the funds they had invested with the Waltons were ultimately used and, more specifically, to evaluate whether the Schedule C Investors had any claim against the Schedule "B" Companies.

52. The Schedule C Investors' position suffered from several significant difficulties. First, the Schedule C Investors did not explain (and have not explained) how the complicated tracing exercise that they proposed would be funded. Second, a claims process had been conducted in respect of each of the seven Schedule "B" Companies from which the Manager recommended distributions (the "**Interim Distribution Companies**") and any further claims against these companies were barred by the terms of the Justice Brown's June 18, 2014 Claims Procedure Order (the "**Claims Procedure Order**" attached as Appendix "I"). Thus, even if a tracing had been performed and provided some factual basis for a claim into the Interim Distribution Companies by one or more of the Schedule C Investors, any claim based on these facts could only proceed if the Claims Procedure Order was varied.

53. By Notice of Motion dated December 19, 2014 (the "**Interim Distribution Motion**"), the Manager sought an Order authorizing it to make an interim equity distribution in respect of the Interim Distribution Companies, including Richmond Row, Liberty Village and Hidden Gem. The proposed distribution was based on the tracing analysis described above. The Schedule C Investors opposed the Manager's Interim Distribution Motion and asked that any distribution be postponed pending completion of the tracing exercise that they proposed. That opposition is relevant to this motion because all of the Discharge Companies except for Bannockburn were also Interim Distribution Companies.

54. The Manager did not agree to the requested deferral because, in addition to the difficulties described above, the Manager's tracing exercise demonstrated that the Interim Distribution Companies had been funded almost entirely with funds provided by Bernstein. The Recorded Contributions (ie., funds that were not paid directly by the Applicants) comprised a very small portion of funds invested into the Interim Distribution Companies and the Manager's tracing demonstrated that virtually all of the Recorded Contributions were in fact investments made by the Applicants in other Schedule "B" Companies and then diverted by the Waltons to fund the Interim Distribution Companies. This conclusion is significant to any evaluation of a claim or potential claim by the Schedule C Investors because if the Waltons did not contribute anything to a particular company then there is no possibility of Schedule C Investors' funds being used to fund a contribution.

55. At the hearing of the Interim Distribution Motion, the Schedule C Investors, the Manager and the Applicants agreed to a compromise whereby the Manager would pay most of the funds that it had proposed to the Applicants but that it would hold back a portion of the funds to cover a potential claim by the Schedule C Investors if they established that the Recorded Contributions were funded by money that they had entrusted to the Waltons. This was a very conservative approach, since the Manager's tracing showed that virtually all of the Recorded Contributions could be traced to contributions made by the Applicants. This compromise was reflected in the January 27 Order.

56. In addition to the amounts described above, the Interim Distribution Companies also retained amounts required to pay taxes, a portion of the Manager's fees and any other potential liabilities against them.

III. Assets of the Discharge Companies and the relief sought by the Manager

57. The relief sought by the Manager will simply give effect to Justice Brown's August 12 Order. Based on that Order, and the Manager's analysis as set out above, the Applicants own all or substantially all of the shares of the Discharge Companies. Thus, by transferring management of these companies to the Applicants, the Manager's motion is primarily seeking recognition of the existing ownership of these companies. No change of control is being proposed.

58. In the interest of ensuring that all stakeholders are fully informed of the practical consequences of the relief sought by the Manager, the Manager has described the assets of the Discharge Companies below. After the Manager's discharge, the Applicants will have the ability to control these assets and the right to use them for their own benefit.

59. Each of the Discharge Companies owned a property that was sold for an amount that exceeded both secured and unsecured debts that it owed. The Manager has conducted a claims process in respect of each of the Discharge Companies and paid all amounts owed by these companies to creditors. With the exception of a lien claimant that has disputed the disallowance of its claim for legal fees against Hidden Gem, no disputed claims remain with respect to any of the Discharge Companies. With the exception of Bannockburn, the Court has already authorized an interim equity distribution to the Applicants pursuant to the January 27 Order.

Company	Funds Available for Distribution	DBDC Percentage	Interim Distribution
Donalda Developments Ltd.	1,230,000	100%	1,230,000[7]
Hidden Gem Development Inc.	930,000	93.8%	872,340
Lesliebrook Holdings Ltd.	190,000	98.0%	186,200
Liberty Village Properties Ltd.	150,000	97.5%	146,250
Royal Agincourt Corp.	110,000	73.2%	80,520
Royal Gate Holdings Ltd.	2,100,000	97.6%	2,049,600

60. Certain Discharge Companies may also be entitled to GST refunds. The potential GST refunds are being held by the CRA due to the non-filing of corporate tax returns for the Schedule

[7] This amount reflects a final distribution made to the Applicants in respect of Donalda Developments Ltd.

"B" Companies. None of the Schedule "B" Companies filed tax returns for 2012 and, since its appointment, the Manager has delayed the filing of tax returns at the request of the Applicants. The Manager is in the process of preparing all of the tax returns required for all of the Schedule "B" Companies and the Applicants have agreed that the tax returns should be filed in the near future.

61. In addition, two of the Discharge Companies, Bannockburn and Richmond Row, have losses for tax purposes.[8] The Manager understands that the Applicants may amalgamate Bannockburn and Richmond Row with one or more other companies and use the losses suffered by Bannockburn and Richmond Row to offset profits earned by such companies.

62. In the Manager's view, it is appropriate for the Applicants to obtain any benefit of the tax losses incurred by the Discharge Companies. Based on the analysis set out above, it is clear that any amounts lost by the Discharge Companies were invested by the Applicants.

Company	Funds on Hand	Potential GST Refund	Tax Income (Loss)
Bannockburn	$668,000	$ 83,300	($ 1,163,000)
Hidden Gem	$ 180,000	$ 54,000	$ 74,000
Liberty Village	$ 1,246,000	$ 626,900	$ 2,400,000
Richmond Row	$ 2,030,000	$ 6,400	($ 2,100,000)
TOTAL	$ 4,293,000	$ 826,400	

[8] Taxable income (loss) is adjusted for the reversal of the Rose & Thistle invoices in 2012 and 2013 (except for Manager recommended and Court approved management fees). The Manager did not remove the invoices from the records, but merely moved them into a disputed item on the balance sheet. This had the effect of increasing net income or decreasing losses on the financial statements. From an accounting perspective, this is a conservative approach.

IV. Other relief sought by the Manager

63. The Order sought by the motion herein is substantially equivalent to the relief sought in respect of Donalda Developments Ltd. ("**Donalda**") and granted on consent by Order dated December 17, 2014 (the "**Donalda Discharge Order**").

A. Holdback in respect of Liberty Village

64. As noted above, the Manager has not been able to trace a total of $151,100 of the funds contributed to Liberty Village to Bernstein. This amount is comprised of $50,100 apparently contributed by Schedule "C" Companies (which translates to 2.5% of total contributions) and $100,000 apparently drawn from funds diverted from the reserve fund of MTCC No. 1037. The Manager therefore intends to hold $160,000 of the funds available to Liberty Village pending further Order of the Court.

B. Limitation of liability for the Manager

65. As part of the Discharge Order, the Manager recommends that it be granted a release from any liability relating to its having acted as manager/receiver of the Discharge Companies.

66. The Manager is not aware of any claim against it relating to the Discharge Companies (or any other matter relating to its role in these proceedings).

C. Limitation of liability of the Discharge Companies

67. As noted above, a claims process has been conducted in respect of each of the Discharge Companies and the claims bar date in respect of each company has long since passed. Pursuant to the Claims Procedure Order, claims against the Discharge Companies other than those raised in the claims process (which have now all been addressed except for one small disputed claim) are barred. The Applicants have requested language, set out in the Draft Order, that will specifically provide that any and all claims against the Discharge Companies shall be deemed to be extinguished and shall not flow through to any successor corporation or amalgamated entity.

68. The Manager is not aware of any specific claim or alleged claim that would be extinguished by the proposed language and is of the view that the protections sought by the

Applicants are reasonable. Issues relating to the management of the Schedule "B" Companies before the Manager was appointed are well documented, as is the effect of the Waltons' conduct on various third parties. It is possible (although not likely) that the Respondents' management of the Discharge Companies gave rise to a claim that is outside the scope of the Claims Procedure Order and arguably not barred by it. It is, in the Manager's view, fair and reasonable to protect successor entities from such claims in the (unlikely) event that they exist.

69. The Manager is not aware of any stakeholder that would be adversely affected by the relief that it seeks, which is substantially identical to what was granted on consent in the Donalda Discharge Order.

D. Retention of funds with respect to disputed claims

70. A lien claimant has disputed the disallowance of its claim for legal fees against Hidden Gem. The Manager's counsel is presently holding funds in trust to satisfy these claims if the relevant disallowance is set aside and will continue to do so until the issue is resolved.

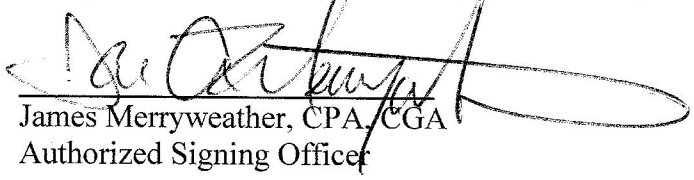
V. Conclusions and Recommendations

71. For the reasons set out in this Report, the Manager respectfully recommends granting the relief sought in its Notice of Motion.

All of which is respectfully submitted this 14th day of December, 2015.

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.

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

A

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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32. Richmond Row Holdings Ltd.

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34. 165 Bathurst Inc.

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14. 260 Emerson Ave., Toronto, Ontario
15. 44 Park Lane Circle, Toronto, Ontario
16. 19 Tennis Crescent, Toronto, Ontario
17. 646 Broadview, Toronto, Ontario

C

CITATION: DBCD Spadina Ltd et al v. Norma Walton et al, 2013 ONSC 6833
COURT FILE NO.: CV-13-10280-00CL
DATE: 20131105

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

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 ON SCHEDULE B HERETO, TO BE BOUND BY THE RESULT

BEFORE: Newbould J.

COUNSEL: *Peter H. Griffin and Shara N. Roy*, for the Applicants

John A. Campion, Emmeline Morse and Guillermo Schible, for the Respondents

Fred Myers and Mark S. Dunn, for the Inspector

HEARD: November 1, 2013

ENDORSEMENT

[1] On October 4, 2013, Schonfeld Inc. was appointed as inspector of all of the companies in schedule B. On October 24, 2013 a motion by the applicants to have Schonfeld Inc. appointed as a manager of those corporations and related corporation was adjourned to November 1, 2013 and

interim relief was granted, including giving the applicants access to and joint control over all bank accounts.

[2] The applicants now move for the appointment of the Inspector as receiver/manager over the schedule B corporations and certain other properties that are mortgaged to Dr. Bernstein under mortgages which have expired. It is resisted by the respondents who maintain that the appointment would be an interim appointment pending a trial of the issues that should be ordered and that the applicants have sufficient protection from the order of October 24, 2013 that the respondents will not attack.

[3] For the reasons that follow, Schonfeld Inc. is appointed as receiver/manager of the 31 schedule B corporations.

Background

[4] Dr. Bernstein is the founder of very successful diet and health clinics. Norma Walton is a lawyer and co-founder with her husband Ronauld Walton of Rose & Thistle. She is a principal of Walton Advocates, an in-house law firm providing legal services to the Rose & Thistle group of companies. Ronauld Walton is also a lawyer and co-founder of Rose & Thistle and a principal of Walton Advocates

[5] Beginning in 2008, Dr. Bernstein acted as the lender/mortgagee of several commercial real estate properties owned by the Waltons either through Rose & Thistle or through other corporations of which they are the beneficial owners.

[6] Following several financings, Dr. Bernstein and the Waltons agreed to invest jointly in 31 various commercial real estate projects. Each is a 50% shareholder of each corporation set up to hold each property.

[7] The known facts and concerns of the applicants giving rise to the appointment of the Inspector are set out in my endorsement of October 7, 2013 and were contained in affidavits of James Reitan, director of accounting and finance at Dr. Bernstein Diet and Health Clinics. Since

then, there has been further affidavit material from both sides and the Inspector has delivered two interim reports and a supplement to the first. The most recent affidavit from the applicants' side is an affidavit of Mr. Reitan sworn October 24, 2013. The most recent from the respondents' side is an affidavit of Norma Walton sworn October 31, 2013 on the day before this motion was heard. There has been no cross-examination on any affidavits. The first interim report of the Inspector is dated October 21, 2013, the supplement to it is dated October 24, 2013 and the second interim report is dated October 31, 2013. I have not permitted any cross-examination of the Inspector but the respondents have been free to make reasonable requests for information from the Inspector and they have availed themselves of that opportunity.

[8] To date, Dr. Bernstein through his corporations has advanced approximately $105 million into the 31 projects (net of mortgages previously repaid), structured as equity of $2.57 million, debt of $78.5 million and mortgages of $23.34 million`.

[9] According to the ledgers provided to the Inspector, the Waltons have contributed approximately $6 million. $352,900 is recorded as equity, which I assume is cash, $1.78 million is recorded as debt and $3.9 million is recorded in the intercompany accounts said to be owing to Rose & Thistle and is net of (i) amounts invoiced by Rose & Thistle but not yet paid; (ii) amounts paid by Rose & Thistle on behalf of the companies such as down-payments; and (iii) less amounts paid by DBDC directly to Rose & Thistle on behalf of the companies and (iv) other accounting adjustments.

Concerns of the applicants

(i) $6 million mortgage

[10] This was a matter raised at the outset and was one of the basis for my finding of oppression leading to the appointment of the Inspector. Mr. Reitan learned as a result of a title search on all properties obtained by him that mortgages of $3 million each were placed on 1450 Don Mills Road and 1500 Don Mills Road on July 31, 2013 and August 1, 2013. Dr. Bernstein had no knowledge of them and did not approve them as required by the agreements for those properties. At a meeting on September 27, 2013, Ms. Walton informed Mr. Reitan and Mr.

Schonfeld that the Waltons were in control of the $6 million of mortgage proceeds (rather than the money being in the control of the owner companies), but refused to provide evidence of the existence of the $6 million. Ms. Walton stated that she would only provide further information regarding the two mortgages in a without prejudice mediation process. That statement alone indicates that Ms. Walton knew there was something untoward about these mortgages.

[11] In his first interim report, Mr. Schonfeld reported that the proceeds of the Don Mills mortgages were deposited into the Rose & Thistle account. Rose & Thistle transferred $3,330,000 to 28 of the 31 companies. The balance of the proceeds of the Don Mills mortgages totalling $2,161,172, were used for other purposes including the following:

1. $98,900 was paid to the Receiver General in respect of payroll tax;

2. $460,000 was deposited into Ms. Walton's personal account;

3. $353,000 was apparently used to repay a loan owed by Rose & Thistle in relation to Richmond Row Holdings Ltd.; and,

4. $154,600 was transferred electronically to an entity named Plexor Plastics Corp. and $181,950 transferred electronically to Rose and Thistle Properties Ltd. Ms. Walton advised the Inspector that she owns these entities with her husband.

[12] In her affidavit of October 31, 2013, Ms. Walton admits that $2.1 million was "diverted" and used outside the 31 projects. She admits it should not have been done without Dr. Bernstein's consent. She offers excuses that do not justify what she did. What happened here, not to put too fine a point on it, was theft. It is little wonder that when first confronted with this situation, Ms. Walton said she would only talk about it in a without prejudice mediation.

[13] In her affidavit of October 4, 2013, Ms. Walton said she had made arrangements to discharge the $3 million mortgage on 1500 Don Mills Rd on October 21, 2013 and to wire money obtained from the mortgage on 1450 Don Mills Road into the Global Mills account (one of the 31 companies) by the same date. Why the money would not be put into the 1450 Don

Mills account was not explained. In any event, no repayment of any of the diverted funds has occurred.

(ii) Tisdale Mews

[14] Tisdale Mews is a rezoning for 35 townhomes near Victoria Park Avenue and Eglinton Avenue East. Mr. Reitan states in his affidavit that Dr. Bernstein made his equity contribution to Tisdale Mews December 2011 in the amount of $1,480,000. The bank statements for December 2011 for Tisdale Mews have not been made available. The forwarded balance on the bank statements available for Tisdale Mews from January 2012 is $96,989.91, indicating that most if not all of Dr. Bernstein's money went elsewhere. Ms. Walton states in her affidavit that the project "was purchased by Dr. Bernstein on January 11, 2012" and he invested $1.7 million in equity. How it was that Dr. Bernstein purchased the property is not explained and seems contrary to the affidavit of Mr. Reitan. The bank account statements for the property show no deposits of any consequence in January 2012 or later.

[15] In any event, Mr. Reitan was able to review bank records and other documents. Invoices and cheques written from Tisdale Mews' bank account show that a total of $268,104.57 from Tisdale Mews has been used for work done at 44 Park Lane Circle, the personal residence of the Waltons in the Bridle Path area of Toronto.

[16] Ms. Walton in her affidavit acknowledges that the money was used to pay renovation costs on her residence. She says, however, that Rose & Thistle funded 100% of the $268,104.57 purchases before any cheques were sent out of the Tisdale Mews account. How this was funded was not disclosed, although she did say that overall, Rose & Thistle has a positive net transfer to the Tisdale Mews account of $2,208,964 "as per Exhibit G to the Inspector's first interim report". Exhibit G to that report has nothing to do with Tisdale Mews. Exhibit D to that report, being the property profile report of the Inspector for the 31 properties, contains no information for Tisdale Mews because information had not yet been provided to the Inspector. The Inspector's updated profile prepared after information was obtained from Rose & Thistle shows $1,274,487 owing from Tisdale Mews to Rose & Thistle, but whether this is legitimate cannot be

determined until back-up documents sought by the Inspector are provided. It is no indication that cash was put into Tisdale Mews by Rose & Thistle.

[17] The statement of Ms. Walton that Rose & Thistle funded 100% of the $268,104.57 purchases on her residence before any cheques were sent out of the Tisdale Mews account makes little sense. There would be no reason for Rose & Thistle to transfer funds into the Tisdale Mews account to pay personal expenses of Ms. Walton for her residence. Again, it has all the appearances of another case of theft.

(iii) Steps to impede a proper inspection

[18] It is quite evident that from the moment the order was made appointing the Inspector, Ms. Walton took various steps to hinder the Inspector. That order was made on October 4, a Friday, and permitted the Inspector to go to the offices of Rose & Thistle during normal business hours and on that evening and throughout the week-end. Mr. Reitan swears in his affidavit that when he arrived at the Rose & Thistle offices at 3:33 p.m. on the direction of the Inspector, which was shortly after the order was made, he saw Ms. Walton locking the door to the premises and she waved to him as she walked away from the doors. He was informed by Angela Romanova that Ms. Walton had told all employees to leave the premises once the order was granted at approximately 3 pm. He observed one employee who left with a server and one or more computers. After a discussion with the employee and Steven Williams, VP of operations at Rose & Thistle, these were taken back into the building. I received an e-mail from Mr. Griffin early in the evening alerting me to the problem and I was asked to be available if necessary. Mr. Reitan states that after several hours, and following Mr. Walton's arrival, Mr. Schonfeld, Mr. Merryweather and he were allowed into the premises.

[19] Ms. Walton in her affidavit states that a laptop "that was about to be removed" from the Rose & Thistle offices was 13 years old and they were disposing of it. One of her occasional workers asked if he could have it and they agreed. She states that the timing was unfortunate. She states that there are eight server towers permanently affixed to the premises. What she does not answer is Mr. Reitan's statement that she locked the doors and told her employees to leave, that whatever was taken from the premises was returned after discussions with the employee and

Mr. Williams, the VP of operations, and that it took several hours before the Inspector and Mr. Reitan were permitted on the premises. The order appointing the Inspector required Ms. Walton to fully co-operate with the Inspector.

[20] The order also permitted the Inspector to appoint persons as considered necessary, including Mr. Reitan. Ms. Walton however took the position that Mr. Reitan should not be on the premises, which was contrary to the order, and that the Inspector should not discuss with the applicants or their lawyers any information he obtained before making his first report to the court. Mr. Reitan was the accounting person for Dr. Bernstein most familiar with the investments and not having him available to the Inspector, either on the Rose & Thistle premises or not, would not be helpful to the Inspector. On October 9, 2013 I made a further order, which should not have been necessary, permitting Mr. Reitan to be on the premises when Mr. Schonfeld or his staff were present. I also ordered that Mr. Schonfeld was entitled, but not required, to discuss his investigation with the parties or their representatives.

[21] Ms. Walton informed the Inspector that the books and record of the companies were last brought current in 2011. Since August or September, 2013, after Mr. Reitan became involved in seeking information, Rose & Thistle employees have been inputting expense information into ledgers relating to the period January 2012 and August 2013. They have also issued a number of invoices for services rendered or expenses incurred by Rose & Thistle during the period January 2012 to August 2013. On October 17, 2013, Mr. Schonfeld convened a meeting with the parties and their counsel to orally present his findings. Prior to that meeting, Ms. Walton would only provide the Inspector with access to general ledgers for individual companies once she and Rose & Thistle had completed their exercise of updating the ledgers and issuing invoices from Rose & Thistle to each company. At the meeting, Ms. Walton agreed to provide the Inspector with access to ledgers for the remaining companies in their current state. These were eventually provided.

[22] Ms. Walton instituted a procedure under which no information could be provided by Rose & Thistle employees to the Inspector only after Ms. Walton had vetted it, which was causing considerable difficulties for the Inspector. On October 18, counsel for the Inspector wrote to counsel to the respondents and asked that the respondents provide immediate unfettered access to the books and records and end the insistence that all information be provided through

Ms. Walton. During the week of October 21, Ms. Walton said she could not meet because she was involved in preparing responding material in the litigation and that her staff was unavailable. By October 24, 2013 no substantive response to the Inspector's request was made, and on that date I made an order requiring Ms. Walton not to interfere with Rose & Thistle employees providing information to the Inspector. This should not have been necessary in light of the terms of the original order of October 4, 2013 appointing the Inspector.

(iv) Improper use of bank accounts

[23] The agreements for each project require that each project has a separate bank account. The Inspector reports, however, that there has been extensive co-mingling of bank accounts and that funds were routinely transferred between the company accounts and the Rose & Thistle account. From the date of each agreement to September 30, 2013, approximately $77 million was transferred from the companies' accounts to Rose & Thistle and Rose & Thistle transferred approximately $53 million to the various company accounts meaning that Rose & Thistle had retained approximately $24 million transferred to it from the various companies.

[24] Ms. Walton confirmed to the Inspector that equity contributions to, and income received by, the companies were centralized and co-mingled in the Rose & Thistle account, which she described as a "clearing house". This practice continued in September 2013 and the Inspector reported it was difficult to trace how transfers from the companies were used because the funds were also co-mingled with funds transferred to the Rose & Thistle account by other Walton companies not making up the 31 companies in which Dr. Bernstein has his 50% interest. It is clear that the Waltons did not treat each company separately as was required in the agreements for each company.

[25] To alleviate the problem of the co-mingling of funds and the payments out to Rose & Thistle, the order of October 25 provided for the payment of deposits to be made to the bank accounts of the 31 companies and that no payment out could be made without the written consent of the applicants or someone they may nominate.

(v) Receivables of Rose & Thistle from the 31 companies

[26] The agreements for the 31 properties state that Dr. Bernstein and the Waltons are to provide 50% of the equity required. They do not provide that the Walton's equity is to be provided in services. They state that each of Dr. Bernstein and the Waltons will put in amounts of money. In her lengthy affidavit of October 31, 2013, Ms. Walton went to the trouble of describing each of the 31 projects, including stating how much equity Dr. Bernstein had put into each property. Tellingly, however, she made no statement at all of how much equity she or her husband had put into any of the properties, and gave no explanation for not doing so. This may be an indication that Ms. Walton is not able to say what equity has been put into each property, hardly surprising as the books and records were two years out of date at the time the Inspector was appointed.

[27] In his first interim report, Mr. Schonfeld reported that based on invoices and general ledger entries provided to October 18, 2013, Rose & Thistle appeared to have charged the companies approximately $27 million for various fees and HST on the fees. On October 17, the date of his meeting with the parties, he had circulated a version of his chart regarding this which identified $2.68 million that had been transferred to Rose & Thistle that could not be reconciled to any invoice issued by Rose & Thistle. On the following day on October 18, Rose & Thistle provided additional invoices to the companies for $5.6 million so that the total amount invoiced exceeded the amounts transferred by Rose & Thistle to the companies by $2.9 million. In his supplement to his first report, Mr. Schonfeld reported that the respondents had produced further invoices from Rose & Thistle dated between January 2012 and September 2013 to the companies for a total of $34.6 million, being $10.6 million more than it had received from the companies. Mr. Schonfeld identified approximately $3.9 million recorded on the ledgers of Rose & Thistle as owing from the companies to Rose & Thistle. This amount is part of the $6 million recorded in the books as being the contribution by the Waltons to the companies.

(vi) Documentation to support Rose & Thistle invoices

[28] The Inspector has sought unsuccessfully so far to obtain documentation underlying Rose & Thistle's invoices of some $34.6 million to the companies, including construction budgets for

the various projects. This is of considerable importance in understanding the claim for equity put into the properties by the Waltons, because by far the largest amount of equity now claimed to have been put in by the Waltons are the fees for services said to have been provided by the Waltons to the various companies.

[29] The information that has been obtained regarding the invoices issued to some of the companies by Rose & Thistle is troubling and gives little confidence in what Ms. Walton and Rose & Thistle have done.

[30] Riverdale Mansion Inc. is one of the 31 projects. It is the owner of a historic mansion on Pape Avenue. Riverdale transferred $1,759,800 to Rose & Thistle and received from Rose & Thistle $785,250. Thus Rose & Thistle retained $974,550 transferred to it by Riverdale.

[31] Rose & Thistle provided the Inspector with invoices addressed to Riverdale for construction management fees totaling $1,183,981 plus HST and maintenance fees of $60,000, including $275,000 for "deposits for materials", $103,863 for "project management services", $295,000 for "site plan deposits and application" and $67,890 for "steel bar ordered and installed". At the October 17 meeting, the Inspector asked for documentation, including third party invoices, to support the amounts invoiced to Riverdale. Ms. Walton said that Rose & Thistle did not have third party invoices for many of the invoiced expenses because Rose & Thistle performed much of the work itself (it has a construction company) and that some of the expenses had not yet been incurred. In response, the Inspector requested documents such as material invoices and payroll records to validate the cost of work done by Rose & Thistle and invoiced to Riverdale. None were provided.

[32] On the following day, October 18, the Inspector received a credit note from Rose & Thistle which showed that the invoice form Rose & Thistle to Riverdale had been reversed except for $257,065.62 for work performed in 2011. The credit note is dated December 31, 2011.

[33] In her affidavit of October 31, 2013, Ms. Walton gave an explanation for the Riverdale reversal, an explanation that has problems. She said that considerable work was done to prepare the site for construction of townhouses and condominiums. As the work was proceeding, the

project changed and the mansion will be rebuilt and become used for a woman's shelter. Rose & Thistle was owed "certain monies" for its work and the invoice for $1,291,025 inclusive of HST was rendered by Rose & Thistle to Riverdale. She states that "the Inspector thought the amount claimed was too high" and so she issued a credit note and submitted a lower invoice for $257,065.62 "that reflected the value of the work done by Rose & Thistle". She says she merely forgot to re-do the invoice after the plans changed.

[34] The applicants have had no chance to cross-examine Ms. Walton on her affidavit. I have considerable doubts that the Inspector told Ms. Walton that the invoice was too high, as he has had no back-up documentation to consider the validity of the invoice and was asking for it to be produced. However, even assuming that the Inspector told her the invoice was too high, which is not what the Inspector reported, one may ask why, if the new invoice of some $257,000 reflected the work that was done, an earlier invoice had been sent for some $1.2 million. That earlier invoice appears to have been highly improper.

[35] Dupont Developments Ltd. is one of the 31 projects. It is a contaminated industrial building and the plan according to Ms. Walton is to "gut renovate" the building and remediate the contaminated site. The Inspector requested the construction budget for it and it was provided by Mr. Goldberg, who said he was responsible for the construction project. Mr. Goldberg told Mr. Schonfeld that the budget documents were out of date. They indicate that Dupont spent $385,000 on construction and $20,000 on environmental renovation. The Inspector had previously been provided with an invoice issued by Rose & Thistle to Dupont for $565, 339.34 which includes an entry for construction management services of $175,300.30, said in the invoice to be "10% of hard costs", implying that Rose & Thistle had supervised construction that cost approximately $1.75 million. The updated general ledger for Dupont received by the Inspector on October 24 showed capitalized expenses of approximately $248,000, construction in progress of $36,000 and various consulting fees of approximately $563,000. All of these documents show different construction expenditures, none nowhere near the implied cost of $1.75 million.

[36] This Dupont budget was the only budget for any of the projects provided to the Inspector by the time of his last report dated October 31, 2013, one day before this motion was heard. The

Inspector concludes that it appears that Rose & Thistle is not maintaining project budgets on an ongoing basis to track expenses and measure construction costs against the pro forma statement prepared when the property was purchased.

[37] Fraser Properties owns property at 30 Fraser Avenue and Fraser Lands owns abutting property purchased in October 2012. Dr. Bernstein made an equity contribution of approximately $16 million. Fraser Properties transferred $10,281,050 to Rose & Thistle and received back $1,215,100. Thus Rose & Thistle retained $9,065,950. In his first report, Mr. Schonfeld said he had inspected the property and saw no construction work or evidence of recent construction work. In his supplement to his first report, after he had received the general ledger and invoices from Rose & Thistle to Fraser Properties, he reported that the invoices to Fraser Properties were approximately $1.6 million. Assuming the invoices can be supported, that would mean that Rose & Thistle has received approximately $7.4 million more from Fraser Properties than it invoiced to Fraser Properties. It is to be noted that at the time of the Inspector's first report, the books and records showed an intercompany receivable due to Rose & Thistle from the companies of approximately $9.9 million. By the time of the first supplement to the Inspector's report three days later, after the invoices and general ledger had been received and reviewed, this amount was reduced to approximately $3.9 million, due to a new debit showing as being owed by Rose & Thistle to Fraser Properties of approximately $6.45 million.

[38] On October 31, 2013 Mr. Campion on behalf of the respondents wrote to counsel to the applicants and to the Inspector and referred to the Inspector asking which filing cabinet he could review to obtain the documents requested, such as third party invoices, contracts, payroll records or other contemporaneous documents. Mr. Campion said that the information sought can only be obtained through discussion with the staff as all documentation is on computer and not in a filing cabinet. This is troubling to the Inspector. It would mean that there is no paper of any kind in existence for $35 million of costs said to have been incurred, or that it has all been scanned and thrown out. It would be unusual to scan it and throw it out, and questionable that it was all scanned when Rose & Thistle was two years late in their bookkeeping and according to Ms. Walton had an outdated software system.

[39] Since the Inspector was appointed, Rose & Thistle has been preparing invoices for work done going back to January 2012, and one may question where the information is coming from to do that. Mr. Campion was undoubtedly passing on what he was told by Ms. Walton, but what he was told raises concerns.

(vii) Other equity investors

[40] The agreements provided that the only shares to be issued were to Dr. Bernstein's corporations or to the Walton's corporations and neither could transfer shares to another party without the consent of the other party. However, in his prior affidavit, Mr. Reitan provided documentary evidence that disclosed that the Waltons have taken on new equity investors in at least one project, without the agreement of Dr. Bernstein. This issue was not answered by Ms. Walton in her affidavit of October 31, 2013, the failure of which is compounded in that Ms. Walton did not disclose, as previously discussed, what equity contributions have been made by the Waltons for any of the properties.

Legal principles and analysis

[41] Section 101 of the *Courts of Justice Act* provides for the appointment of a receiver/manager where it appears to a judge to be just and convenient to do so. In *Royal Bank of Canada v. Chongsim Investment Ltd.* (1997), 32 O.R. (3d) 565, Epstein J. (as she then was) discussed what should be considered in deciding whether to make such an order. She stated:

> The jurisdiction to order a receiver is found in s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. This section provides that a receiver may be appointed where it appears to be just and convenient. The appointment of a receiver is particularly intrusive. It is therefore relief that should only be granted sparingly. The law is clear that in the exercise of its discretion, the court should consider the effect of such an order on the parties. As well, since it is an equitable remedy, the conduct of the parties is a relevant factor.

[42] Section 248 of the OBCA also provides for the appointment of a receiver manager if there has been oppression as contained in section 248(2). Under section 248(2) a court may make an order to rectify the matters complained of and section 248(3) provides:

> (3) In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,
>
> [...]
>
> (b) an order appointing a receiver or receiver-manager;

[43] Various cases other than the *Chongsim Investment* case have discussed the principles to be taken into account. See *Anderson v. Hunking*, [2010] O.J. No. 3042 and *Bank of Montreal v. Carnival Leasing Limited* (2011), 74 C.B.R. (5th) 300 and the authorities referred to in those cases.

[44] In my view this is not a case in which the applicants are seeking an interim order appointing a receiver/manager. They do not seek an interim order. They seek the appointment on the basis of evidence that is largely uncontested by Ms. Walton. I would agree with the respondents that if the evidence relied on by the applicants for the order sought was largely contested, the relief should be considered on the basis that it is interim relief. However, that is not the case. In any event, even if the *RJR MacDonald* tri-part test were applicable, that would not be materially different in this case from the test articulated by Epstein J. in *Chongsim Investment* that requires a consideration of the effect of the order sought on the parties and their conduct.

[45] In my reasons when the Inspector was appointed on October 4, 2013, I found oppression had occurred as follows:

> [27] In my view, on the record before me Dr. Bernstein has met the test required for an investigation to be ordered. To put on two mortgages for $6 million without the required agreement of Dr. Bernstein and then refuse to disclose what happened to the money except in a without prejudice mediation meets the higher test of oppression, let alone the lesser test of unfairly disregarding the interests of Dr. Bernstein. The other examples of the evidence I have referred, as well as the failure to provide monthly reports on the projects to Dr. Bernstein, are clearly instances of the Waltons unfairly being prejudicial to and unfairly disregarding the interests of Dr. Bernstein, a 50% shareholder of each of the owner corporations.

[46] I do not see the picture as now being less clear. To the contrary, it seems much clearer. I have referred to the concerns above in some detail. They include the following:

1. $2.1 million was improperly taken from the proceeds of the $6 million mortgages that never had Dr. Bernstein's approval, $400,000 of which was taken by Ms. Walton into her personal bank account. Ms. Walton was well aware that this was wrong. She is a lawyer and the agreements were drawn in her office. Her initial reaction when confronted about the mortgages by Mr. Reitan, who at the time did not know what had happened to the mortgage proceeds, that she would only discuss it in a without prejudice mediation is a clear indication she knew what she did was wrong and contrary to Dr. Bernstein's interests.

2. $268,104.57 was improperly paid from the Tisdale Mews account to pay for renovations to the Waltons' residence. No reasonable explanation has been provided.

3. The co-mingling of accounts and the cash sweep into the Rose & Thistle accounts was a breach of agreement and unfairly prejudicial to Dr. Bernstein and a disregard of his interests. This is particularly the case in light of the lack of current books and records that should have been prepared and available rather than requiring an Inspector to try to get to the bottom of what has occurred. A lack of records is in itself unfairly disregarding the interests of Dr. Bernstein, particularly taken the size of his investment. Blaming it on outdated computer software is hardly an answer. That should have been taken care of long ago.

4. The frenzied attempts in the past month since the Inspector was appointed to update ledgers and manufacture invoices should never have been necessary and in light of the evidence, obviously casts doubt on what is now being done to update the records. Dr. Bernstein should never have had to face this prejudicial situation.

5. The Waltons have not provided equal payments of money into any of the 31 properties. The claim that their equity was provided by way of set-off for fees and

work, even if that were permissible under the agreements, is unsupported by any available documents to the Inspector. What little has been provided raises serious issues, as discussed above. As well, taking in new equity partners is not at all what Dr. Bernstein signed up for, and indicative of a lack of ability of the Waltons to fund their equity in accordance with the agreements.

6. Dr. Bernstein was entitled to monthly reports. It is now quite evident why that has not occurred.

[47] Mr. Campion contended that a receiver/manager could not be ordered over any particular property without a finding of oppressive conduct regarding that property. I am not at all sure that such a proposition in this case is correct, but in any event there has been oppressive conduct regarding each property. The co-mingling of funds and the sweep of cash from each property's account into Rose & Thistle was oppressive in these circumstances in which there were no contemporaneous books and records kept that would permit Dr. Bernstein, or now the Inspector, to fully understand what occurred to the money from each property. The setting up of alleged fees owing to Rose & Thistle for the properties to substantiate the Waltons' equity contributions, even if permissible, without readily available documentation to substantiate the validity of the fees, was oppressive. The lack of records and reports for each property was oppressive.

[48] It is contended on behalf of the respondents that they have the contractual right to manage the projects and thus no receiver/manager should be appointed. The difficulty with this argument is that the contracts have been breached and the Waltons have certainly not shown themselves to be capable managers. A basic lack of record keeping, compounded by co-mingling of funds and transferring them to Rose & Thistle, belies any notion of proper professional management. Ms. Walton acknowledges that accounting and other issues "have plainly caused him [Dr. Bernstein] to lose confidence in my management". That is a fundamental change to the relationship.

[49] It is contended that the business will be harmed if a receiver/manager is appointed. Ms. Walton states in her affidavit that she believes that the dynamic nature of this portfolio will suffer and in the end suffer unnecessary losses. What is meant by the dynamic nature is not clear.

I recognize that a receiver/manager can in certain circumstances have negative implications in the marketplace, particularly if it means that unsold properties will have to be put up for sale at less than market prices or be sold quickly. There is no indication that is the plan here at all and there is no court ordered sale being requested.

[50] It is also to be recognized that a receiver/manager can bring stability to a situation, which in this case appears to be a requirement to protect the interests of Dr. Bernstein.

[51] Dr. Bernstein with his $100 million plus investment has a huge financial interest in this portfolio of properties. It is hardly in his interest to have the properties dealt with in less than a sound commercial way. He suffers the same risk as the Waltons, and depending on what real equity the Waltons have put in, perhaps far more. The Waltons contend that they have huge financial risk in that they have guaranteed mortgages to the tune of some $206 million. They have not offered any evidence that there is any likelihood of being called upon on their guarantees, and to the contrary Ms. Walton says that all of the projects except perhaps one or two of them are or expected to be profitable. There is no reason why an experienced receiver/manager with capable property managers cannot continue with the success of the ventures.

[52] The respondents contend that with the controls over the bank accounts and the other provisions of the two orders made to date, there is plenty of protection for Dr. Bernstein. There may be something in this argument, but it ignores one of the basic problems caused by the way the business has been run. There is no clear evidence yet what exactly has been put into the properties by the Waltons, and that is crucial to understanding what both Dr. Bernstein and the Waltons are entitled to. In the month since the Inspector was appointed, Ms. Walton has caused back dated invoices to be prepared for past work said to have been done. What they have been prepared from is not at all clear. With some of the troubling things about changing records that have become apparent as a result of digging by Mr. Reitan and the Inspector, discussed above, and the diversion of money that has taken place, there is reason to be concerned exactly what Ms. Walton is doing to shore up her position. The Inspector is not in a position to know what is being prepared on an *ex post facto* basis or from what, and Dr. Bernstein should not have to rely

on a hope that something untoward will no longer be done. The present situation is causing considerable harm to Dr. Bernstein.

Conclusion

[53] Schonfeld Inc. is appointed as manager/receiver of all of the properties in schedule B, effective immediately. I was provided with a draft order that is based on the model order in use in our Court and approved by the Users' Committee. It appears satisfactory but there were no submissions as to its terms. If the respondents have any submissions with respect to the draft order, they are to be made in writing within three days and the applicants or Schonfeld Inc. shall have until Wednesday of next week to respond. In the meantime, the appointment of Schonfeld Inc. as manager/receiver is not to be delayed and Schonfeld Inc. shall immediately have the powers contained in the draft order pending any objection to it by the respondents.

[54] The applicants have applied to have Schonfeld Inc. appointed as receiver over four properties mortgaged to Dr. Bernstein with expired mortgages that are not schedule B corporations. Ms. Walton has stated in her affidavit that funds are being raised that will see these mortgages paid in full by the end of November, 2013. In light of that statement, this application is adjourned *sine die*. It can be brought on after the end of November in the event that the mortgages have not been paid in full.

[55] The applicants have also requested a certificate of pending litigation over 44 Park Lane Circle, the residence of the Waltons in light of the evidence that money from one of the 31 schedule Dr. Bernstein corporations was used to pay for renovations to the residence. I was advised by counsel for Ms. Walton during the hearing of the motion that the money would be repaid that day. Based on that statement, the request for a certificate of pending litigation is adjourned *sine die* and can be brought back on in the event that evidence of the payment is not provided to the applicants and Schonfeld Inc.

[56] The Inspector moved for approval of his interim reports and the actions taken as disclosed in the reports, and approval for his fees and disbursements and those of his counsel. No one opposed the request although Mr. Campion said that the respondents were not consenting to

them. In my view, the actions taken by the Inspector have been entirely proper in difficult circumstances and in her affidavit Ms. Walton acknowledges that the Inspector was necessary because of her issues. The fees and disbursements also appear reasonable. At the conclusion of the hearing I granted the order sought.

[57] The applicants are entitled to their costs from the respondents. If costs cannot be agreed, brief written submissions along with a proper cost outline may be made within 10 days and brief written reply submissions may be made within a further 10 days.

"Newbould J."

Newbould J.

Date: November 5, 2013

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CITATION: DBDC Spadina Ltd. v. Walton, 2014 ONSC 4644
COURT FILE NO.: CV-13-10280-00CL
DATE: 20140812

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, Respondent in person

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

M. Dunn and J. LaBine, for Schonfeld Inc., Manager and Inspector

J. Simpson, for Harbour Mortgage

D. Jackson and R. Fisher, for Christine DeJong, Michael DeJong, Christine DeJong Medical Professional Corporation, C2M2S Holding Corp. and DeJong Homes Inc.

L. Wallach, for the Handelman/Sorga mortgagees

G. Benchetrit, for the Business Development Bank of Canada

D. Michaud, for Equitable Bank

A. Jackson, for Home Trust Company

J. Marshall, for Firm Capital Credit Corp.

HEARD: July 16, 17 and 18, 2014, with subsequent written submissions filed July 30, 2014 by the Applicants, Respondents and Inspector.

REASONS FOR DECISION

I. Overview of the Motions and Return of Application

[1] Between September, 2010 and June, 2013, Dr. Bernstein, through his Applicant companies, invested in a portfolio of 31 properties in Toronto with the Respondents, Norma and Ronauld Walton. Each property was held by a corporation – the "Schedule B Companies" – jointly owned by Dr. Bernstein and the Waltons. The Applicants contributed to the Schedule B Companies $2,568,694 by way of equity, $78,490,801 by way of equity advances converted into debt, largely shareholder loans, and they advanced $23,340,000 under mortgages.[1] Dr. Bernstein advanced mortgage funds against both Schedule B Companies and what the parties have called "Schedule C Properties", which were owned by companies – Schedule C Companies – controlled by the Waltons in which Dr. Bernstein did not have an ownership interest.[2]

[2] These motions by the Applicants and Respondents, and the return of the Applicants' application, deal with further issues in the on-going litigation between Dr. Bernstein and the Waltons concerning the need for the Respondents to account for funds, and to be held accountable for funds, invested by Dr. Bernstein and his companies with them.

[3] As well, Christine DeJong Medical Professional Corporation, C2M2S Holding Corp. and DeJong Homes Inc., other investors with the Waltons, brought a cross-motion seeking relief in respect of one Schedule C Property, 3270 American Drive, Mississauga.

[4] In a separate, handwritten endorsement made at the end of the hearing on July 18, 2014, I made an Interim Order restraining any further dealings with the Schedule C Properties in dispute until the release of these Reasons.

II. Background

[5] Dr. Bernstein is the founder of diet and health clinics. Norma Walton is a lawyer and co-founder with her husband, Ronauld Walton, of the Respondent, The Rose and Thistle Group Ltd. (the "Rose & Thistle"). Called to the Bar in 1995, Ms. Walton was a principal of Walton Advocates, an in-house law firm providing legal services to the Rose & Thistle group of companies. By Decision dated May 16, 2014, the Law Society of Upper Canada's Hearing Division suspended Ms. Walton's licence for 18 months starting on July 1, 2014; the Law Society has appealed that Decision as too lenient.

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[1] Second Report of the Inspector, Appendix B. James Reitan, the CFO of Dr. Bernstein Diet and Health Clinics, put the amounts advanced at approximately $78.8 million in equity and $27.6 million in mortgages.

[2] The terms of five of the mortgages have expired and they remain unpaid. The terms of the other four mortgages will expire between July and December, 2014.

[6] Ronauld Walton is also a lawyer, a principal of Walton Advocates and a co-founder of Rose & Thistle.

[7] Newbould J., in his Reasons of October 7, 2013 appointing Schonfeld Inc. as Inspector of the Schedule B Companies, [3] set out many of the background events to this dispute:

> [5] Beginning in 2008, Dr. Bernstein acted as the lender/mortgagee of several commercial real estate properties owned by the Waltons either through Rose & Thistle or through other corporations of which they are the beneficial owners.
>
> [6] Following several financings, Dr. Bernstein and the Waltons agreed to invest jointly in various commercial real estate projects. To date, Dr. Bernstein has invested approximately $110,000,000 into 31 projects…
>
> …
>
> [7] Dr. Bernstein and the Waltons entered into separate agreements which provided as follows:
>
> a. A new company would be incorporated for each project (the "Owner Company");
>
> b. Dr. Bernstein (through a company incorporated for this purpose) would hold 50% of the shares of the Owner Company;
>
> c. The Waltons (either directly or through a company incorporated for this purpose) would hold the other 50% of the shares of the Owner Company;
>
> d. Each of Dr. Bernstein and the Waltons would contribute an equal amount of equity to each project;
>
> e. The Waltons would manage, supervise and complete each project for an additional fee through Rose & Thistle. Rose & Thistle is not a party to the agreements;
>
> f. The Waltons also agreed to be responsible for the finances, bookkeeping, accounting and filing of tax returns, among other things, of the Owner Company;
>
> g. Each Owner Company was to have a separate bank account;
>
> h. Dr. Bernstein would not be required to play an active role in completing each project, but his approval would be required for:

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[3] 2013 ONSC 6251

i. Any decisions concerning the selling or refinancing of each property;

ii. Any decisions concerning the increase in the total amount of equity required to complete each project; and

iii. Any cheque or transfer over $50,000.

i. The Waltons agreed to provide Dr. Bernstein with:

i. Ongoing reports on at least a monthly basis detailing all items related to each property;

ii. Copies of invoices for work completed each project monthly;

iii. Bank statements monthly; and

iv. Listing of all cheques monthly;

j. Upon sale of a property, Dr. Bernstein and the Waltons would receive back their capital contribution plus a division of profits; and

k. The agreements generally provided that Dr. Bernstein and Norma Walton were to be the sole directors of the Owner Company.

[8] A review by James Reitan, director of accounting and finance at Dr. Bernstein Diet and Health Clinics, in the early summer of 2013 and into early September 2013 revealed that:

a. The Waltons were not making their portion of the equity investments into the properties;

b. The Waltons appeared to be taking on third party investors in the projects;

c. The Waltons were engaged in significant related party transactions in respect of the projects through and using Rose & Thistle;

d. Dr. Bernstein's approval was not being sought for any of the matters set out in subparagraph 7(h) above;

e. Dr. Bernstein was not receiving any of the required reporting, set out in subparagraph 7(i) above;

f. The mortgage payment for August 2013 for 1450 Don Mills did not go to the mortgagee, Trez Capital, but to Rose & Thistle. No documentation has been provided to confirm that the payment was made from Rose & Thistle to Trez Capital. There is no legitimate purpose for the payment going through Rose & Thistle;

g. Additional mortgages of $3 million each were placed on 1450 Don Mills Road and 1500 Don Mills Road on July 31, 2013 and August 1, 2013 respectively, of which Dr. Bernstein had no knowledge and which he did not approve;

h. It appears that there has been extensive co-mingling of the Owner Companies' funds with and into the bank accounts of Rose & Thistle;

i. Rose & Thistle has removed funds from the Owner Companies, which have been recorded as intercompany amounts owing from Rose & Thistle to the Owner Companies;

j. Rose & Thistle has rendered invoices to the Owner Companies, which in some cases have the effect only of reducing the intercompany amount owed by Rose & Thistle, for work and services that have yet to be performed;

k. The Waltons have entered into a series of transactions which have the result of reversing equity contributions made by them and immediately removing equity contributions by the Applicants; and

l. The Owner Companies have incurred significant interest and penalty charges for late penalties of utilities, without explanation.

> [9] On September 20, 2013, Dr. Bernstein appointed Schonfeld Inc. on behalf of the applicants to gather information related to the Owner Companies, the projects and the properties. Schonfeld Inc. has not been granted complete access to the documents (including bank statements, invoices and other documentation) related to 22 of 31 projects. Ms. Walton has indicated that she requires a further matter of weeks to make available the documents for the remainder of the projects.

[8] Most of the Applicants' equity contributions were advanced directly to Schedule B Companies, but some were paid to a Walton company, Rose & Thistle, for transfer to a Schedule B Company, and some were paid directly to a real estate agent for the purpose of acquiring a Schedule B Property.[4]

[9] By order made October 7, 2013, Newbould J. appointed Schonfeld Inc. as Inspector of the Schedule B Companies pursuant to section 161(2) of the *Ontario Business Corporations Act*, R.S.O. 1990, c. B.16. In making that appointment, Newbould J. concluded:

> [27] In my view, on the record before me Dr. Bernstein has met the test required for an investigation to be ordered. To put on two mortgages for $6 million without the required

[4] Aide Memoire to Reply Argument of the Applicants, Schedule E.

> agreement of Dr. Bernstein and then refuse to disclose what happened to the money except in a without prejudice mediation meets the higher test of oppression, let alone the lesser test of unfairly disregarding the interests of Dr. Bernstein. The other examples of the evidence I have referred, as well as the failure to provide monthly reports on the projects to Dr. Bernstein, are clearly instances of the Waltons unfairly being prejudicial to and unfairly disregarding the interests of Dr. Bernstein, a 50% shareholder of each of the owner corporations.
>
> [28] Ms. Walton contends in her affidavit that the appointment of an inspector would likely preclude the respondents from further discharging their accounting and reporting functions. I fail to see how this could be the case, and in any event the evidence is clear that the Waltons have failed to properly provide monthly reports.[5]

[10] About one month later, on November 5, 2013, Newbould J. granted the Applicants' request to appoint Schonfeld Inc. as the receiver – or what the parties styled as the Manager - of the Schedule B Companies. That order was affirmed by the Court of Appeal on May 21, 2014.[6] I will return to the November 5 Reasons at various points in this decision, but for purposes of this background narrative I need only highlight the key findings of fact made by Newbould J. which led him to appoint the Manager:

> [46] I do not see the picture as now being less clear [than on October 7]. To the contrary, it seems much clearer. I have referred to the concerns above in some detail. They include the following:
>
> 1. $2.1 million was improperly taken from the proceeds of the $6 million mortgages that never had Dr. Bernstein's approval, $400,000 of which was taken by Ms. Walton into her personal bank account. Ms. Walton was well aware that this was wrong. She is a lawyer and the agreements were drawn in her office. Her initial reaction when confronted about the mortgages by Mr. Reitan, who at the time did not know what had happened to the mortgage proceeds, that she would only discuss it in a without prejudice mediation is a clear indication she knew what she did was wrong and contrary to Dr. Bernstein's interests.
>
> 2. $268,104.57 was improperly paid from the Tisdale Mews account to pay for renovations to the Waltons' residence. No reasonable explanation has been provided.
>
> 3. The co-mingling of accounts and the cash sweep into the Rose & Thistle accounts was a breach of agreement and unfairly prejudicial to Dr. Bernstein and a disregard of his interests. This is particularly the case in light of the lack of current books and records that should have been prepared and available rather

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[5] *Ibid.*, paras. 27 and 28.
[6] 2014 ONCA 428

than requiring an Inspector to try to get to the bottom of what has occurred. A lack of records is in itself unfairly disregarding the interests of Dr. Bernstein, particularly taken the size of his investment. Blaming it on outdated computer software is hardly an answer. That should have been taken care of long ago.

4. The frenzied attempts in the past month since the Inspector was appointed to update ledgers and manufacture invoices should never have been necessary and in light of the evidence, obviously casts doubt on what is now being done to update the records. Dr. Bernstein should never have had to face this prejudicial situation.

5. The Waltons have not provided equal payments of money into any of the 31 properties. The claim that their equity was provided by way of set-off for fees and work, even if that were permissible under the agreements, is unsupported by any available documents to the Inspector. What little has been provided raises serious issues, as discussed above. As well, taking in new equity partners is not at all what Dr. Bernstein signed up for, and indicative of a lack of ability of the Waltons to fund their equity in accordance with the agreements.

6. Dr. Bernstein was entitled to monthly reports. It is now quite evident why that has not occurred.

[47] Mr. Campion contended that a receiver/manager could not be ordered over any particular property without a finding of oppressive conduct regarding that property. I am not at all sure that such a proposition in this case is correct, but in any event there has been oppressive conduct regarding each property. The co-mingling of funds and the sweep of cash from each property's account into Rose & Thistle was oppressive in these circumstances in which there were no contemporaneous books and records kept that would permit Dr. Bernstein, or now the Inspector, to fully understand what occurred to the money from each property. The setting up of alleged fees owing to Rose & Thistle for the properties to substantiate the Waltons' equity contributions, even if permissible, without readily available documentation to substantiate the validity of the fees, was oppressive. The lack of records and reports for each property was oppressive.

[48] It is contended on behalf of the respondents that they have the contractual right to manage the projects and thus no receiver/manager should be appointed. The difficulty with this argument is that the contracts have been breached and the Waltons have certainly not shown themselves to be capable managers. A basic lack of record keeping, compounded by co-mingling of funds and transferring them to Rose & Thistle, belies any notion of proper professional management. Ms. Walton acknowledges that accounting and other issues "have plainly caused him [Dr. Bernstein] to lose confidence in my management". That is a fundamental change to the relationship.

[49] It is contended that the business will be harmed if a receiver/manager is appointed. Ms. Walton states in her affidavit that she believes that the dynamic nature of this portfolio will suffer and in the end suffer unnecessary losses. What is meant by the dynamic nature is not clear. I recognize that a receiver/manager can in certain

> circumstances have negative implications in the marketplace, particularly if it means that unsold properties will have to be put up for sale at less than market prices or be sold quickly. There is no indication that is the plan here at all and there is no court ordered sale being requested.

[11] As of the July hearing of these motions and application, the Manager had sold 12 of the Schedule B Properties over which it had been appointed for purchase prices totaling $127.013 million. After the payment of existing mortgages, those sales had netted $18.908 million. As of July 9, 2014, the total value of the construction liens registered against the sold properties was $1.228 million.

III. The positions of the parties and the relief requested

A. The Applicants

[12] Later in these Reasons I shall deal at length with the relief sought by each side. By way of summary of the issues engaged by these motions, the Applicants advanced the following positions:

(i) The Respondents had unjustly enriched themselves by improperly diverting funds from the Schedule B Companies to Rose & Thistle and the Schedule C Companies, and the diverted funds should be made subject to a constructive trust to be re-conveyed to the Schedule B Companies. The diverted funds can be traced into the Schedule C Properties and the Court should declare a constructive trust over 44 Park Lane Circle and the Schedule C Properties in favour of the Schedule B Companies in the total amount of $23.6 million;

(ii) The Waltons were fiduciaries of the Schedule B Companies and breached their fiduciary duty when they diverted the funds. That conduct also was oppressive conduct and should be remedied by granting the proprietary interest of a constructive trust in Schedule C Companies/Properties;

(iii) The Waltons' shares in the Schedule B Companies should be cancelled and any entitlement to any finds flowing therefrom disallowed; and,

(iv) A damages award in the amount of $78,420,418 should be made in any event against the Respondents, together with certain ancillary relief including the appointment of a receiver over the property of the Waltons.

B. Norma Walton

[13] Norma Walton advanced three basic positions at the hearing: (i) the Respondents had accounted for the monies advanced to them by the Applicants; (ii) the jointly-owned Schedule B

Companies actually owed the Waltons' Rose & Thistle money, not the other way around; and, (iii) the restrictions placed on the Waltons' ability to deal with their Schedule C Properties by previous Court orders should be removed and they should be entitled to sell those properties in order to satisfy the claims of all their creditors and investors, except for Dr. Bernstein.

IV. Structure of these Reasons

[14] At the heart of these motions, cross-motions and return of application lie two issues: (i) Did the Waltons use the funds advanced to them by the Applicants as their contracts required? (ii) If they did not, did the Waltons use some or all of the funds advanced by the Applicants to their own personal benefit, including the benefit of their Schedule C Companies/Properties?

[15] For the reasons set out below, I conclude that the Waltons did not use the funds advanced to them by the Applicants as their contracts required but, instead, the Waltons mis-used and mis-appropriated most of the funds advanced to them, diverting some of the funds to their own personal benefit and the benefit of their Schedule C Companies. I further conclude that the Waltons have not provided the full accounting of how they in fact used those funds, notwithstanding the October 25, 2013 Order of this Court that they do so.

[16] The Inspector conducted an extensive, but not exhaustive, analysis tracing how the Waltons used the funds advanced to them by the Applicants. The Inspector presented its findings on the amount of the "net transfer" of funds between the jointly-owned Schedule B Companies and Rose & Thistle, and the amount of the "net transfer" of funds between Rose & Thistle and the Walton-owned Schedule C Companies and Properties. Those net transfer analyses formed the focal point of the arguments by both parties, with the Applicants contending that the Waltons had not explained the net transfers out of the Schedule B Companies to Rose & Thistle, and with Norma Walton taking the position that she had. In light of that structure to the evidence and the parties' arguments, I plan to review the evidence in the following manner:

(i) First, I shall examine the evidence about how the funds advanced by the Applicants were used by the Respondents, in particular the evidence of the "net transfer" of funds from the Schedule B Companies to Rose & Thistle and the net transfer of funds from Rose & Thistle to the Schedule C Companies;

(ii) Second, I will examine the evidence concerning the costs of construction actually incurred on behalf of the Schedule B Company projects, focusing on the Respondents' contention that the construction fees charged by Rose & Thistle to the Schedule B Companies were legitimate and explained much of the apparent net transfer of funds to Rose & Thistle;

(iii) Next, I will examine the evidence of the tracing which the Inspector conducted of the Applicants' funds into Schedule C Companies and Properties; and,

(iv) Finally, I will consider the evidence relating to the arguments made by the Respondents explaining their use of the Applicants' funds.

V. The use of the Applicants' funds: the "net transfer" analysis

A. The reports of the Inspector

[17] The Inspector conducted a tracing analysis of some of the funds advanced by the Applicants to the Schedule B Companies. The scope of its analysis was described in the Inspector's Fourth Interim Report (April 23, 2014). The Inspector identified the largest 53 advances by the Applicants to the Schedule B Companies and then examined the activity in the relevant Schedule B Company bank account immediately following each advance. The Inspector then looked for any contemporaneous transfer of funds from the relevant Schedule B Company account to the Rose & Thistle bank account and, finally, examined the Rose & Thistle bank account to ascertain what activity occurred following the receipt of the funds transferred in from the Schedule B Company account, in particular whether there was any contemporaneous transfer of funds from the Rose & Thistle account to a Schedule C Company's account.

[18] In its Fourth Report the Inspector set out the following findings:

> In all but two cases reviewed to date, a portion of those funds provided by the Applicants and deposited to the [Schedule B] Company Accounts were immediately (on the same day and/or during the next few days) transferred from the relevant Company Account to the Rose & Thistle account. In the two exceptions, all of the funds provided by the Applicants to the Company Account were used by the [Schedule B] Company immediately.
>
> Funds transferred into the Rose & Thistle Account were then used in one or more of the following ways: (a) transferred to a Walton Account; (b) transferred to other [Schedule B] Company Accounts; and (c) used to make payments directly out of the Rose & Thistle Account. The accuracy with which a specific dollar contributed by the Applicants can be matched to a specific use depends primarily on the opening balance and the level of activity in the Rose & Thistle Account when the funds were transferred. When funds contributed to a Company were transferred into the Rose & Thistle Account, funds were also transferred into and/or out of the Rose & Thistle Account by or to other Companies or Walton [Schedule C] Companies. In such cases, it is possible to trace funds out of the Rose & Thistle Account into accounts held by the Companies or the Walton Companies but it is not possible to match exactly the funds transferred out of the Rose & Thistle bank account to the funds transferred in as the funds have been co-mingled.

In support of those observations, the Inspector attached as Exhibit F to its Fourth Report a series of flowcharts which summarized the use of funds advanced by the Applicants to various Schedule B Companies.

[19] In its Fifth Report dated July 1, 2014, the Inspector reported that it had continued its tracing analysis and recorded the following further findings:

> The Inspector's analysis to date supports the following conclusions:
>
> (a) The Respondents directed transfers of $23.6 million (net) from the [Schedule B] Company Accounts to a bank account belonging to the Rose & Thistle Group Limited (the "Rose & Thistle Account") during the period from October 2010 to October 2013. These transfers occurred on a regular and ongoing basis during the period examined;
>
> (b) During the same period, the Respondents directed transfers of $25.4 million (net) from the Rose & Thistle Account to companies that they own without the Applicants (the "Walton Companies" [or Schedule C Companies]). These transfers also occurred on a regular and ongoing basis during the period examined;
>
> (c) In almost all cases, some or all of the amounts advanced to the Companies by the Applicants were transferred almost immediately to the Rose & Thistle account;
>
> (d) In seven instances identified by the Inspector, all of the following occurred in a brief period of time:
>
> (i) funds were transferred from one or more Company Accounts;
>
> (ii) funds were then transferred to a Walton Company; and,
>
> (iii) the relevant Walton Company purchased a property.
>
> Based on the foregoing analysis, and the analysis set out below, the Inspector has concluded that the Respondents used new equity invested in, and mortgage amounts advanced to, the Companies by the Applicants to fund the ongoing operations of other Companies and the Walton Companies. Almost every time the Applicants advanced funds to one of the Companies, a significant portion of those funds was transferred to Rose & Thistle. In some instances, funds could be traced directly into a Walton Company. In other instances, funds could not be traced directly because the Applicants' funds were co-mingled with other funds in the Rose & Thistle Account. However, the Inspector has concluded that the Applicants' investment in the Companies was a major source of funds for the Walton Companies.
>
> The Respondents have sought to justify the movement of funds from the Companies to Rose & Thistle on the basis that these transfers were payments for services rendered by the Respondents to the Companies. To date, the Respondents have not provided evidence to substantiate the majority of the alleged fees and the Inspector has found evidence that is not consistent with this explanation. In particular:
>
> (a) the transfer of funds observed by the Inspector is more consistent with funds being taken as needed to fund obligations in the other Companies and the Walton Companies than funds being taken as payment for services rendered. In some cases, funds were transferred by Companies immediately after those companies acquired

Properties and/or invoices were rendered for the exact amount transferred from a particular Company during the preceding period;

(b) there is no evidence that the Respondents possessed sufficient funds to pay for both the construction activity that they alleged to have carried out and the transfers observed to the Walton Companies; and,

(c) in some cases funds have been transferred from Companies, and the Respondents have delivered invoices for construction work, where little or no work had been done on the relevant Property. Moreover, the various Companies owned Properties in different stages of construction and development but none of the Companies retained any substantial cash reserve from the Applicants' initial investment to fund future construction costs.

[20] In her Factum Ms. Walton accepted the Inspector's finding that the net amount of $23,680,852 had been transferred by the Schedule B Companies to Rose & Thistle.[7]

[21] However, Ms. Walton disputed the Inspector's view that the Respondents lacked sufficient funds to pay for both the construction activity they alleged they carried out and the transfers observed to the Schedule C Companies. Ms. Walton deposed that every dollar transferred from the Schedule B Companies to Rose & Thistle was for legitimate work completed and amounts owed to it. As well, Ms. Walton took the position that Schedule B Companies currently owed the Rose & Thistle additional sums for services rendered, but not yet paid. In its Supplement to its Fifth Report the Inspector responded:

> In general terms, the Inspector agrees that construction and development work occurred at the properties identified by Ms. Walton. The Inspector has never asserted that Rose & Thistle did not perform any construction or development work. The Inspector is of the view, however, that Rose & Thistle has failed to provide documents to substantiate a level of construction and development work commensurate with the funds transferred to it from the Companies. In the Inspector's view, construction and development work on the scale alleged by the Respondents would be supported by a significant volume of relevant records including invoices from subcontractors, consultants and suppliers, timesheets, payroll records, progress draws and other similar documents. The supporting documents are (with limited exceptions) notably absent from the materials provided to the Inspector and the court…

B. The Froese Forensics limited critique report

[22] Ms. Walton retained Mr. Ken Froese, of Froese Forensic Partners ("Froese"), to prepare a response to the first Four Reports of the Inspector. Froese prepared a Forensic Accounting

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[7] Factum of the Respondent Norma Walton, para. 49.

Report dated June 25, 2014 in the nature of a limited critique report. That report did not contain a statement of the expert's qualifications as required by Rule 53.03(2.1)(2) of the *Rules of Civil Procedure*.[8] An acknowledgment of expert's duty form was filed only when Ms. Walton filed her reply factum. Although Froese did not swear an affidavit through which to tender his report, thereby rendering the report hearsay, in the result the Applicants cross-examined him on his report. Under those circumstances, I am prepared to overlook those deficiencies in the Froese Report, and I will accept it as an expert's report properly tendered under Rule 53.03.

[23] The first area dealt with by Froese concerned the tracing analysis performed by the Inspector. Froese had written to the Inspector on May 30, 2014 requesting certain information. The Inspector met with Froese on June 3 and 10, 2014. Froese made the following observations about the Inspector's tracing analysis:

(a) Although the Inspector stated that the tracing analysis was based on the 53 largest advances by the Applicants, Froese identified four other mortgage advances made by the Applicants which were larger in amount;

(b) In respect of the 53 advances traced by the Inspector, Froese stated that $35.2 million of the $55.8 million was transferred from Schedule B Companies to the Rose & Thistle Account: "Our conclusion in reviewing the Inspector's tracing of the 53 Advances is that many of the advances are co-mingled in the Rose & Thistle clearing account and thus cannot be directly traced to Schedule C Companies";

(c) The net transfer from Rose & Thistle to Walton-owned Schedule C Companies identified by the Inspector as amounting to $25,464,492 should be reduced by $1 million to take into account certain unrecorded deposits;

(d) The net amount owing from Schedule C Companies to Rose & Thistle does not represent a direct tracing of the Applicants' funds to Schedule C Companies or an amount owing by Schedule C Companies to Schedule B Companies.

[24] Froese's general conclusion about the Inspector's tracing analysis was as follows:

> Although we concluded that there are very few examples of a direct tracing of advances from Dr. Bernstein to Schedule B Companies that traced to the Rose & Thistle clearing account and then to Schedule C Companies without co-mingling with other sources of funds, *this does not negate the fact that, over all, net funds flowed to Schedule C Companies from Rose & Thistle, and that net funds flowed to Rose & Thistle from Schedule B Companies*. Rather,

[8] Mr. Froese's CV and retainer letters were produced and marked as exhibits on his July 8, 2014 cross-examination.

in our view it means that each Schedule C Company needs to be evaluated from the perspective of:

1) the tracing analysis performed by the Inspector, in conjunction with our comments on the tracing for particular advances; and,

2) the *overall* net transfer position of each Schedule C Company, as reflected in the net transfers schedule prepared by the Inspector, as adjusted for additional relevant information. (emphasis added)

Froese commented specifically on the inspector's tracing analysis for seven of the properties owned by Schedule C Companies. Froese did not offer any other analysis of the overall net transfer position of each Schedule C Company, no doubt because he was not asked to do so by the Respondents as part of his retainer.

[25] Froese also commented on the accuracy of the overall cash transfer analysis performed by the Inspector found in Appendix B to the Inspector's Fourth Report. Froese stated:

> The Inspector's Cash Transfer Analysis includes transactions from September 1, 2010 to December 31, 2013 for Schedule C Companies and from October 1, 2010 to December 31, 2013 for Schedule B Companies. *It is a helpful analysis in that it provides an overall perspective on net transfers between these periods, and on amounts potentially owing from Schedule C Companies to Rose & Thistle*.
>
> We have the following comments on the Inspector's Cash Transfer Analysis:
>
> 1) The Cash Transfer Analysis does not include all transactions between Rose & Thistle and the Schedule B and C Companies, such as proceeds on sale or refinancing of a property where funds are deposited directly to the Rose & Thistle clearing account from a source other than a bank transfer. For example, $341,189 was deposited to Rose & Thistle in relation to 620 Richmond Street, a property we understand was beneficially owned by Richmond Row Holdings, a Schedule B Company;
>
> 2) Some deposits are not included in the Cash Transfer Analysis, including $909,950 of deposits to Rose & Thistle from Norma Walton (see Schedule 2); and,
>
> 3) There may be other transactions relevant to evaluating amounts owing between the Schedule C Companies and Rose & Thistle, such as unpaid costs for services provided between the companies.
>
> As we have not reconciled Rose & Thistle's bank account to the Cash Transfer Analysis, there may be deposits or transfers that are missing or mis-categorized in the analysis. (emphasis added)

Presumably Froese did not perform such a reconciliation because the Respondents did not ask him to as part of the retainer. Froese testified that in preparing his report he received no audited

financial statements or any form of prepared financial statements for the Schedule B Companies, Rose & Thistle or the Schedule C Companies.

[26] In the Supplement to its Fifth Report (July 9, 2014) the Inspector commented on this portion of the Froese Report:

> The Inspector and Froese both acknowledged that, in some cases, funds could be traced directly from the [Schedule B] Companies to the Walton [Schedule C]Companies. The Inspector and Froese also agreed that, on a net basis, there was a transfer of $23.8 million from the Companies to Rose & Thistle and a transfer of more than $25 million from Rose & Thistle to the Walton Companies.
>
> …
>
> Some transfers are possible to trace to specific funds (as is evidenced numerous times in the tracing of specific amounts to Walton Company property acquisitions which is acknowledged in the Froese Report) and some are not.
>
> In all, Froese and the Inspector agree that some funds can be traced directly from the Companies to the Walton Companies immediately before the Walton Companies purchased a Property. Froese asserts that the amount that can be traced into some Walton Companies is lower than the Inspector…

The Inspector also commented:

> Froese states that the $23.8 million does not represent a direct tracing to Walton Companies from Companies, but does not offer an explanation as to where else the Walton Companies received funds from, except in a few instances. This is generally consistent with the Inspector's analysis.

C. Disputes over the transfers in and out of specific Schedule B Companies

C.1 Certain transfers

[27] Froese commented on the Inspector's treatment of several advances (or groups of advances) on which the Inspector did not offer a specific response:

(a) Froese acknowledged that an $808,250 mortgage advance from Dr. Bernstein to Tisdale was transferred to the Rose & Thistle clearing account, but contended that because this transfer predated the agreement between Bernstein and the Waltons for that company, it should not be treated as a transfer from a Schedule B Company to Rose & Thistle;

(b) Although Froese acknowledged that 15 mortgage advances involved funds transferred from a Schedule B Company to Rose & Thistle which were co-mingled with other funds, Froese observed that 13 of the advances related to mortgagess which subsequently were fully repaid;

(c) With respect to Dr. Bernstein funds deposited to Liberty Village and Queen's Corner which Froese acknowledged were transferred to Rose & Thistle, Froese stated that there was substantially more co-mingling between Schedule B and Schedule C Companies than disclosed in the Inspector's analysis or, in the case of Queen's Corner, the advances did not trace to Schedule C Companies.

C.2 Twin Dragons (241 Spadina)

[28] In its analysis the Inspector traced $251,350 of an October 18, 2010 Applicants' advance of $1,120,500 from Twin Dragons – the Schedule B Company which owned 241 Spadina - to Rose & Thistle over the period October 25 to 29, 2010. The Inspector also commented that transfers into the Rose & Thistle account from Schedule C Companies during that period amounted to $32,050, while transfers out to Schedule C Companies amounted to $114,780.

[29] Froese stated that the Inspector's analysis did not include transfers in the same time frame from Rose & Thistle back to a second Twin Dragons bank account and deposits of non-Bernstein funds to Twin Dragons. Froese stated that transfers to/from Twin Dragons and Rose & Thistle in the five-day period under review netted to $350, or "essentially that almost none of the funds traced to a Schedule C Company."

[30] In its report the Inspector made two comments in response to the Froese analysis. First, the Inspector stated:

> Regarding Twin Dragons (Chart 1 of Appendix F) the $1,120,500 provided by the Applicants and deposited to the Twin Dragons bank account on October 18, 2010, most of the funds appear to have been used to close the acquisition of the Property. However, an amount of $150,000 from these funds was transferred from the Twin Dragons bank account to the Rose & Thistle bank account and was used to fund a cheque to Pointmark Real Estate in the amount of $150,000. *According to Froese, this cheque relates to a deposit on the Property at 18 Wynford, which is owned by Wynford Professional Center Limited (one of the [Schedule B] Companies). The Inspector agrees with this aspect of the Froese analysis.* (emphasis added)

Accordingly, this was an instance where funds advanced by the Applicants to one Schedule B Company for its use were diverted by the Waltons to another Schedule B Company in breach of the Waltons' agreements with Dr. Bernstein.

[31] The second comment of the Inspector concerned the Froese observations made in a chart he provided to the Inspector that third parties had deposited share subscription amounts into a second Twin Dragons bank account between October 27 and 29, 2010. On September 24, 2010 Dr. Bernstein Diet Clinics Ltd. entered into an agreement with the Waltons and Twin Dragons Corporation in respect of the intended purchase and development of 241 Spadina Avenue, Toronto. That agreement stipulated that the ownership of Twin Dragons would be 50% to Dr.

Bernstein and 50% to Ron and Norma Walton. Section 13 stated: "The only shares to be issued in the company will be as set out above, and neither party may transfer his or her shares to another party without the consent of all the other parties, which consent may be unreasonably withheld." As can be seen, the agreement contemplated that there would be no third party investors in the Schedule B Company or Property.

[32] Froese provided the Inspector with a chart which recorded share subscriptions totaling $250,000 received on October 27 and 29, 2010, from third parties - Teresa and Joe Memme and Duncan Coopland.[9] The Inspector filed copies of the cheques for both investments: one was dated October 26 and the other October 27, 2010. Both were made out to Twin Dragons Corporation. Both were dated approximately one month *after* Dr. Bernstein had concluded his agreement with the Waltons in respect of Twin Dragons.

[33] Froese testified that he subsequently realized that the third party investors had been removed from Twin Dragons, and he corrected his analysis on that point.[10]

[34] Back on June 7, 2013, Mr. Reitan, on behalf of the Applicants, had written to Norma Walton complaining that the records disclosed third-party equity contributions into Twin Dragons following the execution of the agreement with Bernstein. Ms. Walton responded on June 13, 2013 with a very aggressive letter in which she stated:

> We do not have outside investors in the properties we jointly owned with Dr. Bernstein. As Mario explained, before Dr. Bernstein became a 50% owner of Spadina and Highway 7, we had attracted investment from third parties. The moment he became an investor, we shifted all of those responsibilities over to the Rose & Thistle Group Ltd. and that is where they currently remain…

[35] That was not an accurate statement by Ms. Walton. As noted, both the Memmes and Coopland wrote share subscription cheques to Twin Dragons one month *after* the execution of the agreement with the Applicants. One can only conclude that they did so at the direction of Norma Walton. In its Fifth Report the Inspector stated:

> The contract between the Applicants and the Respondents prohibits any third party investors in Twin Dragons and the Respondents assert that the third-party investments were deposited into the Twin Dragons bank account in error
>
> …

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[9] Both appear on Appendix "B" to these Reasons.
[10] Transcript of the cross-examination of Ken Froese conducted July 8, 2014, QQ. 111-112.

> In all, the documents reviewed and accounting treatment of the foregoing investments is not consistent with an erroneous investment in the wrong company as alleged by Ms. Walton.

[36] I accept that analysis by the Inspector. The statement made by Ms. Walton in her June 13, 2013 letter to Reitan regarding third party investors in Twin Dragons was not only inaccurate, it was misleading.

C.2 Bannockburn Lands Inc. (1185 Eglinton Avenue East)

[37] Froese stated that the Inspector's analysis of the tracing of a mortgage advance to Bannockburn Lands Inc. – the Schedule B Company which owned 1185 Eglinton Avenue East - omitted a deposit on March 28, 2011 into the Rose & Thistle clearing account from a Schedule C Company, 1780355 Ontario Inc.: "Accordingly, there was more co-mingling between Schedule B and Schedule C Companies than disclosed in the Inspector's analysis."

[38] In its Fifth Report the Inspector provided a detailed response to the comments made by Froese. The Inspector reported that after Froese had raised questions concerning Bannockburn, the Inspector conducted a further review of the banking and accounting records of Bannockburn and Rose & Thistle. The Inspector made the following points:

(a) In dealing with Froese's questioning of how the Inspector could be certain that the funds transferred to Rose & Thistle were the Applicants' funds, the Inspector stated:

> > Froese indicated that their review had identified another mortgage as part of the Bannockburn transaction and suggested that the mortgage could have possibly been a source of funds for the transfer. However, this is not correct. As is set out below, the mortgage in question is a vendor take-back mortgage and no funds were advanced;

(b) The Inspector reported that the Applicants had advanced their funds for the property by a cheque made payable to the Waltons' law firm, Walton Advocates. After dealing with closing adjustments on the acquisition of the Eglinton Avenue property, Walton Advocates transferred a net amount of $628,630.52 to Rose & Thistle on December 17, 2010. The Inspector stated:

> > As the mortgage referred to on the closing adjustments schedule was a vendor take-back mortgage, no cash was provided from this mortgage. Therefore, the funds of $628,630 transferred from Walton Advocates to Rose & Thistle can be directly traced to funds provided by the Applicants and this is consistent with the recording of the transaction in the accounting records of Bannockburn.

On cross-examination Froese agreed with that analysis by the Inspector;[11]

(c) Although a few weeks following the acquisition of the property Rose & Thistle rendered an invoice to Bannockburn for "work completed" in respect of the property, the Inspector observed that the quantum of the invoice exactly matched the "excess" cash provided by the Applicants not required on closing in the amount of $628,632.52. The Inspector stated:

> It appears, therefore, that the amounts on the invoice were calculated based on eliminating the intercompany receivable account between Bannockburn and Rose & Thistle which arose largely because of the cash transfers made from Bannockburn to Rose & Thistle.

(d) The Inspector stated that "a major use of funds by Rose & Thistle around the time of the $628,630 transfer from Walton Advocates was for payments to 364808 Ontario Ltd. totaling $484,349". 364808 Ontario was a Walton-owned Schedule C Company which owned a Davenport Road property purchased on July 5, 2002 by Norma and Ron Walton. Based upon the Inspector's review of the small balance in the Rose & Thistle bank account prior to the transfer from Walton Advocates, the Inspector concluded that "the Applicants' funds can be traced through to Rose & Thistle and were used to fund these payments to this Walton Company."

D. Summary of conclusions on the "net transfer" analysis

[39] The evidence set out above disclosed a substantial agreement between the Inspector and Froese on the overall amounts of the net transfers from (i) Schedule B Companies to Rose & Thistle and (ii) from Rose & Thistle to Schedule C Companies. The analysis performed by the Inspector was more comprehensive than the limited critique Froese was retained to perform. Both the Inspector (in respect of Twin Dragons) and Froese (in respect of Bannockburn) accepted certain criticisms made by the other of aspects of their respective analysis. On balance, I do not regard the specific critiques made by Froese to alter, in a material way, the findings made by the Inspector on the quantum of the net transfers. Consequently, I make the following findings of fact about the "net transfer" analysis of the movement of funds from Schedule B Companies to Rose & Thistle and from Rose & Thistle to Schedule C Companies:

(i) The Waltons directed the transfer of $23.6 million (net) from the Schedule B Company Accounts to a bank account belonging to Rose & Thistle during the period from October 2010 to October 2013;

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[11] *Ibid.*, QQ. 137-144.

(ii) During the same period, the Waltons directed transfers of $25.4 million (net) from the Rose & Thistle Account to companies that they owned without the Applicants – the Schedule C Companies; and,

(iii) In almost all cases, some or all of the amounts advanced to the Schedule B Companies by the Applicants were transferred almost immediately to the Rose & Thistle Account.

I further find that those transfers of funds from Schedule B Companies to Rose & Thistle constituted breaches of the agreements between the Applicants and the Respondents which required that each Schedule B Company, and the funds advanced to it, be used only to purchase, renovate and refinance the specific property owned by the Schedule B Company.

[40] Froese opined that the co-mingling of Schedule B Company funds and other funds in the Rose & Thistle account prevented, in most cases, the tracing of the Applicants' funds through Schedule B Companies to Schedule C Companies. For reasons which I will discuss in **Section VI below**, I do not accept Froese's opinion on that point. I also accept the point made by the Inspector that Froese did not offer an explanation of where the Waltons' Schedule C Companies otherwise sourced their funds, no doubt because he was not retained to express such an opinion. However, as will be discussed later in these Reasons, Ms. Walton has not provided a satisfactory answer to that most basic of questions.

V. Issues concerning the use of funds for Schedule B Properties

[41] From the evidence filed there is no doubt that the Respondents caused funds, including funds advanced by the Applicants, to be used to develop, renovate or construct several of the Schedule B Properties. The question raised by the evidence was: how much did the Respondents spend in the way of legitimate costs on the Schedule B Properties? As I will explain below, the Respondents have never provided a satisfactory answer to that question, notwithstanding an October, 2013 Order of this Court that they do so. Although the Respondents contended that a significant part of the funds advanced by the Applicants were used to pay invoices rendered by Rose & Thistle to Schedule B Companies for legitimate construction costs, as the following review of the evidence will disclose the Respondents have not provided concrete evidence to support the validity of the construction costs billed by Rose & Thistle despite repeated requests by the Inspector.

A. The invoices for construction costs and management fees charged by Rose & Thistle to Schedule B Companies

A.1 Overview

[42] The Respondents relied heavily on invoices rendered by Rose & Thistle to the Schedule B Companies to provide an explanation for $12,264,158[12] of the $23.680 million net transfer of funds from the Schedule B Companies to Rose & Thistle. In her April 28, 2014 affidavit Ms. Walton deposed:

> In my opinion, the only basis upon which the Applicants can advance a claim against my non-Bernstein assets is if I am unable to back up the invoices Rose and Thistle charged to the joint portfolio.

Because of the centrality of those invoices to the Respondents' defence, I intend to spend some time reviewing how this issue has unfolded since October, 2013.

[43] From the early stages of this proceeding the Inspector expressed concern that the Rose & Thistle invoices were not rendered on a regular basis and, instead, a significant number of invoices had been rendered just prior to and following its appointment. In his November 5 Reasons Newbould J. commented:

> The frenzied attempts in the past month since the Inspector was appointed to update ledgers and manufacture invoices should never have been necessary and in light of the evidence, obviously casts doubt on what is now being done to update the records.

In her Factum Ms. Walton acknowledged, in her own way, the frailty of the Rose & Thistle invoices:

> When the Inspector was appointed by the court, Walton was forced to rush through a number of invoices for work Rose and Thistle had performed for the Schedule B properties and the joint portfolio. As a result of the rush to account for all the work provided to the joint portfolio, Walton is not sure that all work done has been invoiced and Walton made mistakes in some of the invoices provided.[13]

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[12] $8,500,853 by way of invoiced construction work; $1,183,013 for property management fees; and $2,580,292 in the way of property maintenance fees.
[13] Walton Factum, para. 96.

A.2 The failure of the Respondents to provide back-up documentation for the Rose & Thistle invoices

[44] Before reviewing the evidence concerning the Inspector's efforts to secure back-up documentation for the invoices rendered by Rose & Thistle to the Schedule B Companies, mention should be made of the Inspector's comments on the state of the accounting system maintained by the Respondents for their construction projects. In its First Report (October 21, 2013), the Inspector stated:

> Ms. Walton has advised the Inspector that the books and records of the Companies are not current. Ms. Walton also advised the Inspector that, before her recent attempt to update the books and records of the Companies, they were last brought current in 2011.
>
> The Inspector understands that Ms. Walton and Rose & Thistle have been working to bring the Companies' books and records up to date. As part of this process, Rose & Thistle has been inputting expense information into the ledgers in or around August and September 2013 relating to the period between January 2012 and August 2013. Rose & Thistle has also issued a number of invoices dated August and September 2013 for services rendered or expenses incurred by Rose & Thistle during the period from January 2012 to August 2013.
>
> In this regard, the Inspector notes that the Companies' books and records are kept using QuickBooks accounting software. QuickBooks is a basic accounting package that is primarily marketed to small businesses. The Companies do not have any:
>
> (a) comprehensive financial accounting and reporting system;
>
> (b) cash flow forecasting, budgeting or reporting system; or,
>
> (c) systematic cash controls.
>
> Prior to the October 17 all-hands meeting hosted by the Inspector, Ms. Walton would only provide the Inspector with access to general ledgers for individual Companies once she and Rose & Thistle had completed their exercise of updating the ledger and issuing invoices from Rose & Thistle to such Company. At the October 17 meeting, Ms. Walton agreed to provide the Inspector with access to the ledgers for the remaining 11 Companies in their current state. That evening, the Inspector was provided with access to seven of the remaining 11 ledgers.

[45] Turning then to the issue of the Rose & Thistle invoices to Schedule B Companies, as early as October 21, 2013 - the date of the Inspector's First Report - the Respondents had provided invoices issued by Rose & Thistle to 27 of the Schedule B Companies for which the general ledgers had been provided for an aggregate amount in excess of $32 million. At that time the Inspector requested "back-up documentation for the Rose & Thistle invoices that have been provided to date". The Inspector stated:

> The Inspector has requested, but not yet received, documentation to substantiate the invoiced amounts. Once these documents are provided, further due diligence is required to confirm that the invoices from Rose & Thistle relate to services provided to, or expenses incurred on behalf of, the [Schedule B] Companies.

By October 24, 2013, the Inspector was reporting that the amount of the invoices rendered by Rose & Thistle to the Schedule B Companies had risen to $34.6 million, or $10.6 million more than Rose & Thistle had received from the Schedule B Companies.

[46] In its First Report the Inspector gave an example of the difficulties it was encountering in securing from the Respondents documents to support the invoices rendered by Rose & Thistle to Schedule B Companies. The property at 458 Pape Avenue was owned by Riverdale Mansion Inc. Rose & Thistle provided the Inspector with invoices addressed to Riverdale for construction management fees of slightly more than $1.18 million for expenses which included "deposits for materials", "project management services", "site plan deposits and applications", and "steel rebar ordered and installed". When the Inspector asked for documentation, including third party invoices, to support the amounts invoiced:

> Ms. Walton advised the Inspector that Rose & Thistle did not have third-party invoices for many of the invoiced expenses because Rose & Thistle performed much of the work itself and some of the expenses have not yet been incurred. In response, the Inspector requested that documents, such as material invoices and payroll records, be provided to validate the cost of work performed by Rose & Thistle and invoiced to Riverdale. As of the date of this report, no such documentation has been provided.
>
> On October 18, 2013, the Inspector received a Credit Note from Rose & Thistle which showed that the invoice to Riverdale had been reversed except for $257,065.62 charged for work performed in 2011.

[47] Subsequent reports of the Inspector disclosed not only the continuing difficulties in obtaining backup documentation to support the amounts claimed in the Rose & Thistle invoices, but also questioned the accuracy of the invoices. For example, in the Inspector's Second Report (October 31, 2013), it reported that it had been provided with an invoice issued by Rose & Thistle to Dupont Developments Ltd. (1485 Dupont Street) which included an entry for construction management services in the amount of $175,300.30. The invoice stated that the construction management fee was "10% of hard costs". From that the Inspector reasonably assumed that Rose & Thistle had supervised construction which had cost approximately $1.75 million. However, Rose & Thistle staff provided the Inspector with project budgets that indicated Dupont Developments had spent only $385,000 on construction. The Inspector reported:

> The Inspector also received a general ledger for Dupont Developments on October 24, 2013. The general ledger shows capitalized expenses of approximately $248,000,

> construction in progress of $36,000 and various consulting fees of approximately $563,000.
>
> Based on the foregoing, it appears that Dupont Developments' construction budget (which is out of date), its general ledger (which was updated before being provided to the Inspector) and invoice from Rose & Thistle all show different construction expenditures in respect of the Dupont Project.
>
> It also does not appear that Rose & Thistle is maintaining project budgets on an ongoing basis to track expenses and measure construction costs against the *pro forma* statement prepared when the property at 1485 Dupont was purchased.

[48] The difficulties encountered in obtaining proper accounting information from the Respondents were exemplified by the correspondence from the Respondent's former counsel, John Campion, to Applicant's counsel on October 31, 2013, in response to a request for "information about an accounting". On behalf of his client Mr. Campion responded: "I do not know what that reference is meant to encompass." Based no doubt on information provided by his clients, Mr. Campion wrote:

> The Inspector has stated that they have not been provided with third-party invoices, contracts, payroll records or other contemporaneous documents. My client instructs me that other than the budgets that are being provided by Ms. Liu over the next three days, she is not aware of any request made that has not been fulfilled, as best it can be.
>
> The Inspector keeps asking which filing cabinets he can review to obtain this information. The information he seeks can only be obtained through discussions with the staff mentioned above as all documentation is on computer and not contained in a filing cabinet.
>
> As a result of the above, we believe that the Inspector has been given the kind of access to the Rose and Thistle documents that is available and reasonable under the order of Justice Newbould. Without wishing to criticize the Inspector, I am informed that he expects to have "physical copies of documents produced to him from a filing cabinet". This is not the way that Rose and Thistle stores its information. Upon request being made in an orderly manner, the Inspector has and will receive information and documentation as soon as it can be retrieved and ordered in a manner that meets his request.

[49] Again, no doubt based upon information provided by his clients, Mr. Campion wrote:

> The Inspector has also met with Yvonne Liu, Project Manager, Construction and has provided to them information that has been requested, along with one construction budget. She is sending to the Inspector over the next three days all remaining budgets. The Inspector has spoken with and met with Mario Bucci, CFO of the Rose and Thistle Group, and Mr. Bucci has provided to the Inspector all information requested. Ms. Walton has offered to the Inspector to arrange a meeting with Carlos Carreiro, former Director of Construction of Rose and Thistle but the Inspector has not done so. Steve

Williams, VP of Operations as also met with the Inspector and provided what the Inspector requested.

[50] As will be seen from the subsequent reports of the Inspector which are set out below, the Inspector never received the information it requested. As the Inspector stated in the Supplement to its Fifth Report (July 9, 2014): "Neither construction budgets nor any significant volume of third-party documentation has been provided to the Inspector."

[51] The Inspector submitted its Third Report on January 15, 2014 in which it dealt at some length with the issue of the Rose & Thistle invoices:

> The Inspector previously reported that Rose & Thistle Group Ltd. (Rose & Thistle) transferred approximately $24.2 million (net) from the Schedule B Companies to itself between September 2010 and October 2013. In support of these transactions, Rose & Thistle provided the Inspector invoices totaling approximately $30.6 million (plus HST) for management fees, maintenance fees and construction and project management. The Inspector's current analysis of these billings is outlined below.
>
> **Construction and project management billings**
>
> Of the total $30.6 million charged by Rose & Thistle, approximately $27.6 million was purportedly charged for construction supervision, project management and other project costs. Included in this amount is $6.6 million that is explained below in the "contributed equity" section, leaving support required for $21 million. *Despite the Inspector's request, Rose & Thistle has still not provided evidence to support these billings. Therefore, the Inspector is still unable to comment on the validity of these billings at this time.*
>
> As Rose & Thistle has yet to provide evidence to substantiate more than $20 million of billings for construction and project related costs, the Inspector is expanding its work to include an analysis of funds transferred from Rose & Thistle to other non-Schedule B companies where those funds appear to have initially originated from Schedule B companies. This Inspector will report on this work as soon as it is able to do so.
>
> **Management fees**
>
> Rose & Thistle charged a management fee to Schedule B Companies based upon 4% of the gross revenues of individual properties that generated revenue. The agreements between the Applicant and the Respondents do not specifically state that the fee is to be charged. However, the agreements generally state that Walton (as defined in each agreement) is responsible for managing the properties, including all finance, bookkeeping, office administration, accounting, information technology provision. The Inspector has no comment on the legal issue of whether Rose & Thistle is entitled to charge for those services under the terms of the various agreements as they may be duly interpreted. *The Inspector is of the opinion that a fee of 4% is a reasonable amount and is consistent with rates charged in the marketplace for similar services. Further, the Inspector worked with Rose & Thistle to reconcile the management fees charged on*

revenue producing properties. These fees amount to approximately $1 million in the aggregate.

Maintenance fees

Rose & Thistle charged maintenance fees to the Schedule B companies based upon a fixed monthly amount per property. This fee is purportedly charged to reimburse Rose & Thistle for the cost of providing maintenance employees to certain of the properties. The Inspector has no comment on the legal issue of whether Rose & Thistle is entitled to levy these charges under the terms of the various agreements as they may be duly interpreted. *The Inspector is of the view that it can be appropriate for a real estate management service provider to seek reimbursement for costs that are not covered under its management fees when utilizing outside property management. However, the Inspector has not been able to verify or reconcile records of the fees charged to costs actually incurred by Rose & Thistle or for any set markup on such costs. These fees amount to approximately $2 million in the aggregate*. (emphasis added)

[52] In its Fourth Report (April 23, 2014), the Inspector stated that Rose & Thistle had withdrawn some of the invoices which made up its original $30.6 million claim against the Schedule B Companies, and now was alleging that it had invoiced those companies for $27,292,722. The Inspector reported that as a result of the failure of Rose & Thistle to provide evidence to support the majority of those billings, it had expanded its work to include an analysis of the funds transferred from Rose & Thistle to bank accounts controlled by the Waltons (the "Walton Accounts"). The Inspector reported:

On February 21, 2014, counsel to the Inspector circulated a document prepared by the Inspector outlining the Inspector's analysis of funds flowing to and from the [Schedule B] Company Accounts to the Rose & Thistle Account and from the Rose & Thistle Account to the Walton Accounts.

The spreadsheet, which is referred to below as the "Cash Transfer Analysis", was circulated subject to the limitations noted in counsel's email…A summary version of the Cash Transfer Analysis, which shows the total amounts transferred to and from the Rose & Thistle Account to each Company Account and each Walton Account is attached as Appendix "B".

Neither the Applicants nor the Respondents have challenged the accuracy of the Cash Transfer Analysis…

In all, Rose & Thistle received approximately $23.6 million more from the [Schedule B] Companies than it transferred to the Companies…

… In total, the Walton Accounts received transfers totaling $64,712,258 from the Rose & Thistle account and transferred $39,247,766 to the Rose & Thistle account during the period examined. The Walton Accounts received a net transfer of $25,464,492 from Rose

> & Thistle. That is, Rose & Thistle transferred approximately $25 million more to the Walton Accounts than it received from the Walton Accounts during the period examined.

[53] By the time of its Fifth Report (July 1, 2014) the Inspector was still reporting the failure by the Respondents to provide appropriate backup documentation for the Rose & Thistle construction expense invoices:

> The Inspector's analysis is impaired by the fact that the Respondents have not provided back-up documentation, including third party invoices, proof of payment and progress draws relating to the majority of the alleged construction expenses. *Accordingly, the Inspector cannot perform a detailed reconciliation of the alleged construction expenses to the cash transfers to determine whether these transfers related to construction work that had been performed.* The Respondents have instead provided reports from third-party quantity surveyors which will be addressed in a supplemental report.
>
> …
>
> Rose & Thistle provided the Inspector with invoices addressed to Riverdale (a Schedule B Company) totaling $1.18 million. The invoices listed, among other things, expenses related to "deposits for materials", "project management services", "site plan deposits and applications" and "steel rebar ordered and installed".
>
> The Inspector asked for documentation, including third party invoices, to support the amounts invoiced to Riverdale. Ms. Walton advised the Inspector that Rose & Thistle did not have third-party invoices for many of the invoiced expenses because Rose & Thistle performed much of the work itself and some of the expenses have not yet been incurred. This would appear to be inconsistent with her statement that transfers from the Companies to Rose & Thistle were in the nature of payments for services that have been provided but not yet invoiced. The Inspector requested that documents, such as material invoices and payroll records, be provided to validate the cost of work performed by Rose & Thistle and invoiced to Riverdale. No such documentation has been provided. (emphasis added)

A.3 The Inspector's observations on the Rose & Thistle invoices

[54] In its Fifth Report the Inspector made several comments about the invoices which Rose & Thistle had rendered to the Schedule B Companies:

(a) There was no apparent co-relation between the amount of construction work performed on a Schedule B Property and the volume of funds transferred from that property. For example, in respect of the property at Fraser Avenue, the two Fraser companies made net transfers of approximately $9.2 million to Rose & Thistle, but little or no construction work was completed on the Fraser Properties before the Manager was appointed. By contrast, Twin Dragons successfully renovated and leased 241 Spadina and received a net transfer from Rose & Thistle of approximately $1.3 million. The Fraser property is dealt with further in **Section V.A.5** below;

(b) The Inspector observed a pattern whereby the amounts invoiced by Rose & Thistle to the Schedule B Companies appeared to match the amount of cash previously transferred from the Schedule B Company to Rose & Thistle. For example, the Inspector reported that it appeared that the amounts invoiced from Rose & Thistle to Bannockburn (1185 Eglinton East) in 2010 and 2011 were calculated to match the net cash transferred from Bannockburn to Rose & Thistle during those years. The Inspector pointed to Wynford and Riverdale Mansion as other Schedule B Companies in respect of which a similar matching-invoice practice by Rose & Thistle took place. Those invoices had the effect of essentially eliminating the inter-company debt owed by Rose & Thistle to the Schedule B Company;[14] and,

(c) In respect of the Schedule B Company, Riverdale Mansion, the Inspector reported that it had received a credit note from Rose & Thistle which showed the invoices to Riverdale had been reversed except for $257,065.62 charged for work performed in 2011. The Inspector stated: "The Credit Note was not accompanied by any return of funds. This would appear to reinforce the Inspector's conclusion that invoices rendered by Rose & Thistle to the Companies were calculated based on the net cash transferred from the Companies to Rose & Thistle rather than on the value of actual work, if any, performed by Rose & Thistle."

[55] In its report Froese stated that any further analysis of the net unsupported or unexplained transfers from Schedule B Companies to Rose & Thistle would require an evaluation of the quantity surveyor reports related to the Schedule B Properties to address further work performed by Rose & Thistle for those properties. Froese noted that the quantity surveyor reports were not made available to it in sufficient time to address them.

A.4 The cost consultant reports filed by Ms. Walton

[56] Ms. Walton filed reports from two cost consultants commenting on work performed by Rose & Thistle for Schedule B Properties. Intrepid Quantity Surveying Inc. prepared three reports dealing with 32 Atlantic Avenue, 241 Spadina Avenue and 18 Wynford Drive. The work on the Atlantic and Spadina properties had been fully completed; the building at 18 Wynford had been partially renovated.

[57] BTY Group prepared a set of 21 reports entitled "Audit Report On Incurred Cost To Date" for the following properties: (i) 1185 Eglinton East (Bannockburn); (ii) Cityview Drive (Cityview Industrial); (iii) 14 Dewhurst (Dewhurst Developments); (iv) 1500 Don Mills Road

[14] At paragraphs 66 through 69 of his affidavit sworn June 26, 2014, James Reitan provided other examples of this practice.

(Donalda Developments); (v) 65 Heward (Double Rose Developments); (vi) 1485 DuPont (DuPont Developments); (vii) 153 Eddystone (Eddystone Place); (viii) Fraser Avenue (Fraser Lands/Fraser Properties); (ix) 1450 Don Mills Road (Global Mills); (x) 14 Trent (Hidden Gem Developments); (xi) Lesliebrooke Holdings and Lesliebrooke Lands; (xii) 47 Jefferson (Liberty Village Lands); (xiii) 140 Queens Plate Crescent (Northern Dancer Lands); (xiv) 1003 Queen Street East (Queen's Corner Corp.); (xv) 875 Queen Street East (Red Door Developments); (xvi) 450 Pape (Riverdale Mansion); (xvii) Highway 7 (Royal Agincourt); (xviii) 1 Royal Gate Boulevard (Royal Gate Holdings); (xix) Skyway Drive (Skyway Holdings); (xx) 295 The West Mall (West Mall Holdings); and, (xxi) 355 Weston Road (Weston Lands).

[58] The BTY Group were not independent experts. The record disclosed that they had acted as cost consultants for progress draws on some Schedule B Properties during the course of demolition and construction work on them – 241 Spadina; 1185 Eglinton;[15] and 18 Wynford.[16]

[59] The authors of the cost consultant reports all purported to express opinions in their reports. Opinion evidence in civil cases must comply not only with the general rules of evidence, but also with Rule 53.03 of the *Rules of Civil Procedure*. Rule 53.03(2.1) mandates that any report of an expert witness must contain seven categories of information. In the case of the reports prepared by Intrepid Quantity Surveying they lacked the following mandatory information: area of expertise; qualifications; instructions provided to the expert; and, an acknowledgment of the expert's duty signed by the expert. Those constituted material omissions of mandated information for expert reports and, in my view, rendered the reports prepared by Intrepid Quantity Surveying inadmissible as expert evidence.

[60] As to the reports prepared by BTY Group, they also suffered from the same omissions of material mandated information. As well, they did not disclose the name of the expert who had prepared the reports – a singular omission which I have never seen before. By reason of those failures to include information mandated by Rule 53.03(2.1), I conclude that the cost consultant reports prepared by BTY Group are inadmissible as expert evidence.

[61] Even had I admitted the reports prepared by Intrepid Quantity Surveying and BTY Group as expert evidence, for the reasons set out below their probative value in respect of the issues in dispute on these motions would have been quite minimal.

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[15] Norma Walton Motion Record, Vol. 1, pp. 207 and 212; Vol. 2, p. 380.

[16] Bernstein CX, Exhibit 5. It appeared from Exhibit 5 that in issuing their progress payment reports the BTY Group had relied heavily on the invoices from the Rose & Thistle Group, rather than examining the underlying supporting documentation for such invoices.

The reports prepared by Intrepid Quantity Surveying

[62] The three Intrepid Quantity Surveying ("IQS") reports possessed a similar structure, so let me use the March 10, 2014 report on 32 Atlantic Avenue as an example of the limited probative value of the opinions expressed in those reports. First, it was difficult to discern the purpose of the report. Rule 53.03(2.1)(3) requires a report to contain "the instructions provided to the expert in relation to the preceding"; none appeared in the body of the report. Rule 53.03(2.1)(4) requires a report to contain "the nature of the opinion being sought and each issue in the proceeding to which the opinion relates"; none was provided in the report.

[63] From the report it appears that Ms. Walton had asked IQS to review the budget for the 32 Atlantic Avenue project. IQS reported that they had reviewed the file and had "provided our comments here for your reference." At the end of the report, IQS stated:

> In our opinion, we believe the work in place for the construction work is reasonable based on information and invoices received to substantiate the cost to date.

[64] The IQS report focused on two aspects of the project's budget: construction costs of $3.045 million and management fees of approximately $150,000.

[65] The IQS review of the construction costs was based upon an undated Vendor Transaction List provided by the Respondents. IQS requested copies of invoices to substantiate the items booked to the accounting system. Although it was provided with 89% of the overall hard costs booked to the Respondents' accounting system, it was not provided with the Rose & Thistle construction invoice for $216,330.57.

[66] The Vendor Transaction document attached to the IQS report recorded amounts incurred for various types of work from various suppliers. The legend for that document identified which invoices had been reviewed (presumably by the Rose & Thistle management) and which invoices remained outstanding. In its report for the Atlantic Avenue property, IQS noted that it had only been provided with proof of 20% expended by way of an invoice and that it was relying primarily on the accounting summaries prepared by the Respondents' accounting system, not on the actual underlying invoices.

[67] IQS reported that the Respondents had provided timesheets which confirmed 20% of the Rose & Thistle construction fees of $216,330.57, but it identified significant limits placed on its review of those Rose & Thistle construction fees. In particular, IQS could only rely upon "accounting summaries" provided by the Respondents when reviewing the Rose & Thistle construction fees. Although the accounting summaries confirmed 88% of the $216,330.57, IQS reported:

> These costs may have been incurred by [Rose & Thistle Properties] and entered into their accounts system, but we only have proof of 20% expended by way of an invoice.

> We have been provided with partial bank account records and cancelled cheques. A full review to ensure that the amounts booked have cleared the [Rose & Thistle Properties] bank account was not part of the IQS scope of work.

The IQS report made clear that it lacked adequate backup documentation for most of the $216,333.57 in construction fees charged by Rose & Thistle. In my view, those limitations identified by IQS severely limited the utility of their reports in verifying the amounts Rose & Thistle was recorded as charging the Schedule B Company which owned the project, Liberty Village.

[68] IQS reported that the budget identified management fees charged by Rose & Thistle of approximately $150,000. IQS stated:

> We have not reviewed backup invoices to date, however we have been provided a summary breakdown of the fees.
>
> These costs may have been incurred by [Rose & Thistle Properties], but we do not have proof of the expenditure by way of an invoice.
>
> The management fee is for time spent by [Rose & Thistle Properties] employees to coordinate the construction activities and the consultants.

IQS also noted in respect of the management fees that it had not been provided with timesheets or accounting backup. IQS calculated that the management fee charged had amounted to 4.5% of the total hard construction costs for the project which appeared to be reasonable based on the scope of work and a standard industry range of 2.5% to 4.5% for management fees.

[69] Similar limitations were contained in the other two IQS reports. IQS' report on the Twin Dragons project - 241 Spadina[17] - noted that it had not been asked to review construction costs, so it had not reviewed copies of invoices to substantiate the items booked to the Respondents' accounting system "as this was outside our scope of work. Costs booked to the vendor transaction list *are assumed* to be valid." IQS also observed, regarding the $133,209 management fee charged, that it had not reviewed the internal Rose & Thistle Properties back-up for the fee. The only opinion expressed by IQS in respect of the 241 Spadina budget was that the management fee of 3.47% was reasonable based upon the scope of work and industry practices.[18]

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[17] Dr. Bernstein acknowledged on his cross-examination that following the completion of the renovation of 241 Spadina, he began to receive equity distribution cheques from Twin Dragons: Transcript of the cross-examination of Dr. Bernstein conducted July 9, 2014, QQ. 295; 456-8.

[18] Carlos Carreiro filed an affidavit in support of the Respondents, his former employer, attesting, in a descriptive way, to the work his company had performed for Rose & Thistle at 241 Spadina, 32 Atlantic Avenue and 450 Pape. No documentation supporting the work performed or invoiced was attached to his affidavit. Yvonne Liu filed a

[70] In its report concerning 18 Wynford Drive, IQS noted that it had been provided with two invoices for construction costs from Rose & Thistle totaling $3.55 million, but IQS stated:

> Both of the above two invoices can be traced back to the vendor transaction list. *However the co-relation is not indicative of actual costs incurred as further details to substantiate actual backup to the costs incurred are not available*.[19]

[71] As to the management fee of $355,000 charged by Rose & Thistle for 18 Wynford, IQS opined that the management fee of 6.95% was "in a higher range of what is expected based on the scope of work and industry standards". IQS ventured that industry standards of between 2.5% and 4.5% "would be more reasonable".

[72] In sum, the IQS reports did not assist the Respondents in explaining or justifying the construction costs invoiced by Rose & Thistle to the examined Schedule B Companies. The reports did not fill in the evidentiary gap identified by the Inspector. Instead, they highlighted the unwillingness of the Respondents to produce the back-up documentation needed to test and verify the amounts charged by Rose & Thistle to Schedule B Companies for both construction costs and management fees.

The reports prepared by BTY Group

[73] The BTY Group reports disclosed that Rose & Thistle had asked it to provide an opinion on the validity of the hard construction, soft construction and Rose & Thistle management costs for a number of properties "in comparison to other projects". Although the reports were styled as "audit reports", they disclosed that the information provided by Rose & Thistle to BTY Group consisted of the budgets, ledgers and summary of management fees for each project. The BTY Group relied on those Rose & Thistle accounting documents and summaries. BTY Group did not review any invoices or cancelled cheques to substantiate the payments noted in the accounting records of Rose & Thistle.

[74] In the case of its analysis of the management fees charged by Rose & Thistle to the projects, BTY Group recorded their understanding that no accounting records existed to substantiate the information provided by Rose & Thistle with respect to the management fees incurred on a project. As a result, the opinions of the BTY Group about the reasonableness of the management fees were based solely on its review of the summary of management costs

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similar type of affidavit describing work her personal company had performed for Rose & Thistle at 32 Atlantic, 241 Spadina, 1485 Dupont, 153 Eddystone, 450 Pape Avenue, 18 Wynford, 14 Dewhurst, Highway7 West, 1 Royal Gate, 3765 St. Clair Avenue East, and 1003 Queen Street East.

[19] Emphasis added. In the Supplemental Report to its Fifth Report (July 9, 2014), the Inspector noted that not all of the amounts spent by Rose & Thistle on construction at 18 Wynford were relevant to the tracing analysis because some of them may have been funded by Rose & Thistle drawing on 18 Wynford's condominium reserve fund.

provided by Rose & Thistle for a project as a percentage of the project budget. For example, as noted in its report of the management fee review for the 1185 Eglinton East (Bannockburns) project:

> We have not been privy to the calculation of the costs noted in this section and we acknowledge that there are no accounting records in place to justify the costs noted as being incurred on the project. Our opinion as to the reasonableness of the costs incurred to date is based on our experience of working on projects of a similar type and nature across several provinces in Canada.

The BTY Group, using its knowledge of other similar projects in the market, performed a comparative analysis which ranked each category of costs identified in the project's accounting summaries as either "not in line with", "in line with", or "below" current market conditions for those types of costs.

[75] As can be seen, the BTY Group reports did not examine whether costs recorded in the Respondents' accounting records for a project were in fact incurred, including whether costs included in invoices from Rose & Thistle to a Schedule B Company had been incurred. Put another way, the BTY Group reports assumed the accuracy of the accounting records of Rose & Thistle and the Schedule B Companies.

[76] In the Supplement to its Fifth Report, the Inspector offered the following comments on the cost consultant reports prepared by the BTY Group:

> [T]he fundamental question relating to the Rose & Thistle Invoices is whether Rose & Thistle actually performed the invoiced work and is entitled to the claimed payment. All but one of the cost consultant reports offered by the Respondents does not address this issue at all. The exception relates to the property at 32 Atlantic…
>
> In particular, the BTY reports essentially compared the costs in Rose & Thistle's budget and accounting ledgers to the work that Rose & Thistle said it performed. BTY appears to have assumed that Rose & Thistle performed the relevant work and incurred the costs associated with it…
>
> Since all of BTY's information appears to originate in the books and records of Rose & Thistle, the BTY reports do not contribute anything meaningful to the analysis of whether those books and records are accurate. BTY compares the assumed cost of the work against its understanding of market rates for the same work but it does not assess whether the work was actually performed. As a result, in the Inspector's view, the BTY reports do not assist the Inspector's analysis of what work Rose & Thistle performed on each property and what payment it is entitled to for that work.

[77] Based upon my review of the reports prepared by the BTY Group, I accept the Inspector's conclusion that the reports do not contribute anything meaningful to the analysis of whether the books and records of Rose & Thistle are accurate nor do they contribute anything

meaningful to the inquiry into the accuracy, validity or reasonableness of the invoices rendered by Rose & Thistle to the Schedule B Companies. As was the case with the IQS reports, the BTY Group reports did not fill in the evidentiary gap noted by the Inspector. That rendered the BTY Group reports of little probative value to the issues in dispute.

A.5 Issues raised in cost consultant reports on specific Schedule B Properties

[78] The frailty and unreliability of the invoices rendered by Rose & Thistle were illustrated by the analysis of the invoices rendered for three specific Schedule B Properties.

Bannockburn (1185 Eglinton)

[79] Bannockburn acquired the property at 1185 Eglinton Avenue East on December 17, 2010. The Bannockburn development was intended to consist of two residential condominium towers with a block of townhouses. Demolition of the previous property on the site was performed, but no other work took place.

[80] BTY Group reviewed the Rose & Thistle accounting ledger for hard construction costs on the project. The Inspector reported that on December 31, 2010 Rose & Thistle issued an invoice to Bannockburn in the amount of $467,719.60 for services provided between December 7 and 31, 2010 – i.e. the invoice included the 10 day period prior to the acquisition of the property. The Rose & Thistle invoice included items for demolition disposal, development approval expenses and project management fees. In the Supplement to its Fifth Report the Inspector stated:

> The amount of this invoice matched exactly the amount transferred to Rose & Thistle from Bannockburn. Moreover, Bannockburn did not purchase 1185 Eglinton Avenue until December 17, 2010, ten days after the invoice shows that work commenced. In her email commenting on the Fifth Report, Ms. Walton explained that Rose & Thistle engaged consultants and began work on a property before the purchase of that property closed.
>
> The amounts listed on the December 31, 2010 invoice from Rose & Thistle to Bannockburn cannot be reconciled to the transaction list appended to the [BTY Group] Bannockburn Report. In particular, there are no demolition costs and less than $25,000 in development costs recorded on the ledger provided to BTY for the period prior to December 31, 2010.

30 Fraser Avenue; 7-15 Fraser Avenue

[81] Fraser Properties Corp. owned land located at 30 Fraser Avenue in Toronto; Fraser Lands Ltd. owned the adjacent property at 7-15 Fraser Avenue. Dr. Bernstein made an equity contribution of $16,024,960 to Fraser Properties. As early as its First Report, the Inspector had reported:

> Fraser Properties transferred $10,281,050 to Rose & Thistle and received transfers of $1,215,100 from Rose & Thistle. Rose & Thistle retained $9,065,950 paid by Fraser Properties.

[82] In its report the BTY Group stated that the Fraser Avenue properties housed existing one and two story buildings, with the plan being to renovate the existing buildings and construct two new commercial buildings. The BTY Group reviewed and reported on the accounting ledgers of Rose & Thistle. In the Supplement to its Fifth Report the Inspector stated:

> Rose & Thistle provided the Inspector with invoices to Fraser Lands Ltd. totaling $300,896 and invoices to Fraser Properties Ltd. totaling $1,598,580…
>
> It appears that the ledger provided by Rose & Thistle to BTY does not support the amounts invoiced to Fraser…
>
> Rose & Thistle received transfers of $9,080,850 from the Companies that own the Fraser Property, issued invoices totaling $1,899,477 with respect to alleged work performed on the Fraser Property and provided BTY with records showing that it had actually incurred expenses totaling $395,532 in respect of the Fraser property.

1485 Dupont

[83] In its report on the property at 1485 Dupont (Dupont Developments) the BTY Group stated that the accounting ledgers provided by Rose & Thistle showed hard construction cost bill payments to contractors of $805,036.20 and soft construction costs payments to contractors of $113,383.91. As was the case in all of its reports, the BTY Group stated that it had not undertaken a review of invoices or cancelled cheques to substantiate the payments noted in the ledger as paid. In the Supplement to its Fifth Report the Inspector stated:

> The Inspector also notes that Ms. Walton's construction cost figure does not appear to account for amounts that are owed to contractors but not paid. For example, the Respondents delivered an affidavit of Yvonne Liu stating that Rose & Thistle completed various construction work on the property at 1485 Dupont Avenue ("the DuPont Property"). Construction liens in the aggregate amount of $821,297 have been registered against the DuPont Property. The Inspector has not evaluated the validity of these lien claims. However, the existence of substantial lien claims in respect of DuPont undermines the assertion that funds transferred to Rose & Thistle from the [Schedule B] Companies were used to pay for construction at DuPont.

A.6 Ms. Walton's comments on the cost consultant reports

[84] In her June 21, 2014 affidavit, Ms. Walton commented on each of the reports prepared by the cost consultants and she gave general descriptions of the work performed on each property. Notwithstanding that Ms. Walton spent extensive time in her affidavit dealing with each property, she did not append to her affidavit the back-up documentation to support the amounts

charged by Rose & Thistle to each project which the Inspector had been requesting since last October.

A.7 Conclusion on the Rose & Thistle invoices

[85] Ms. Walton deposed that "as confirmed by the third party cost consulting reports, the value of all work completed by Rose and Thistle has been confirmed". In her Factum she pointed to the cost consultant reports as establishing that Rose & Thistle had spent specific amounts on construction costs. The IQS and BTY Group cost consultant reports do not allow any such conclusion to be drawn – they dealt only with the amounts which were recorded in the books and records provided by Rose & Thistle to the cost consultants without providing any independent audit or verification of the accuracy or validity of those amounts.

[86] In paragraph 10 of the October 25, 2013 Order of Newbould J. the Respondents were required to "provide forthwith a full accounting of ***all monies*** received, disbursed, owed to and owed from the Schedule B Corporations and The Rose & Thistle Group Ltd. since September, 2010 to the present." That order required the Respondents to account for all monies owed by Schedule B Companies pursuant to invoices rendered by Rose & Thistle. The Waltons have failed to do so. The Waltons have left unanswered the repeated demands of the Inspector for documentation to back-up and support those invoices, and Ms. Walton has filed cost consultant reports which assumed the accuracy of those invoices, instead of providing an independent audit of their accuracy.

[87] Rose & Thistle no doubt provided some construction and maintenance work for the Schedule B Companies, but the Waltons bore the burden of establishing the validity and accuracy of the invoices which Rose & Thistle rendered for those services. Not only have they failed to do so, but one can only conclude from the refusal of the Waltons over the past nine months to provide back-up for the Rose & Thistle invoices – both to the Inspector and to their own cost consultants - that back-up for the full amounts of those invoices simply does not exist.

[88] I therefore accept the view of the Inspector expressed in its Fifth Report, and I find that the Respondents have not produced the documentation needed to perform a detailed reconciliation of the alleged construction and maintenance expenses to the cash transfers to determine whether those transfers related to construction and maintenance work that Rose & Thistle actually performed for Schedule B Companies.

[89] I make a similar finding in respect of the management fees charged by Rose & Thistle. Those fees were charged as a percentage of the construction costs incurred. Without an accounting of the accuracy of the construction costs actually incurred, an assessment of the reasonableness of the management fees is not possible. However, I will accept the reconciliation of management fees in the amount of $1 million reached by the Inspector with the Respondents for revenue-producing properties as reported in the Inspector's Third Report.

[90] Taken together, those two findings mean that of the $30.6 million in invoices rendered by Rose & Thistle to the Schedule B Companies, the Respondents have established the validity and reasonableness of only $1 million of them – i.e the reconciliation relating to management fees for revenue-producing properties. The Respondents have failed to prove, on the balance of probabilities, that the remaining invoices covered work or services actually performed by Rose & Thistle for Schedule B Companies, notwithstanding that the information needed to do so remained in the possession and control of the Respondents.

B. Placing two mortgages on the Don Mills Road Schedule B Properties without the Applicants' consent

[91] On July 31 and August 1, 2013, two mortgages of $3 million each were registered against the Schedule B Properties at 1450 Don Mills Road and 1500 Don Mills Road. Notwithstanding that the agreements between the parties for these properties required that any decisions concerning the refinancing of the properties required the approval of Dr. Bernstein, Norma Walton did not tell Dr. Bernstein that the mortgages were placed on the properties. In his November 5 Reasons appointing a receiver, Newbould J. dealt with those mortgages:

> [10] This was a matter raised at the outset and was one of the basis for my finding of oppression leading to the appointment of the Inspector. Mr. Reitan learned as a result of a title search on all properties obtained by him that mortgages of $3 million each were placed on 1450 Don Mills Road and 1500 Don Mills Road on July 31, 2013 and August 1, 2013. Dr. Bernstein had no knowledge of them and did not approve them as required by the agreements for those properties. At a meeting on September 27, 2013, Ms. Walton informed Mr. Reitan and Mr. Schonfeld that the Waltons were in control of the $6 million of mortgage proceeds (rather than the money being in the control of the owner companies), but refused to provide evidence of the existence of the $6 million. Ms. Walton stated that she would only provide further information regarding the two mortgages in a without prejudice mediation process. That statement alone indicates that Ms. Walton knew there was something untoward about these mortgages.
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> [11] In his first interim report, Mr. Schonfeld reported that the proceeds of the Don Mills mortgages were deposited into the Rose & Thistle account. Rose & Thistle transferred $3,330,000 to 28 of the 31 companies. The balance of the proceeds of the Don Mills mortgages totalling $2,161,172, were used for other purposes including the following:
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> 1. $98,900 was paid to the Receiver General in respect of payroll tax;
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> 2. $460,000 was deposited into Ms. Walton's personal account;
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> 3. $353,000 was apparently used to repay a loan owed by Rose & Thistle in relation to Richmond Row Holdings Ltd.; and,

> 4. $154,600 was transferred electronically to an entity named Plexor Plastics Corp. and $181,950 transferred electronically to Rose and Thistle Properties Ltd. Ms. Walton advised the Inspector that she owns these entities with her husband.

[12] In her affidavit of October 31, 2013, Ms. Walton admits that $2.1 million was "diverted" and used outside the 31 projects. She admits it should not have been done without Dr. Bernstein's consent. She offers excuses that do not justify what she did. What happened here, not to put too fine a point on it, was theft. It is little wonder that when first confronted with this situation, Ms. Walton said she would only talk about it in a without prejudice mediation.

[13] In her affidavit of October 4, 2013, Ms. Walton said she had made arrangements to discharge the $3 million mortgage on 1500 Don Mills Rd on October 21, 2013 and to wire money obtained from the mortgage on 1450 Don Mills Road into the Global Mills account (one of the 31 companies) by the same date. Why the money would not be put into the 1450 Don Mills account was not explained. In any event, no repayment of any of the diverted funds has occurred.

…

[46] I do not see the picture as now being less clear. To the contrary, it seems much clearer. I have referred to the concerns above in some detail. They include the following:

> 1. $2.1 million was improperly taken from the proceeds of the $6 million mortgages that never had Dr. Bernstein's approval, $400,000 of which was taken by Ms. Walton into her personal bank account. Ms. Walton was well aware that this was wrong. She is a lawyer and the agreements were drawn in her office. Her initial reaction when confronted about the mortgages by Mr. Reitan, who at the time did not know what had happened to the mortgage proceeds, that she would only discuss it in a without prejudice mediation is a clear indication she knew what she did was wrong and contrary to Dr. Bernstein's interests.

[92] The Respondents appealed the November 5 Order to the Court of Appeal; Norma Walton represented herself on the appeal. She submitted to the Court of Appeal that Newbould J. had erred in describing her involvement in the two unauthorized Don Mills mortgages as "theft". In rejecting that argument the Court of Appeal stated:

> We also do not accept that the application judge's use of the word "theft" is necessarily a mischaracterization of some of the conduct of Ms. Walton. However, even if the word "theft" is considered inappropriate given its criminal connotation, Ms. Walton's own affidavit acknowledges a knowing misappropriation of funds in respect of at least one property. Whatever one might choose to call that conduct, it provided powerful evidence

> that Dr. Bernstein's interests in the property were being unfairly prejudiced by the conduct of the Waltons. The application judge's use of the word "theft" does not, in our view, taint his factual findings or the manner in which he exercised his discretion.[20]

[93] In her Factum on these motions Ms. Walton stated that "there is no question that the borrowing of $6 million from the Don Mills properties was contrary to the contracts between Walton and Bernstein". However, she filed an affidavit in which she sought to correct "a fundamental misconception that has pervaded this litigation from the beginning concerning my knowledge of the payment of funds from the $6 million of mortgages." Ms. Walton deposed:

> What I want to make clear, though, is that I never knew the sum of $2,161,172 had been ultimately paid out to me and my companies from that $6 million until after the Inspector completed his work. That complete lack of knowledge or intention was not made clear in the October 31 affidavit I filed and as such I am correcting that now…

In her affidavit Ms. Walton blamed the inadequacy of the Respondents' accounting software at the time, and she contended that at the time of the Don Mills Road mortgages she made "the assumption that the Bernstein-Walton properties were funding the Bernstein-Walton properties and the non-Bernstein properties were funding the non-Bernstein properties."

[94] For several reasons I do not accept Ms. Walton's explanation.

[95] First, Ms. Walton offered no new evidence on the point that was not before Newbould J. or the Court of Appeal, apart from her denial that she knew about the payments out.

[96] Second, Ms. Walton's contention that she had assumed the Bernstein properties were only funding Bernstein properties flies in the face of the overwhelming evidence presented by the Inspector that when most funds were advanced into the Schedule B Companies by the Applicants, the Respondents immediately transferred them out to Rose & Thistle and, in many cases, to Schedule C Companies. Throughout these proceedings Norma Walton has presented herself to the Court, through her affidavits and through her submissions, as the person who was in charge of the entire enterprise, whether it be the operation of Schedule B Companies, Rose & Thistle or the Schedule C Companies. In paragraph 38 of her June 21, 2014 affidavit, Ms. Walton clearly acknowledged that she was the one who had managed the jointly owned portfolio of Schedule B Properties. On her cross-examination Ms. Walton admitted that she had authorized the transfer of monies out of the Schedule B Companies to Rose & Thistle, including by getting on the computer and making electronic transfers herself.[21]

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[20] 2014 ONCA 428, para. 12.
[21] Cross-examination of Norma Walton conducted July 8, 2014, QQ. 95-96.

[97] Her husband, Ronauld Walton, did not file an affidavit in these proceedings, nor did the Chief Financial Officer of the Rose & Thistle group of companies, Mario Bucci.[22] Their failure to file evidence is most significant, and I infer from that failure that neither Ronauld Walton nor Mario Bucci could offer evidence which would assist the Respondents in establishing a defence to the Applicants' allegations. Nor have they stepped forward to contend that the improper transfers of monies out of the Schedule B Companies were the result of directions or orders given by someone other than Norma Walton.

[98] Third, on her July 8, 2014 cross-examination Ms. Walton admitted that she was the one who had provided the Devry Smith Frank law firm with instructions on the two Don Mills Road mortgage transactions,[23] including directing that the proceeds from the Don Mills mortgages be paid into the Rose & Thistle bank account.[24] Those admissions support a finding, which I make, that Ms. Walton knowingly directed the proceeds from the two Don Mills mortgages to be paid into the Rose & Thistle bank account and that she did so knowing that such payments would be in breach of the obligations of the Waltons to Dr. Bernstein.

[99] Fourth, Ms. Walton failed to appreciate that in her efforts to remove the moniker of "theft" from her conduct in respect of the two $3 million mortgages, she only compounded the difficulty of her legal position vis-à-vis the Applicants. In her affidavit Ms. Walton deposed that "every single day transfers between our companies were occurring and there was no visibility with our accounting software as to each company's position vis-à-vis the transfers of funds". Yet, over the course of three years from September 24, 2010 until June 27, 2013, Ron and Norma Walton entered into a series of agreements with the Applicants which contained provisions representing that (i) monthly reports would be made - which implied that the accounting systems used by the Schedule B Companies would be adequate to provide accurate, detailed monthly accountings of the funds advanced to the Schedule B Companies – and (ii) that the Schedule B Company would only be used to purchase, renovate, lease, and refinance the specified property. Also, on an ongoing basis, Norma Walton was representing to Dr. Bernstein that she was able to calculate his financial position in Schedule B Property projects. For example, her April 15, 2012 email to Dr. Bernstein represented that "Spadina will net you $6.66 million plus accrued interest to repay your mortgages; plus $1.12 million to repay your capital; plus $754,000 to pay your profits, for a total of $8.534 million."

[100] If, as Ms. Walton now deposed, the Respondents' accounting system was inadequate to ascertain the position of each Schedule B Company vis-à-vis the transfers of funds, then by entering into a series of agreements with the Applicants containing those representations, and by

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[22] As of Ms. Walton's cross-examination on July 8, 2014, Mr. Bucci remained the CFO of Rose & Thistle: Q. 45.
[23] Walton CX, QQ. 72-73.
[24] *Ibid.*, QQ. 74-83.

making such specific representations about financial returns in her periodic updates to Dr. Bernstein, Norma Walton would have engaged in a pattern of deceitful misrepresentation leading the Applicants to believe that the Respondents knew what was happening with the monies advanced, when they did not because of the lack of visibility within their accounting system. In trying to concoct an implausible excuse for her conduct concerning the two Don Mills mortgages, Norma Walton ended up damning her own position.

[101] Fifth, as part of the Don Mills Road mortgage transaction documents Ms. Walton falsely certified that only she and her husband were the shareholders of Global Mills Inc. In fact Dr. Bernstein's company, DBDC Global Mills Ltd., was a 50% shareholder. Ms. Walton testified that Dr. Bernstein had instructed her not to disclose his shareholding interest in Schedule B Companies.[25] Ms. Walton produced no documents to support that allegation,[26] and I reject it.

[102] Sixth, in paragraph 101 of her Factum Ms. Walton submitted, in respect of the two $3 million Don Mills mortgages, that "there was no attempt to hide this and everything was completely transparent on the books and records of our companies. The Inspector found it easy to trace exactly what had happened to this money given that transparency." That was a breathtaking statement by Ms. Walton, and it demonstrated her continued willingness to distort the truth. In fact, Ms. Walton had given no prior notice to Dr. Bernstein about her intention to place the two mortgages on the Don Mills properties. She hid that transaction from Dr. Bernstein. There was no transparency. The transaction only came to light as a result of Mr. Reitan's searches of title as part of a larger concern by the Applicants over the Respondents' lack of transparency about what they were doing with the Applicants' funds. Even then, the true facts about the two mortgage transactions did not emerge until Ms. Walton was compelled to disclose them in the early stages of this proceeding. For Ms. Walton to now attempt to spin those facts in her favour shows her complete lack of understanding about what it means to tell the truth. There really is no other way to put the matter.

[103] Her distortion of the facts in respect of the Don Mills Road mortgages echoed her conduct which I described in a June 20, 2014 decision regarding the dispute between two mortgagees on 875 and 887 Queen Street East. I found that Norma Walton had materially misrepresented the true state of affairs to one of the mortgagees, RioCan:

> Norma Walton's representation that the lender had deposited the certified cheque - a representation which was re-transmitted to RioCan with the intention that RioCan rely upon it - was misleading in a very material respect. Why? Because the lender,

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[25] *Ibid.*, Q. 87

[26] Walton did produce a February 25, 2013 email in which she requested Dr. Bernstein to resign as a director for Wynford, Spadina and Eglinton: Walton Motion Record, Vol. 1, p. 123.

> Woodgreen, which had deposited the cheque, had immediately returned the funds to Red Door Lands, ostensibly taking the position that its deposit of the cheque had not constituted an acceptance of payment against principal of the mortgage. That sequence of events can be gleaned from the communications which had flowed back and forth between Walton and Kesten about which RioCan knew nothing.[27]

[104] In sum, I do not accept Ms. Walton's continued protestations that she had a complete lack of knowledge that funds from the two $3 million mortgages on the Don Mills Road properties had been misappropriated to the use of Walton and her companies. The voluminous evidence placed before me on this motion leads me to have absolutely no doubt that Norma Walton not only knew, in detail, what was taking place with the transfer of funds from those two mortgages, but that those transfers took place at the direction of, and under the control of, Norma Walton. Norma Walton knowingly put in place the two Don Mills Road mortgages of $3 million each without the required approval of Dr. Bernstein and she knowingly misappropriated some of the proceeds of those mortgages to her own personal use and the use of companies which she owned, but in which Dr. Bernstein had no ownership interest.

[105] Unfortunately, Ms. Walton's continued efforts to repair her reputation in respect of the Don Mills Road mortgage transactions by distorting the truth makes it clear to me that it will never be possible to secure from her a true accounting of what happened to the funds advanced by the Applicants.

VI. Issues concerning the Waltons using the Applicants' funds for Schedule C Properties

[106] The Applicants seek relief against what are called the Schedule C Properties - i.e. properties owned by, or controlled by, Ron and Norma Walton, usually through a company in which Dr. Bernstein had no ownership interest. At the hearing the Respondents disputed including some of the properties in the Applicants' list of Schedule C Properties, contending that they did not own them. I will address that issue in **Section XI.B** of these Reasons. Suffice it to say, at this point of time, that the reason the Applicants included a property in the list of Schedule C Properties against which they sought relief was because the Rose & Thistle website represented that the property was owned by the Waltons or Rose & Thistle.

[107] In its Fourth Report the Inspector identified seven properties owned by Walton Schedule C Companies for which it could ascertain that funds transferred from a Schedule B Company to Rose & Thistle were transferred, in turn, to the Schedule C Company to acquire the property. Froese addressed the Inspector's findings in his report. Froese's high level comment was:

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[27] 2014 ONSC 3732, para. 21.

> We reviewed the tracing performed by the Inspector and agree that some funds from the applicants can be traced through the Rose & Thistle clearing account to Schedule C Companies and that these funds were used for the purchase of properties. However, the tracing performed by the Inspector does not address other funds received by the Schedule C Companies and transferred to Rose & Thistle or transferred through Rose & Thistle to Schedule B Companies.
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> …
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> The net result is that, in relation to the seven properties, approximately $2 million of funds flowed from Dr. Bernstein through the Rose & Thistle clearing account to the Schedule C Company account, where the funds were available at the time the properties were purchased. It should be noted that no funds trace to the purchase of the properties owned by Academy Lands and Front Church, and that less funds trace to the College Lane property than are determined by the Inspector as a result of co-mingling of funds.

I shall consider Froese's comments on the analysis performed by the Inspector for specific properties below.

[108] Mr. Reitan, in his affidavit sworn June 26, 2014, deposed that the following amounts of the Applicants' funds were used to purchase or refinance some of the Schedule C Properties:

(i) $330,750 for the purchase of 14 College Street and $987,165 for the refinancing of 14 College Street;

(ii) $1.032 million for the purchase of 3270 American Drive;

(iii) $1.6 million for the purchase of 2454 Bayview Avenue;

(iv) $937,000 for the purchase of 346E Jarvis Street[28] and the repayment of Dr. Bernstein's mortgage on 346F Jarvis Street;

(v) $2.337 million for the purchase of 44 Park Lane Circle, the personal mansion of Norma and Ronauld Walton;

(vi) $221,000 for the purchase of 2 Kelvin Street and $115,950 for the purchase of 0 Luttrell Avenue; and,

(vii) $371,200 for the purchase of 26 Gerrard Street East.

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[28] That is, the unit bearing PIN 21105-0166, the parcel register for which is found at the Inspector's Fourth Report, Tab J.

A. 14 College Street

Inspector

[109] College Lane Ltd. was a Walton Schedule C Company. On July 5, 2011, College Lane purchased 14 College Street, Toronto, for $5.6 million, financed largely by a mortgage in the amount of $5.5 million. The Inspector conducted two tracing analyses on this property: the first focused on the acquisition of the property in July, 2011, and the second dealt with the discharge of a mortgage on July 4, 2012.

[110] In its Fourth Report the Inspector reported that on June 30, 2011, five days prior to the acquisition of 14 College Street, the opening balance in the Rose & Thistle account was $18,266. The Inspector reported that the Applicants made equity or mortgage advances to several Schedule B Companies shortly before that date which were quickly followed by transfers from the Schedule B Companies' accounts to the Rose & Thistle account: (i) $220,650 on June 30 from Bannockburn; (ii) $223,150 on June 30 from Twin Dragons; (iii) $91,350 from Riverdale; and (iv) $56,550 from Wynford Professional Center Limited. The Inspector also noted that on June 30, 2011, $216,250 was transferred from two Walton Companies to Rose & Thistle, and on June 30, 2011, several transfers out occurred to various Schedule B Companies and Walton Companies from Rose & Thistle. The Inspector reported that it had traced $330,750 of the Applicants funds into the purchase of the College Lane property on July 5, 2011.

[111] In its April 25 Supplement to the Fourth Report the Inspector reported on its further analysis for this property which led it to conclude that approximately $983,475, primarily sourced from funds paid to Schedule B Companies by the Applicants (Donalda Developments Ltd. and Fraser Properties Corp.), were transferred to Rose & Thistle and then forwarded to College Lane which, in turn, used the funds to discharge a mortgage which had been granted to Windsor Bancorp on July 4, 2012.

Froese

[112] In respect of Inspector's report that it had traced $330,750 of the Applicants funds into the purchase of the College Lane property, Froese stated:

> The co-mingling of Schedule C Company funds and Schedule B Company funds does not permit a direct tracing of the $330,750 to College Lane, *although a portion is traceable*, depending on the assumptions applied to the tracing. (emphasis added)

I accept the Inspector's analysis on this issue. Although there was co-mingling in Rose & Thistle at the time of funds from Schedule B and C Companies, the vast majority of the funds had originated with Schedule B Companies which the Inspector could trace to specific advances of the Applicants' funds.

[113] Froese stated, in respect of the Inspector's report that $983,475 of Applicants' funds had been transferred to College Lane, that a third-party financing of $715,650 partially offset that amount and that further post-acquisition (July 5, 2011) transfers between College Lane and Rose & Thistle resulted in a net balance of $1,070,536 owing from College Lane to Rose & Thistle as at December 31, 2013:

> In our view the $1,070,536 net amount is the appropriate amount owing to Rose & Thistle from Academy Lands (sic). This includes funds co-mingled in the Rose & Thistle clearing account, some of which were funds deposited from Dr. Bernstein to Schedule B Companies.

As I will discuss below, I do not accept giving precedence to the post-acquisition net transfer state of accounts advocated by Froese.

B. 3270 American Drive (United Empire Lands)

Inspector

[114] On March 11, 2013, United Empire Lands, a Walton Schedule C Company, purchased 3270 American Drive, Toronto, for $6.7 million, with mortgages totaling $5.67 million registered against title.

[115] The Inspector reported that funds totaling approximately $1.032 million, primarily sourced from funds advanced by the Applicants to a Schedule B Company – West Mall Holdings Ltd. - were transferred to the Rose & Thistle account on March 8, 2013 and, that same day, transferred to United Empire Lands. Those funds could be tied to a $1.649 million March 7 Applicants' equity investment in West Mall which was transferred in three installments on March 7 and 8 to the Rose & Thistle account. One of those installments was the $1.032 million transferred on March 8 from Rose & Thistle to United Empire Lands.

Froese

[116] In his report Froese stated:

> The Inspector identified a March 8, 2013 transfer of $1,032,000 from West Mall Holdings Ltd. to Rose & Thistle that he concluded was sourced from the Applicants funds. On the same day, a transfer of $1,032,000 of funds from Rose & Thistle to United Empire Lands Ltd. provided the funds to United Empire to close the purchase of the 3270 American Drive property on March 11, 2013.
>
> *We do not disagree with this analysis*. However, it does not take into account funds received from Christine DeJong Medical Professional Corporation for an investment in United Empire that were used in part to fund Schedule B Companies and which were being repaid to United Empire through the $1,032,000 transfer. (emphasis added)

Christine DeJong brought her own cross-motion and filed an affidavit. She deposed that she thought the payments she was making to United Empire Lands would be used to acquire the American Drive property.

[117] Froese also stated in his report:

> Based on the above information, United Empire funds of $706,850 were transferred to Rose & Thistle and used in part to fund Schedule B Companies. Schedule B funds of $1,046,000 were transferred through Rose & Thistle to United Empire, in part as repayment of the $706,850.

C. 2454 Bayview Drive (Academy Lands Ltd.)

Inspector

[118] Academy Lands Ltd., a Walton Schedule C Company, purchased property at 2454 Bayview Avenue, Toronto, on December 21, 2011 for $8 million, with a charge in the amount of $6.2 million registered in favour of Business Development Bank of Canada. Accordingly, $1.8 million had to be otherwise financed in order to acquire the Bayview property.

[119] The Inspector reported that on December 12, 2011, the amount of $1.6 million was transferred from the Rose & Thistle Account to Academy Lands.

[120] A week earlier, on December 6, 2011, the closing balance in the Rose & Thistle Account had been only $97,880. The Inspector reported that on December 5, 2011, the Applicants paid into the account of Royal Agincourt Company, a Schedule B Company, an equity investment in the amount of $1.782 million. Between December 5 and December 13, 2011, the amount of $1.73 million was transferred out of that account into the Rose & Thistle bank account. On December 8, 2011, the Applicants made a mortgage advance of $706,050 to Tisdale Mews Inc., another Schedule B Company, which, on the same day, was transferred from that bank account to the Rose & Thistle bank account.

[121] The Inspector expressed the view that the transfers from the Royal Agincourt account and the mortgage advance from the Tisdale Mews account to Rose & Thistle were the primary sources of the funds for the transfer of $1.6 million to Academy Lands on December 12 which, in turn, funded the acquisition of 2454 Bayview on December 21, 2011.

Froese

[122] Froese made several comments about the Inspector's analysis. First, Froese stated:

> *We agree that $1.6 million and $110,350 traced to Academy Lands*. However, these funds were fully returned to Rose & Thistle during the period of the Inspector's analysis in the following two days. This is an example of a "snapshot" tracing being accurate in

> and of itself but not reflecting relevant transactions within several days of the period selected by the Inspector. (emphasis added)

Froese concluded: "Accordingly Academy Lands did not retain any funds from Dr. Bernstein in December 2011 when it purchased 2454 Bayview."

[123] I am not prepared to accept that statement. Gaps in the evidence do not permit the making of such a forceful assertion. Let me explain why.

[124] A review of the Academy Lands bank account statement for the month of December, 2011 certainly shows that the December 12 "transfer in" of $1.6 million from Rose & Thistle was the main source of the $1.986 million balance which existed on December 20, the day before the acquisition of the Bayview property. The $1.986 million was withdrawn by way of a certified cheque on December 20. The next day – the day of closing - an identical amount was deposited "at the counter" back into the Academy Lands account. The identity of amounts of the December 20 withdrawal and December 21 deposit back-in would support an inference, which I draw, that the same money withdrawn on December 20 was re-deposited the following day into the Academy Lands account.

[125] On December 21 – the day of closing - there was a transfer of $322,800 from the Academy Lands account to the Rose & Thistle account. Unfortunately, neither the Inspector's report nor the Froese report investigated the specific use of those funds. The Froese Report did attach the Rose & Thistle bank statement which showed that the $322,800 deposit was the source for over a dozen payments of various amounts over the course of that day which reduced the account's balance to just slightly more than $30,000. I was not pointed to evidence which would explain those various transfers out of the Rose & Thistle account, specifically whether they had anything to do with payments made on the closing of the purchase of the Bayview property.

[126] Froese also stated that they had been informed that the vendor of the Bayview property, Dibri Inc., had provided $1.75 million of financing to Academy Lands in an unregistered vendor take-back mortgage that was not registered until 2014: "As a result, little or no funds were required to close the purchase of the property." On this point, I have reviewed Exhibit 2 to the Froese Report. It does not contain a statement of adjustments for the closing of the acquisition of Academy Lands and the copy of the charge is obviously a mere draft. The other closing documents contained in Exhibit 2 did not refer to a vendor take back mortgage.

D. 346 Jarvis, Unit E (1780355 Ontario Inc.)

Inspector

[127] The tracing analysis performed by the Inspector in its Fourth Report traced parts of two April 15, 2013 advances by the Applicants – $1.286 million into Dewhurst and $1.452 million into Eddystone – into the bank account of Rose & Thistle ($641,500 and $866,700 respectively).

The Inspector reported that transfers to Schedule C Companies and Ms. Walton from Rose & Thistle around that time amounted to $1.194 million consisting of $937,000 to 1780355 Ontario, $111,550 to Plexor Plastics (a Walton company) and $110,000 to Norma Walton.

[128] The Inspector reported that shortly after the transfers totaling $937,000, Norma and Ron Walton purchased a property at 346E Jarvis, Toronto, using 1780355 Ontario Inc.

Froese

[129] Froese stated that he agreed with the Inspector that $937,000 traced through the Rose & Thistle clearing account to 1780355 Ontario. Froese stated that as of December 31, 2013 the net amount owing to Rose & Thistle by 1780355 Ontario was $496,897. That led Froese to state:

> *In summary, we agree with the Inspector's tracing of $937,000 of Dr. Bernstein's funds through Schedule B Company accounts to the Rose & Thistle clearing account and to 178 Inc.* In our view, however, the $496,897 net amount owing from 178 Inc. to Rose & Thistle is the appropriate amount to consider owing to Rose & Thistle from 178 Inc. (emphasis added)

E. 44 Park Lane Circle

Inspector

[130] The Waltons own a large mansion in the Bridle Path area of Toronto on 44 Park Lane Circle which they acquired on June 26, 2012 for $10.5 million. Two mortgages totaling $8 million were registered against title that day.

[131] On June 25, 2012, Rose & Thistle transferred $2,584,850 into Ms. Walton's personal account and that day she transferred $2.5 million to acquire 44 Park Lane Circle. The $2,584,850 transfer was largely sourced from (i) a June 15 equity investment by the Applicants of $2,320,963 into Red Door Developments (875 Queen St. East) which was transferred that same day to Rose & Thistle and (ii) a June 25 $675,000 equity investment made by the Applicants in respect of 1450 Don Mills which was deposited directly into the Rose & Thistle account.[29]

Froese

[132] Froese did not dispute the Inspector's analysis concerning the use of the Applicants' advance to Red Door Developments; Froese did not address the advance to 1450 Don Mills.

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[29] On June 25, 2012, two of the deposits made into the Rose & Thistle bank account were for $675,000 and $1.662 million; they were followed immediately by a transfer out of $2.337 million.

Evidence of Ms. Walton about the acquisition of the property

[133] In her June 21, 2014 affidavit, Ms. Walton explained how she and her husband came to own the property at 44 Park Lane Circle. She deposed:

> We purchased the 6.2 acre property at 44 Park Lane Circle in June 2012 for $10.5 million with the intention of making money on the property, similar to our last house we bought at 92 Truman[30] and similar to the commercial properties we purchase on a regular basis. It was never our intention to remain in the residence long-term, and we lived there with our four children through major renovations to save living costs and expenses.

Looking at the marketing brochure prepared by a realtor retained by the Respondents for a potential sale of 44 Park Lane Circle – Exhibit SS to Ms. Walton's June 21, 2014 affidavit – it is difficult to be moved by Ms. Walton's protestations of the hardship of living through renovations. The pictures of the house show a palatial mansion finished to the highest standards with only the best of luxury amenities.

[134] Ms. Walton candidly admitted that she and her husband had used some of the money provided by Dr. Bernstein for the 875 Queen Street East property to acquire their residence at 44 Park Lane Circle:

> We used the proceeds of sale provided by Dr. Bernstein to us when he bought into our 875 Queen Street property. We had a cost base of $6.65 million and he bought in at a price of $9.5 million. The $2.215 million he invested to purchase 50% of the shares in 875 Queen Street East was used by us to fund the purchase of 44 Park Lane Circle, as this money was due to us, such money representing the equity we had created in the property and disclosed to Dr. Bernstein prior to his purchase. This money was not to be used to complete the Queen Street project as it was part of the purchase price for Dr. Bernstein to buy in.

As Ms. Walton clarified in her July 3, 2014 affidavit, they had invited Dr. Bernstein to buy into that project "many months after we had contracted to buy" the property, not after they had actually bought the property. In fact, as her June 8, 2012 email to Dr. Bernstein disclosed, Ms. Walton only had the property under "conditional contract" at the time she solicited an investment from him.

[135] In its Third Report dated January 15, 2014, the Inspector set out the explanation it had received from Walton for the 875/887 Queen Street East transaction:

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[30] The Waltons sold their 92 Truman house about a year after they had acquired the Park Lane Circle.

> From June 15 to 25, 2012, Rose & Thistle transferred the $2.3 million paid by Dr. Bernstein to itself and established an inter-company receivable due from Rose & Thistle to Red Door in that amount. Ms. Walton subsequently delivered an invoice dated June 30, 2012… that purported to charge fees to Red Door in the amount of approximately $2.1 million effectively offsetting the inter-company debt. Ms. Walton subsequently advised the Inspector that the purpose of the transaction was to adjust her equity to draw and the agreed-upon increase in value between the time she purchased the company and Dr. Bernstein's buy-in. An adjustment to Ms. Walton's equity account on the books of the company has been recommended by the company's external accountant. The Inspector questioned the propriety of Rose & Thistle delivering an invoice purportedly charging fees as a mechanism to reflect a distribution of equity to a shareholder. Upon being challenged by the Inspector, Ms. Walton reversed the invoice and reinstated the receivable due from Rose & Thistle. In addition, an increase was recorded to Ms. Walton's equity on the balance sheet adding approximately $2.2 million as a fair market value adjustment. The Inspector notes that paragraph 13 of the agreement between the parties provides that equity is to be distributed to the shareholders only after the property is developed and sold. The receivable due from Rose & Thistle remains outstanding and Ms. Walton has yet to explain the basis upon which Rose & Thistle removed cash from this company to create the receivable in the first place.

[136] I do not accept Ms. Walton's contention that they were entitled to use Dr. Bernstein's equity contribution to 875 Queen Street East to fund the acquisition of their Park Lane Circle residence. Her explanation does not accord with the representations which were made in the June 25, 2012 agreement between Norma Walton and Ron Walton, on the one part, and Dr. Bernstein, on the other, for the Queen Street East properties. Attached to that June 25, 2012 agreement was a table setting out the capital required for the project. The table recorded total capital required of $11.64 million. Included in that required capital was $2.215 million for "development monies invested to date". The chart represented that three sources of funds would be used to satisfy the required capital: (i) a $7 million mortgage; (ii) $2.32 million from Dr. Bernstein; and, (iii) $2.32 million from Ron and Norma Walton.

[137] In her evidence, Ms. Walton seemed to suggest that the reference to the required capital of $2.215 million for "development monies invested to date" somehow signaled to Dr. Bernstein that when he signed the agreement he knew, or should have known, that the Waltons would extract some "earned equity" from the project. Ms. Walton canvassed this point with Dr. Bernstein on her cross-examination of him which led to the following exchange:

> Q. 1811. Ms. Walton: I'm going to suggest to you that this email, coupled with this statement, shows that your buy-in to the Queen Street property was at a price that was higher than the cost base because of the work that the Walton Group had done on the property in the two years prior that they had it under contract?
>
> A. Dr. Bernstein: My agreement to purchase in was at the cost of purchasing the properties and the cost out-of-pocket of monies spent or to be spent to get to the closing. That is what it was for.

Q. 1812: Dr. Bernstein, I know you're saying that now, but did you ever say, "Norma, I like the project, but I want to be in at the purchase price and I don't want to pay any development monies of 2.215 million?"

A: No, because I took this to say that you spent $2.215 million in bringing the property to where it was.

Q. 1813: Did you do any due diligence on that 2.215 million?

A: I trusted you and your comments and your documentation that you spent that money.

Q. 1814: Okay, but you…

A: Did I ask you to verify it? No. Did I trust you? Yes, I did.

Q. 1815: So you bought into the property understanding that there was already $2.215 million of value inherent in the purchase price?

A. Absolutely not. I bought into the property because it says here you spent $2.215 million to that point or that will have been spent with the closing, along with legal fees and land transfer tax, municipal and Ontario land transfer tax and other fees and disbursements of $65,000. That's what I bought into.

…

Q. 1817: Let me rephrase. Are you unhappy that you agreed to buy in at nine and a half million dollars?

A: If the circumstances are all in place… Are you asking me about today?

Q. 1818: Yes

A: From my understanding today, you didn't spend $2.215 million. From my understanding today, you did not secure Red Door to do anything and move value. From my understanding today, what you told me here is not true.

[138] Dr. Bernstein testified that when he invested in the Queen Street East project he was not aware that he was not buying in at the original cost base of the property, as contended by Ms. Walton.[31]

[139] Section 4 of the Queen Street East agreement provided that Dr. Bernstein wished to own 50% of the shares in the companies, Red Door Developments Inc. and Red Door Lands Ltd., in exchange for providing 50% of "the equity required to complete the project". Section 4

[31] Bernstein CX, QQ. 1752-3; 1811.

stipulated that "[T]he company will issue sufficient shares such that Bernstein has 2,320,963 and Walton has 2,320,963 voting shares of the same class". Section 4 stipulated that Dr. Bernstein would receive shares issued from the company's treasury, not acquire shares from the Waltons which were already issued and outstanding. Both Ron and Norma Walton are lawyers; I have no doubt that they understand the basics of corporate law.

[140] Section 7 of the agreement dealt with the equity contributions - Dr. Bernstein was required to provide his by June 20, 2012, and the Waltons were required to provide theirs "in a timely manner as required as the project is completed".

[141] Section 15 of the agreement specifically dealt with the use of funds advanced to the Red Door Companies:

> The Company will only be used to purchase, renovate and refinance the property at 875 and 887 Queen Street East, Toronto, Ontario or such other matters solely relating to the Project and the Property.

[142] As to the ability of the parties to extract their capital from the Queen Street East project, Section 13 stated:

> Once the Project is substantially completed to the point that all of the Property has been sold, both parties will be paid out their capital plus profits and Walton will retain the company for potential future use.

[143] Norma Walton deposed in paragraph 51 of her June 21, 2014 affidavit that the money she and her husband had extracted out of the Red Door Companies following Dr. Bernstein's advance of equity was money which "was due to us, such money representing the equity we had created in the property and disclosed to Dr. Bernstein prior to his purchase". In her July 3, 2004 affidavit she contended that "the increase in value from the time we contracted to purchase to the time we invited Dr. Bernstein to partner with us was ours alone as we were the sole owners of the company at that time." Those assertions are flatly contradicted by the plain language of the agreement with Dr. Bernstein to which Ron and Norma Walton put their signatures. Also, the plain language of the agreement flatly contradicted her statement that Dr. Bernstein's "money was not to be used to complete the Queen Street project as it was part of the purchase price for Dr. Bernstein to buy in."

[144] Moreover, in her June 8, 2012 email to Dr. Bernstein soliciting his investment in the property, Norma Walton made no mention of her intention to use his investment to fund the Waltons' "extraction of equity" so that they could buy a home on Park Lane Circle.

[145] Based upon Norma Walton's June 21, 2014 evidence, I can only conclude that when Norma and Ron Walton signed the June 25, 2012 agreement with Dr. Bernstein for the 875/887 Queen Street East project, they fully intended to use the funds advanced by Dr. Bernstein to

fund, in part, their own acquisition that day of their 44 Park Lane Circle personal residence. They did not disclose to Dr. Bernstein their intended use of his funds. To the contrary, in the agreement they signed with him on June 25, 2012, they led Dr. Bernstein to believe that the funds he advanced would be used solely for the project at 875/887 Queen Street East and that neither he nor his co-venturers, Norma and Ron Walton, would be able to withdraw their capital from that project until it had been sold. By signing the agreement with Dr. Bernstein on June 25, 2012, and then proceeding immediately to appropriate the funds he advanced to their own use later that day to acquire their mansion at 44 Park Circle Park Lane Circle, Norma and Ron Walton deceived Dr. Bernstein and unlawfully misappropriated Dr. Bernstein's funds to their own personal use. In short, the Waltons defrauded Dr. Bernstein.

Evidence of Norma Walton about the ownership interests of others in 44 Park Lane Circle

[146] Ms. Walton deposed that she and her husband currently were in the process of severing the 44 Park Lane Circle property into two separate parcels. In her December 17, 2013 affidavit Ms. Walton deposed that the property was owned by her husband and herself and that no shareholders owned an interest in the property. However, on the net worth statement attached as Exhibit "MM" to her June 26, 2014 affidavit, Ms. Walton had divided the property into two parts – 44a and 44b – and listed $5.77 million in preferred shares invested in "44b" Park Lane Circle. On December 18, 2013 Newbould J. ordered that the Respondents could not deal with 44 Park Lane Circle without further order of the Court.

[147] Mr. Reitan deposed that Ms. Walton must have sworn false evidence on December 17, 2013, or the Waltons were in breach of Justice Newbould's order of December 18, 2013 or Exhibit MM to Ms. Walton's June 26, 2014 affidavit was false.

[148] Based upon a review of the entire record, I think the answer lies in a fourth explanation. In her evidence and at the hearing Ms. Walton went to considerable pains to state that she intended to take care of all of her creditors – except Dr. Bernstein – because she had promised to make good on their investments as preferred shareholders in various Schedule C Companies which no longer possessed any equity to pay their shareholders. Many of the affidavits and statements filed by the preferred shareholders stated that they had agreed with Ms. Walton that she could pay them from the proceeds of sale from other Walton properties, even though the Schedule C Corporations in which they had invested lacked any equity to pay them out as preferred shareholders. I conclude that Ms. Walton's reference in her net worth statement to $5.77 million of preferred shareholders in "44b" Park Lane Circle was her way of saying to the preferred shareholders that she would protect them out of the proceeds of the severed "44b" portion of the Park Lane Circle property once it was sold. That evidence demonstrates that if Ms. Walton thinks it fit to pay a creditor, she will work to do so; if she does not, she won't. In Ms. Walton's worldview, her discretion is absolute, and her creditors must abide by the exercise of her discretion and the preferences she accords certain creditors.

Renovations to 44 Park Lane Circle

[149] The evidence also disclosed that funds originating in a Schedule B Company, Tisdale Mews, were used to fund $268,104.57 in renovations to the Waltons' 44 Park Lane Circle home. Ms. Walton justified the use of those funds by stating that "Rose & Thistle funded 100% of the $268,104.57 purchases before any cheques were sent out of the Tisdale Mews account" and, overall, Rose & Thistle transferred more money to Tisdale Mews than it had received from that Schedule B Company. In his November 5 Reasons Newbould J. considered that evidence from Ms. Walton and concluded that "no reasonable explanation has been provided" for the use of the Tisdale Mews funds.

F. 2 Kelvin Street and 0 Luttrell Avenue

Inspector

[150] 6195 Cedar Street Ltd., a Walton Schedule C Company, purchased 2 Kelvin Street, Toronto, on April 17, 2012, for $1.8 million, with a mortgage in the amount of $1.44 million registered against title.

[151] The Inspector reported that funds totaling approximately $221,000, primarily sourced from funds paid by the Applicants to a Schedule B Company, were transferred to the Rose & Thistle account on April 17, 2012 and, in turn, transferred that day to Cedar. The opening balance in the Rose & Thistle account on April 17 was $10,285. A $700,000 equity investment made by the Applicants to Fraser Lands Ltd. that day was transferred out of that Schedule B Company's account to the Rose & Thistle account.

Froese

[152] Froese stated: "We agree with the Inspector that $221,000 traces through the Rose & Thistle clearing account to 6195 Cedar, with a limited amount of co-mingling in the clearing account in or around April 17, 2012."

Applicants' evidence

[153] Mr. Reitan deposed that the property at 0 Luttrell was adjacent to the one at 2 Kelvin Street. A Walton company, Bible Hill Holdings Ltd., purchased the Luttrell property on November 15, 2012. Norma Walton did not disclose the Respondents' ownership interest in that property in her affidavit sworn December 17, 2013; she only later admitted that ownership interest as a result of inquiries from Applicant's counsel. Mr. Reitan also deposed, in paragraph 164 of his June 26, 2014 affidavit, that up to $152,950 of a $318,392 November 13, 2012 contribution by Dr. Bernstein to Salmon River Properties Ltd. in respect of 0 Trent Avenue was transferred through the Rose & Thistle account to Bible Hill Holdings Ltd. to finance the

acquisition of 0 Luttrell. Having reviewed the supporting documents filed by Reitan to reach that conclusion, I accept his analysis.

G. 26 Gerrard Street (Gerrard House Inc.)

Inspector

[154] Gerrard House Inc., a Schedule C Company, purchased 26 Gerrard Street, Toronto, on December 20, 2011, for $5.5 million, at which time two charges were registered totaling $4.95 million.

[155] The Inspector reported that it appeared that funds totaling approximately $371,200, primarily sourced from funds paid by the Applicants to the Schedule B Companies, were transferred to the Rose & Thistle account on December 20, 2011 and, that same day, were transferred to Gerrard House.

[156] The opening balance in the Rose & Thistle account on December 20 was $40,369. Most of three mortgage advances made by the Applicants that day to three Schedule B Companies were transferred to the Rose & Thistle account: $278,200 from Liberty Village Properties Ltd.; $39,900 from Riverdale; and, $120,400 from Wynford.

Froese

[157] Froese agreed with the Inspector that "$371,200 traces through the Rose & Thistle clearing account to Gerrard House, with a very limited amount of co-mingling in the clearing account on December 19 and 20, 2011."

H. The Froese critique of the Inspector's "snapshot" approach

[158] In its report Froese criticized the Inspector's tracing analysis because it was a "snapshot" tracing which, while accurate in and of itself, did not reflect the history of other transfers into and out of Rose & Thistle and a Schedule C Company. Froese expressed the view that the determination of the amount owing to or from Rose & Thistle to a Schedule C Company should be based upon the net amount owing as at December 31, 2013.

[159] The Inspector responded to this criticism in its Fifth Report emphasizing that "the tracing charts at Appendix F are intended to provide a snapshot of activity at a particular point of time. Funds transferred to or from the relevant company outside of the time period are not captured."

[160] Let me comment on two principles which guided Froese's analysis – one implied; the other stated. First, Froese made no comment on the propriety of the Respondents' pooling funds advanced by the Applicants with other Schedule B Company funds, Rose & Thistle funds, Schedule C Company funds, and amounts advanced by third party investors in respect of

Schedule C Companies. Second, Froese was of the view that the appropriate way to approach the issue of who owed whom what involved looking at the state of the various net balance accounts amongst the Schedule B Companies, Rose & Thistle and Schedule C Companies at a particular point of time. In his report Froese frequently used December 31, 2013 as that point of time.

[161] While I understand the technical reasons why Froeses followed those principles when conducting his analysis, the principles did not take into account the critical feature of the context surrounding all of those inter-company transfers of the Applicants' funds – they should never have happened. The contracts between the Applicants and the Respondents contained provisions designed to ensure that funds advanced by the Applicants to a Schedule B Company did not leak out from that company's account and that third-party investment funds did not leak into the Schedule B Companies. The Waltons utterly ignored those contractual obligations, with several consequences:

(i) Funds advanced by the Applicants to Schedule B Companies in fact ended up going to Walton-owned Schedule C Companies, a fact acknowledged by Froese;

(ii) The pooling of the Applicants' funds with others by the Respondents has caused significant difficulties in ascertaining precisely what happened with all of the funds advanced by the Applicants. That difficulty was caused by the Respondents systematically ignoring their contractual obligations. The Respondents had complete control over all of the funds. The co-mingling of the Applicants' funds with others was a problem solely of the Waltons' making; and,

(iii) To contend that one should look at the net balances owed between Rose & Thistle and a Schedule C Company at a more recent point of time, rather than focusing on transfers which made available Applicants' funds for Schedule C Companies to acquire properties, ignored the fact that the transfer of Schedule B Company funds to Schedule C Companies at times when a Schedule C property was acquired should never have happened in the first place and that "but for" the transfer of Applicants' funds to Schedule C Companies, the latter would not have been able to acquire the Schedule C Property.

In my view, for the Respondents to use an expert's report to argue that the Inspector's analysis of the tracing of Applicants' funds into Schedule C Companies lacked absolute precision does not help the Respondents' case at all. It amounted to nothing more than chipping away at the edges of inter-company transfers which the Waltons should never have made. It also reinforced the utter failure of the Waltons to discharge the onus on them of explaining precisely what had happened with the Applicants' funds. For the Waltons to be able to rely on net inter-company balances at, say December 31, 2013, in opposition to the Applicants' claims for relief against Schedule C Companies, they would have to demonstrate that all of the Applicants' funds which

were transferred at an earlier point of time into a Schedule C Company to fund its acquisition of a property ultimately found their way back into the Schedule B Company from which they originated and were used only by that Schedule B Company. That the Respondents have not done, or even tried to do. As a result, I do not accept the opinion proffered by Froese that the better way of assessing transfers to Schedule C Companies is to ascertain the net balance owing by or to a Schedule C Company at some point of time long after the Applicants' funds had been made available to the Schedule C Company to acquire a property – a benefit to the Waltons and a detriment to Dr. Bernstein.

I. The "trending up" of transfers to the Schedule C Companies

[162] The Inspector performed an overall analysis of the net amounts transferred from Schedule B Companies to Rose & Thistle and from Rose & Thistle to Schedule C Companies during the period October, 2010 to December, 2013. The net amount transferred from Schedule B Companies to Rose & Thistle was $23.68 million and the net amount transferred from Rose & Thistle to Schedule C Companies was $25.37 million. The Inspector stated, in its Fifth Report:

> The Inspector's analysis shows a consistently increasing net transfer from the [Schedule B] Companies to Rose & Thistle. In other words, even if some amounts were transferred to the Companies by Rose & Thistle, these returns did not keep pace with the steady flow of funds from the Companies to Rose & Thistle and from Rose & Thistle to the Walton Companies.

[163] In its Fifth Report the Inspector included a chart and graph which compared the net amount of transfers from the Schedule B Companies to Rose & Thistle with the net amount of transfers from Rose & Thistle to Walton Companies for each month from October, 2010, when the Applicants made their first investment, to December, 2013. The Inspector reported:

> The graph depicts the net amount transferred as at the end of each month. The graph indicates a steady trend upwards. That is, the net amount transferred from [Schedule B] Companies increased, on a month over month basis for most months. The transfers from Rose & Thistle to Walton Companies increased in most months in a similar ratio….
>
> The timing and quantum of the transfers described above is not consistent with the Respondents' contention that the transfers to Rose & Thistle represent payment for, among other things, more than $20 million worth of construction work performed by or on behalf of Rose & Thistle for the benefit of the Companies.
>
> If the transfers had been related to construction work, a substantial portion of the funds taken from the Companies would have to have been used to pay construction costs, including contractors (if the work was subcontracted) or suppliers and labor (if the work was performed by Rose & Thistle). Only the profit earned by Rose & Thistle on the construction would have been available for transfer to the Walton Companies. However, throughout the period examined, the amount transferred to the Walton Companies and the amount transferred from the Companies increased at approximately the same pace. In

every month examined, the amounts transferred to the Walton Companies represented a significant percentage of the amount transferred from the Companies. There is no evidence that the Respondents had sufficient resources to fund both the transfers to the Walton Companies and the work shown on the invoices that they have proffered to justify those transfers.

J. Preferred Shareholders of some Schedule C Companies

[164] What evidence was filed on these motions to explain the sources of funding available to the Schedule C Companies other than the funds of the Applicants which were transferred by the Waltons out of the Schedule B Companies? Ms. Walton deposed that there was $14,107,876 of 42 "innocent third party investors' money" in the Schedule C Companies consisting of preferred shareholders, common shareholders and debtors. A chart summarizing those investments - Exhibit MM to her June 21, 2014 affidavit - only recorded $7.7 million in investments and it did not provide any back-up documentation to verify the investments.

[165] Ms. Walton also filed affidavits or statements from 30 preferred shareholders in five Schedule C Companies: Front Church Properties, Academy Lands, The Rose & Thistle Group, Cecil Lighthouse and 1793530 Ontario. Each shareholder deposed to the "value" of his or her preferred shares (or in some cases loans) in Schedule C Companies. The particulars are set out in Appendix "B" to these Reasons.

[166] I am not prepared to accept that the "value" each shareholder attributed to his or her shares reflected that actual amount invested by the shareholder. Some of the affidavits strongly suggested that shareholders were including capital appreciation and accrued dividends or distributions in the "value" of their investments. For example, Christine DeJong deposed that she had advanced $716,906 to United Empire, a Schedule C Company, in January, 2013, and stated that the value of her shares, according to the Respondents, was now $992,750. However, taking that "value" evidence from preferred shareholders at its highest, it disclosed a "value" of $8,780,817 attributed by those shareholders to their investments in the five Schedule C Companies.

K. Summary of findings on transfers of funds to Schedule C Companies

[167] I accept, in large part, the tracing analysis performed by the Inspector on the Schedule C Companies described above. I find that in the instances identified by the Inspector, in a brief period of time the Waltons directed the transfer of funds advanced by the Applicants from a Schedule B Company to a Walton-owned Schedule C Company, through Rose & Thistle, and the Schedule C Company used those funds to purchase a property. In the result, I find that the following amounts of the Applicants' funds were used to purchase or discharge encumbrances on Schedule C Properties:

(i) 14 College Street: $1,314,225 ($330,750 + $983,475);

(ii) 3270 American Drive: $1.032 million;

(iii) 2454 Bayview: $1.6 million;

(iv) 346E Jarvis St.: $937,000;

(v) 44 Park Lane Circle: $2.5 million;

(vi) 2 Kelvin Street: $221,000;

(vii) 0 Trent: $152,900; and,

(viii) 26 Gerrard Street: $371,200.

[168] I also accept the following conclusion of the Inspector:

> [T]he Inspector has concluded that the Respondents used new equity invested in, and mortgage amounts advanced to, the [Schedule B] Companies by the Applicants to fund the ongoing operations of other Companies and the Walton Companies. Almost every time the Applicants advanced funds to one of the Companies, a significant portion of those funds was transferred to Rose & Thistle. In some instances, funds could be traced directly into a Walton Company. In other instances, funds could not be traced directly because the Applicants' funds were co-mingled with other funds in the Rose & Thistle account. However, the Inspector has concluded that the Applicants' investment in the Companies was a major source of funds for the Walton Companies.

C. Other issues concerning Schedule C Properties

C.1 Galloway Road

[169] Highland Creek Townes Inc., a Walton company, owned the property at 232 Galloway Road, Toronto. On May 18, 2011, Dr. Bernstein, through his company 368230 Ontario limited, advanced a mortgage loan to Highland Creek. The principal amount of the mortgage was $4.05 million, advanced in two tranches. The mortgage matured on June 30, 2012. It was guaranteed by Norma and Ron Walton.

[170] Mr. Reitan deposed that his review of the title for the property disclosed that Ms. Walton had caused the discharge of Dr. Bernstein's mortgage in August, 2012 notwithstanding that the full amount of the principal had not been repaid. There was no dispute that the discharge was done without Dr. Bernstein's knowledge, consent or approval. When this discharge was discovered, Dr. Bernstein pressed Ms. Walton to pay out his mortgage on Galloway. Dr. Bernstein emailed Ms. Walton on October 1, 2013, asking what she had done with the $6 million in mortgages on the Don Mills Road properties and he continued:

> You promised to pay out the Galloway mortgage by September 30. I do require, and I did expect the funds. When can this be paid out?

[171] Ms. Walton's email response of the same date ignored that question and, instead, pressed Dr. Bernstein to stop his public litigation and move their dispute into "a private setting immediately". That prompted the following response from Dr. Bernstein:

> Dear Norma;
>
> And the $6M is located ____ ?? ____
>
> And the Galloway mortgage is being paid out on ____ ?? _____
>
> I cannot get answers asking you directly – what other options do I have?

[172] On his July 9, 2014 cross-examination Dr. Bernstein testified that he still had not been paid out on the Galloway mortgage.[32]

[173] Ms. Walton's unilateral discharge of Dr. Bernstein's mortgage on the Galloway property without the payment in full of the amount due under the mortgage provided another example of Ms. Walton's pattern of breaching her contracts with Dr. Bernstein, as well as a pattern of oppressive conduct by Norma and Ronauld Walton, as directors and officers of corporations, against the interests of Dr. Bernstein as a corporate creditor.

C.2 30/30A Hazelton

[174] The Respondents seek court approval to sell 30 Hazelton, a Schedule C Property, to 1659770 Ontario Inc., the corporate profile for which lists Jennifer Coppin as the director and officer. George Crossman, a lawyer at Beard Winter LLP, deposed that in 2009 he had been involved in a real estate transaction in which Jennifer Coppin offered to purchase his client's condominium unit through 1659770 Ontario Inc. Ms. Coppin was charged criminally in respect of that transaction, it being alleged that she had altered the agreement of purchase and sale to inflate the purchase price to secure higher financing. Mr. Crossman deposed that he understood it was a term of Ms. Coppin's probation that she not engage in any further real estate dealings.

VII. Explanations Proffered by Ms. Walton for the Use of the Applicants' Funds

[175] Ms. Walton proffered several explanations for the Respondents' use of the Applicants' funds, some of which I have already considered. Nonetheless, this section will summarize and consider each proffered justification.

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[32] Bernstein CX, Q. 1198.

A. Dr. Bernstein was a silent partner and did not insist on the strict observance of the agreements

[176] A major theme of Ms. Walton's affidavits was that Dr. Bernstein wanted to be a silent partner with the result that over the years he did not insist upon strict compliance with the agreements' reporting obligations. That led Ms. Walton to contend in her factum: "Bernstein acquiesced to Walton managing the portfolio in Walton's sole discretion".

[177] The evidence did disclose that during the initial two years of the parties' business relationship, Dr. Bernstein appeared to be content with receiving only periodic reports from Ms. Walton or answers to specific questions which his accountants posed. As Dr. Bernstein stated on his cross-examination, "I just assumed you were following protocols for our agreements…"[33]

[178] By September, 2012 Dr. Bernstein and his accountants were beginning to ask more pointed questions, including requesting financial statements for the Schedule B Companies. By March, 2013, Dr. Bernstein was requiring the Respondents to secure his approval for payments over $50,000 from Schedule B Companies as stipulated by the agreements. In June, 2013 Mr. Reitan requested detailed information about Dr. Bernstein's investments and raised specific concerns with Ms. Walton. Although this course of conduct would prevent Dr. Bernstein from relying on the Respondents' failure to provide monthly reports in the early part of their relationship as an event of default under the agreements, Dr. Bernstein most certainly did not waive his entitlement to receive any reports under the agreements. When Dr. Bernstein began to request them, he was entitled to receive them.

[179] The evidence also disclosed that even in September, 2013, as the relationship between the parties was breaking down and Dr. Bernstein was becoming quite vocal in his demand for a proper accounting of his money, Norma Walton was not prepared to adhere to the terms of her agreements with Dr. Bernstein. Those agreements stipulated that no refinancing of a property would take place without his approval. On September 20, 2013, Ms. Walton emailed Dr. Bernstein advising that the $3.27 million mortgage on 140/150 Queen's Plate Drive was coming due at the end of the month and that she had arranged a new mortgage for $3.35 million which would close in early October. Ms. Walton had signed the term sheet for the replacement mortgage on September 18, 2013, without first securing Dr. Bernstein's approval. Dr. Bernstein emailed her on September 23 insisting that she comply with the terms of their agreement and obtain his approval for any decisions regarding refinancing before they were made. Ms. Walton's response was telling because it revealed her complete unwillingness to follow the contractual terms which bound her:

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[33] *Ibid.*, Q. 1318.

> We are up against a deadline such that if we do not refinance, Carevest will call our loan. I have been working hard to arrange refinancing and initially we tried to get BDC on board but they won't provide funds without site plan approval. Hence I arranged for Stephen to provide the mortgage. I would assume that is agreeable given the alternative is calling the loan, no?

Even when Dr. Bernstein subsequently agreed to refinance on the basis of a new $3.27 million mortgage, Ms. Walton proceeded to put in place a mortgage for an increased amount, $3.35 million.[34]

[180] From this I conclude that Ms. Walton was prepared to ignore not only the contractual language which bound her, but also the express instructions of her co-investor. Instead, Ms. Walton simply did as she saw fit irrespective of her legal obligations.

B. The pooling of funds was permissible or at least not wrongful

[181] Ms. Walton deposed that when she was managing the jointly-owned portfolio of companies, she used Rose & Thistle "as a clearinghouse account to smooth cash flow across the portfolio." In its First Report the Inspector recorded the explanation Ms. Walton had provided for the pooling of funds:

> Ms. Walton confirmed to the Inspector that equity contributions to, and income received by, the [Schedule B] Companies were centralized and co-mingled in the Rose & Thistle account, which Ms. Walton described as a "clearing house". Ms. Walton provided the following explanations for this practice:
>
> (a) Since the Properties are at various stages of development, some are cash flow positive and others cash flow negative. The transfers to and from the Rose & Thistle account "smooth out" the cash flow of the companies; and,
>
> (b) Rose & Thistle does not bill for services that it provides on a regular basis and some transfers were in the nature of payments for services that have been provided but not yet invoiced.

[182] In its Fifth Report (July 1, 2014) the Inspector reported:

> The Respondents provided the Applicants with a pro forma setting out the anticipated cost of completing planned development and/or construction on each project. The Applicants invested 50% of the budget shown on the pro forma but these funds were dispersed among the [Schedule B] Companies and Walton Companies. Accordingly, the

[34] See the email exchanges at Motion Record of the Applicants, Volume 3, Tab 119.

> funds invested by the Applicants in a Company did not remain available to that Company.
>
> Since the Companies did not retain the amounts that the Applicants invested, almost every Company required outside funding in order to complete the work shown on the relevant pro forma. These funds appear to have been drawn in some cases (including those illustrated in Appendix F to the Fourth Report) from new equity investments and mortgage advances by the Applicants. In other words, new advances to one Company appear to have been used to fund the existing obligations of other Companies or Walton Companies.

[183] On his cross-examination Froese stated that the companies managed by the Respondents did not have any controls in place designed to prevent the co-mingling of funds or the movement of funds from Schedule B Companies to Rose & Thistle and on to Schedule C Companies. Froese stated that depending on the arrangement between the parties and the companies, you would expect controls to be in place if the arrangements called for that.[35]

[184] In its Fifth Report the Inspector discussed the consequences of the pooling or co-mingling of funds advanced to the Schedule B Companies by the Applicants:

> The Inspector notes that the Respondents' position that they are owed funds by the [Schedule B] Companies is premised on the assumption that every Company is responsible for every other Company's debts to Rose & Thistle. The Respondents assert that if Company A owed Rose & Thistle $1 million and Company B had $1 million in its bank account, they were entitled to take payment from Company B for the debt owed by Company A. This is significant since the contract governing investment into each Company provided that the Respondents were to provide equity funding once the Applicants' equity investment was exhausted. *The co-mingling of funds therefore had two important consequences: (i) the Applicants' equity investments were exhausted much more quickly because they were used to fund alleged obligations across the portfolio and not only to fund one Company; (ii) the Respondents were able to delay their own equity contributions by transferring funds from other Companies instead of injecting new equity into the relevant Company*. (emphasis added)

[185] Notwithstanding the voluminous email correspondence from Ms. Walton to Dr. Bernstein reporting on the progress of projects, it was not until June 13, 2013 that she told him that the funds he was advancing to the Schedule B Companies were being pooled amongst those companies, transferred to Rose & Thistle and also transferred to Schedule C Companies, when she responded to Mr. Reitan's June 7, 2013 complaint letter.

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[35] Froese CX, QQ. 91-96.

[186] The pooling or co-mingling of funds was a critical breach of the obligations which Norma and Ron Walton owed to Dr. Bernstein under their agreements. In her factum Ms. Walton submitted: "It never occurred to Walton that Bernstein would object to the pooling of funds". I completely reject that submission; it is not in the least credible. One would have thought that the "specific-purpose" clauses contained in each of the agreements for the Schedule B Companies which the Waltons – both lawyers – had signed over the course of three years would have provided Ms. Walton with good reason to think that Dr. Bernstein would object to the pooling of funds since such pooling contravened those agreements. Ms. Walton's protestation of innocent, but mistaken, belief on this issue simply was not credible.

[187] In addition, based on the evidence adduced I find that:

(i) The Applicants were not aware that the Respondents were withdrawing funds from the Schedule B Companies' bank accounts for any purpose other than the costs of the associated property;

(ii) The Applicants did not know that funds from Schedule B Companies were transferred or diverted to the Rose & Thistle "clearing house" bank account because the Respondents, in particular Ms. Walton, deliberately hid those transfers from the Applicants; and,

(iii) The Waltons deliberately did not tell the Applicants that they were using funds advanced by the Applicants to Schedule B Companies for their own personal purposes and benefit and for the benefit of the Schedule C Companies which they owned or controlled.

C. Production of the general ledgers of the Schedule B Companies

[188] As an exhibit to her June 21, 2014 affidavit Ms. Walton produced the detailed general ledgers for each of the Schedule B Companies. She viewed the production of the general ledgers as amounting to a full accounting of the Applicants' funds as previously ordered by this Court. It was not. Those general ledgers had been produced to the Inspector last October. They did not enable an analysis of the Applicants' funds transferred from the Schedule B Companies to Rose & Thistle, and then to the Schedule C Companies, so they did not satisfy the Respondents' obligation to provide a full accounting of how the Respondents had used the Applicants' funds.

D. The Respondents previously had provided a full accounting

[189] Ms. Walton submitted that the Respondents had provided a full accounting of the use of the Applicants' funds and sought a declaration to that effect. This was an argument which Ms. Walton had made on several other occasions, as summarized in my Reasons of May 20, 2014:

To date the respondents have failed to comply with orders of this Court requiring them to provide an accounting of monies received from the applicants. The trail starts with the October 25, 2013 order of Newbould J. where, at paragraph 10, he ordered "that the Respondents shall provide forthwith a full accounting of ***all monies*** received, disbursed, owed to and owed from the Schedule "B" Corporations and The Rose & Thistle Group Ltd. since September, 2010 to the present".

In her affidavit sworn December 17, 2013, Walton deposed, in response to the applicants' allegation that she had failed to provide a full accounting, that "I have provided all information/documentation to the Receiver/Manager", and she proceeded to give some details, concluding: "The Receiver/Manager is in possession and control of all financial documents held by the Walton Group in relation to the Schedule B Companies, and all documents related to the Rose and Thistle Group have been provided to him." In his endorsement made January 20, 2014, Newbould J. rejected Walton's contention that the respondents had provided a full accounting. He concluded they had not, and he ordered:

> Ms. Walton is to provide the accounting ordered in paragraph 10 of the order of October 25, 2013 no later than January 31, 2014. Delivering records to the Manager is not an accounting.

Notwithstanding that clear finding and further order by Newbould J., in her notice of motion dated March 31, 2014, Walton sought an order that the applicants "clarify what is meant by the term 'a full accounting of all monies received, disbursed, owed to and owed from Schedule 'B' Corporations and The Rose and Thistle Group Ltd. since September 2010 to the present' as found in the October 25, 2013 Order." In her affidavit of that date Walton deposed:

> I have heard the Applicants complain a number of times to the Court that I have not provided an accounting as ordered on October 25, 2013. I have sworn an affidavit wherein I explain what I provided by October 28, 2013 to fulfill this requirement.

As noted, back on January 31 Newbould J. held that the respondents had not delivered the ordered accounting and directed them to do so. They have not done so. Moreover, it is not for the applicants to explain the meaning of an order of this Court; that job falls to the judges of this Court. When Walton raised this point at a recent hearing before me, I informed her that a full accounting would involve explaining what had happened to every penny of the money invested by Dr. Bernstein with the respondents. That has not occurred, and that most serious failure by the respondents weighs heavily in considering what part, if any, of the net proceeds of the sale from the Gerrard Street Property should be made available to them for their personal use or benefit.[36]

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[36] 2014 ONSC 3052, paras. 97-100.

As I have found above, and will discuss further below, the Respondents still have not provided the ordered accounting.

[190] Finally, on this point, in his order dated November 1, 2014, Newbould J. directed the Respondents to pay the Inspector's fees. They failed to do so. In a March 21, 2014 Order Newbould J. directed the Inspector to examine the Respondents about their non-payment of fees. The Inspector commenced his examination of Norma Walton on April 11, 2014. Prior to the examination Ms. Walton had not produced documentation relating to her financial situation; at the examination Ms. Walton gave numerous undertakings to produce such documentation. As of the date of the Inspector's Fifth Report (July 1, 2014), Ms. Walton had fulfilled or partially fulfilled 8 of the 39 undertakings given at her examination. According to the Inspector, the remaining 31 undertakings remained entirely unsatisfied, including the important undertaking to provide copies of bank statements relating to the Walton Schedule C Companies. In its Fifth Report the Inspector stated that Ms. Walton had advised she would answer the balance of her undertakings once she had filed her evidence for the July 16 hearing. At the hearing I inquired whether Ms. Walton had delivered those outstanding undertaking answers. She had not.

E. The charts attached to the June 21, 2014 Norma Walton affidavit

[191] In paragraphs 10 through to 14 of her June 21, 2014 affidavit, Norma Walton attempted to account for the $23.68 million in net transfers from Schedule B Companies to the Rose & Thistle Group, and in paragraph 49(l) of her Factum Ms. Walton argued that "everything that was transferred from the jointly owned properties to Rose and Thistle had been accounted for as monies used by Rose and Thistle to purchase, renovate or manage the joint portfolio."

E.1 Construction work billed by Rose & Thistle

[192] The chart contained in paragraphs 11 and 13 of her affidavit, as well as Tab A to her Factum (which I will call the "Reconciliation Chart"), recorded that $8.5 million of construction work had been performed by Rose & Thistle for Schedule B Companies between January, 2011 and February, 2012, specifically for the Spadina, Eglinton, Wynford and Atlantic properties. Ms. Walton stated that she had prepared the Reconciliation Chart with the assistance of Mr. Bucci, the CFO of Rose & Thistle; she did not explain why Mr. Bucci had failed to provide any evidence in this proceeding, especially evidence which would provide an accounting of the Applicants' funds.

[193] Ms. Walton deposed that she was unable to complete the analysis for the construction work performed on projects after February, 2012 because she was still awaiting the reports prepared by her cost consultants. That explanation made no sense and I do not accept it. As described above, the cost consultants simply relied upon accounting summaries provided to them by Rose & Thistle. Put another way, the cost consultants merely used information already in the possession of Rose & Thistle to prepare their reports. It therefore makes no sense that Rose &

Thistle would be unable to use information already in its possession to explain the total amount of construction costs which it contended it had incurred on behalf of the Schedule B Companies.

[194] In her Factum Ms. Walton argued that Rose & Thistle was entitled to up to an additional $17.070 million for construction costs based on the cost consulting reports.[37] I give no credence whatsoever to that argument. On the contrary, I found earlier in these Reasons that the Respondents had failed to account for and to justify the amount of the construction costs invoiced by Rose & Thistle to the Schedule B Companies.

E.2 Management fees

[195] Ms. Walton explained that $1.183 million of the net transfer could be explained by management fees which Rose & Thistle had billed to the Schedule B Companies. Earlier in these Reasons I accepted the reconciliation between the Inspector and the Respondents of $1 million in management fees.

E.3 Property maintenance costs

[196] Ms. Walton's Reconciliation Chart also recorded $2.58 million in property maintenance costs performed by Rose & Thistle. In the Supplement to its Fifth Report the Inspector stated:

> Ms. Walton's chart includes property maintenance fees charged to the Properties. The Inspector understands that these costs represent costs incurred by Rose & Thistle on behalf of the [Schedule B] Companies with respect to maintenance of the various Properties. The Inspector has not been provided with back-up documentation in respect of these fees.

I find that the Respondents have not established, on a balance of probabilities, that they incurred such maintenance costs on behalf of Schedule B Companies.

E.4 Deposits paid by Rose & Thistle for Schedule B Properties

[197] The Reconciliation Chart also recorded $6.657 million in deposits paid by Rose & Thistle for the purchase of Schedule B Properties. The Inspector, in the Supplement to its Fifth Report, stated:

> The Inspector understands that in some cases Dr. Bernstein funded the deposits by payments directly into the Rose & Thistle account. Accordingly, Ms. Walton appears to state that the Waltons funded their share of deposits on some properties by drawing funds out of other [Schedule B] Companies. These transfers do not appear to represent payment

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[37] Walton Factum, paras. 49(f), (g) and (i).

> for services rendered by R&T because all such services appeared to be shown elsewhere on Ms. Walton's chart.
>
> Put simply, Ms. Walton's chart, if correct, appears to indicate that Dr. Bernstein funded his share of the listed deposits directly and the Walton's share of those deposits indirectly (since the Waltons used funds that Dr. Bernstein had previously contributed to another company).[38]

[198] Let me express my profound displeasure and frustration at the way the Waltons' "evidence" on this point was developed. Last year the Waltons were ordered to provide a full accounting of the funds advanced by Dr. Bernstein. They failed to do so, as was found by both Newbould J. and myself in earlier reasons. Yet, in her June 26, 2014 Affidavit and her Factum filed July 15, 2014, Ms. Walton, for the first time, argued, through her Reconciliation Chart that Rose & Thistle had paid for $6.657 million in deposits for Schedule B Properties for which accounting recognition previously had not been given. That spawned a flurry of responding submissions from other parties on the point, both before and after the hearing, ultimately culminating with Ms. Walton massaging a reply chart put in by the Applicants (Mr. Reitan's Schedule "E") to contend that the Waltons in fact had injected $8.933 million in equity into the Schedule B Companies, an assertion for which the Waltons had adduced no concrete, forensically verifiable evidence!

[199] That is no way in which to perform an accounting.

[200] Since last October the Waltons have been subject to an order of this Court requiring them to account. For eight months they ignored that order. Frankly, what appears on Ms. Walton's Reconciliation Chart should have been put before the Inspector last October so that proper consideration could have been given to the arguments set out in it. I am thoroughly unimpressed by Ms. Walton's last minute effort to "jam through" an accounting. Her breach of the previous accounting order, together with the last minute nature of her accounting attempt, combine to justify a high degree of skepticism towards the arguments embedded in the Reconciliation Chart.

[201] Returning to the property purchase deposits, I would observe that the "back-up" Ms. Walton provided for these deposits at Exhibit B to her June 26, 2014 affidavit in large part consisted of Rose & Thistle bank account statements, certain entries on which bore handwritten asterisks, unaccompanied by any other explanation. I infer that the asterisked entries corresponded with the deposits recorded on Schedule A to her Factum. Her Exhibit B also contained copies of a number of Rose & Thistle cheques, only some of which seemed to have anything to do with deposits for purchases of land. However, Ms. Walton failed to show how

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[38] Ms. Walton understood that all monies provided by Dr. Bernstein to the Schedule B Companies, whether directly or through Rose & Thistle, would be included in the $78.48 million "transferred to Rose & Thistle" total.

those payments made by Rose & Thistle were recorded on the books and records of Rose & Thistle and the relevant Schedule B Company, a most material omission in her argument.

[202] In any event, I do not accept Ms. Walton's argument on this point. In Appendix E to its Fourth Report the Inspector reported that for the period under review it had identified $78.42 million in transfers from Schedule B Companies to Rose & Thistle and $54.739 million in transfers from Rose & Thistle to Schedule B Companies, for a net transfer of $23.68 million from Schedule B Companies to Rose & Thistle. Ms. Walton contended, in her July 15, 2014 Factum, that the $23.68 million in net transfers from Schedule B Companies should be reduced by, or could be partially accounted for by, $6.657 million in deposits made by Rose & Thistle in respect of Schedule B Properties. According to her Reconciliation Chart, those deposits spanned the period from September, 2010 (Eglinton) to April, 2013 (620 Richmond). Had Rose & Thistle transferred to Schedule B Companies funds for deposits on Schedule B Properties – whether Bernstein funds or non-Bernstein funds - one reasonably would expect that those deposits would have been taken into account in the transfers from Rose & Thistle to Schedule B previously reported by the Inspector because the books and records of Rose & Thistle would have recorded such inter-company transfers. To take them into account again, as Ms. Walton seemed to argue, would amount to double-counting or, as put by the Inspector in the Supplement to his Fifth Report, it would mean that "Dr. Bernstein funded his share of the listed deposits directly and the Walton's share of those deposits indirectly (since the Waltons used funds that Dr. Bernstein had previously contributed to another company)". In sum, I do not accept Ms. Walton's submission that deposits of $6.657 million should be recognized to reduce the net transfer amount due from Rose & Thistle to the Schedule B Companies as found by the Inspector.

E.5 Equity withdrawals

[203] The Reconciliation Chart also recorded $3.615 million representing a December 2011 and June, 2012 "Dr. Bernstein purchase from Walton in the schedule B" [Tisdale and 875 Queen Street East] of $1.4 million and $2.215 million respectively. Ms. Walton deposed that those amounts related to Dr. Bernstein "buying into a company after we had already owned the company for a period of time". That "earned equity", according to Ms. Walton, further reduced the net transfers from Schedule B Companies to Rose & Thistle. I do not accept Ms. Walton's submission on that point. I will turn now to the Respondents' "earned equity" argument in which two properties figured prominently – the property at 875/887 Queen Street East held by Red Door Developments Inc. and Red Door Lands Inc. (which I discussed earlier in the context of 44 Park Lane Circle), as well as the Tisdale Mews property at 78 Tisdale Avenue.

875/887 Queen Street East

[204] In Section VI.E of these Reasons I rejected Ms. Walton's argument that she had been entitled to withdraw $2.32 million in "earned equity" from funds advanced by Dr. Bernstein for

875/887 Queen Street East and, instead, found that the Waltons had misappropriated to their own personal use on June 25, 2012 funds advanced by Dr. Bernstein to acquire their personal residence at 44 Park Circle Park Lane Circle and, by so doing, Norma and Ron Walton had deceived Dr. Bernstein and engaged in fraud.

78 Tisdale Avenue

[205] In his Third Report dated January 15, 2014, the Inspector set out the explanation it received from Ms. Walton for the Tisdale transaction:

> In the case of Tisdale, Ms. Walton purchased the property for approximately $1.4 million. Rose & Thistle performed development work on the property before Dr. Bernstein invested in it. In the relevant agreement between the parties dated January 11, 2012… Dr. Bernstein bought 50% of the shares of Tisdale based on an agreed-upon value of approximately $6.7 million. Ms. Walton therefore had one half of that amount, approximately $3.35 million in equity in Tisdale immediately after Dr. Bernstein's investment. Rose & Thistle delivered an invoice to Tisdale dated January 1, 2012… that purported to charge fees to Tisdale in the amount of approximately $4.4 million. Ms. Walton subsequently advised the Inspector that the purpose of the transaction was to effectively adjust her equity to draw out the increase in value between the time she purchased the company and Dr. Bernstein's buy-in. An adjustment to Ms. Walton's equity account on the books of the company has been recommended by the company's external accountant. The Inspector questioned the propriety of Rose & Thistle delivering an invoice purportedly charging fees as a mechanism to reflect a distribution of equity to a shareholder. Upon being challenged by the Inspector, Ms. Walton reversed the invoice and an increase was recorded to Ms. Walton's equity on the balance sheet adding approximately $4.4 million as a fair market value adjustment. The Inspector understands that Ms. Walton relies upon this increase in her equity account as a basis to explain several expenses that she caused Tisdale to pay. The Inspector notes the paragraph 13 of the agreement between the parties provides that equity is to be distributed to the shareholders only after the property is developed and sold.

[206] I do not accept Ms. Walton's explanation that she was entitled to treat funds advanced by Dr. Bernstein for Tisdale as a return of equity to her. Again, the agreement the Waltons signed with Dr. Bernstein did not permit such conduct. Section 7(a) stated that Dr. Bernstein would provide $1.48 million of his 50% share of the joint $3.342 million equity investment upon signing, while section 7(b) stated that "Walton has already provided the bulk of their equity and they will provide another $191,000 in a timely manner as required as the Project is completed". Section 13 did not permit the payment out of capital until the project was "substantially completed". Consequently, the Waltons' extraction of some of the funds advanced by Dr. Bernstein on the basis that they were entitled to a return of capital or payment out of their equity was in breach of their clear contractual obligations to Dr. Bernstein. They had no right to do so.

[207] Further, as in the case of 875/887 Queen Street East, the Waltons did not inform Dr. Bernstein that they intended to treat some of his equity injection as a return of capital to them.[39] By failing to so inform Dr. Bernstein, at a time when they represented to Dr. Bernstein that no capital would be withdrawn until the substantial completion of the project, the Waltons deceived and defrauded Dr. Bernstein.

Comments by Froese on equity contributions

[208] In its report Froese stated:

> Based on information attached to each Agreement, over the period from 2010 to 2013, expected funding available at the date of purchase of the Bernstein properties exceeded the funds required to purchase the properties by approximately $55.5 million. That is, the pro forma information showed that there was significant excess funding available to commence work on the projects. As well, Walton was to initially advance approximately $14.5 million as compared to the $75.2 million to be advanced by Dr. Bernstein as an equity investment (plus mortgage financing for certain properties).
>
> The co-mingling of funds through the Rose & Thistle clearing account resulted in a portion of the $55.5 million of excess funding at the date of purchase to carry the properties without further funding requests of the shareholders, and also without the immediate need for Walton contributions.

As previously noted, the agreements between Dr. Bernstein and the Waltons contained clauses which provided that the Schedule B Company would "only be used to purchase, renovate and construct, and sell" the specified property or "such other matters solely relating to the Project and the Property." While Froese's comments about the co-mingling of funds reflected a theoretical view about how funds could be used, they ignored the specific provisions in each of the agreements between Bernstein and the Waltons about how the funds had to be used.

[209] Froese also stated:

> This analysis supports the position of Norma Walton that Dr. Bernstein expected, or reasonably should have expected, there to be a significant disparity in the initial investment in the Bernstein properties, with Walton to fund future costs required to complete each project.

With respect, such an assertion fell outside the proper scope of the opinions which Froese was in a position to express, especially because there was no evidence to support such an assertion.

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[39] Norma Walton's email of December 27, 2011 made no mention of the Waltons extracting equity from Tisdale: CX Bernstein, Ex. 18.

E.6 Conclusion

[210] In conclusion, I find that the Reconciliation Chart filed by Ms. Walton did not assist her in accounting for the net transfers from the Schedule B Companies to Rose & Thistle. At the end of the day, the Respondents have only justified an adjustment of $1 million to the Inspector's net transfer figure based upon the reconciliation of management fees reached with the Inspector.

F. It was the receivership which caused the Applicants financial harm

[211] On several occasions during this proceeding Ms. Walton has contended that it was the Applicants' decision to seek the appointment of receiver which caused them financial harm. She argued that had the Applicants allowed the Waltons to deal with the portfolio, everyone would have been financially happy. In her June 21, 2014 affidavit, Ms. Walton again stated that a valuation of the portfolio of Schedule B Properties the Respondents had commissioned from Colliers right after the receivership order was made showed an appraised value of the portfolio of $328.34 million. That appraisal was not placed before me in evidence; I am unable to comment upon it.

[212] Moreover, Ms. Walton's submission on this point ignored the simple fact that it was the conduct of the Respondents in breaching the agreements by co-mingling funds and applying some of the Applicants' funds for unintended purposes, including self-dealing in favour of the Respondents' personal interests, that lies at the root of the current situation. The receivership order was designed to mitigate the harm caused by the Respondents' wrongful conduct.

VIII. Analysis: Overview

[213] I intend to proceed with the analysis of the parties' claims by considering the groups or packages of relief sought by them. The relief sought by the Applicants has evolved since the service of their initial February Notice of Motion. Much of the relief requested by the Applicants at the July hearing originated in their Consolidated Notice of Cross-Motion/Notice of Motion dated February 14, 2014, which was originally returnable on March 5, 2014. For a variety of reasons that hearing was adjourned until this past July. In their June 13, 2014 Fresh as Amended Consolidated Notice of Motion, Notice of Cross-Motion and Notice of Return of Application the Applicants expanded the scope of the relief to include some not requested by the Applicants in their initial February Notice of Motion.

[214] At the hearing the Applicants amended and expanded the relief sought in two further respects. First, the Applicants advised that they had reached an understanding with the mortgagees of some of the Schedule C Properties, as a result of which they were amending the relief requested in respect of those properties. Second, the Applicants submitted a form of draft order which went through three iterations during the course of the hearing and which further

expanded the relief they sought. Ms. Walton took issue with what she described as the "creeping" amendments the Applicants sought to make to their claims.

IX. Motion to amend the Notice of Application

[215] The Applicants sought an order granting them leave to issue and serve the Fresh as Amended Notice of Application attached to their June 13, 2014 Consolidated Notice of Motion. Ms. Walton submitted that it was inappropriate for Dr. Bernstein to continually seek to amend his application to claim ever-expanding relief. She submitted that apart from any "ancillary matters" flowing from the orders last year appointing the Inspector and the Manager, Dr. Bernstein should not be entitled to assert additional claims. Ms. Walton submitted:

> This is Bernstein's seventh proposed amendment to the application. He is not entitled to continue to amend the application every time he decides he wants something further from Walton. The proper route for him now is to come back through the receivership for anything he wants within the receivership, and to launch a statement of claim if he intends to sue for damages after the Schedule B accounting is completed. It is improper form to claim damages through the seventh amendment to an application when the relief originally sought has been finally determined.

[216] I do not accept Ms. Walton's submission. The Respondents have ignored the October, 2013 Order to account. As a result, the Inspector had to expand the scope of its work, and only through the Inspector's investigations did a clearer – albeit still incomplete - picture emerge about how the Respondents had dealt with the Applicants' funds.

[217] As I read the Applicants' proposed Fresh as Amended Notice of Application, they are making the amendments in light of the evidence which has emerged through the Inspector's reports. That is a proper basis upon which to amend, and I therefore grant the Applicants leave to issue and serve their proposed Fresh as Amended Notice of Application.

X. Analysis: Relief involving Schedule B Companies/Properties and the Individual Respondents

A. The relief sought

The Applicants

[218] Both the Applicants and Ms. Walton sought relief in respect of the Schedule B Companies and Properties. On their part, the Applicants sought the following relief in their Notice of Motion in respect of the Schedule B Companies and against the Individual Respondents:

(i) An order that the issued and outstanding shares in the Schedule "B" Companies held by the Waltons be cancelled where shareholder equity had not been contributed by them;

(ii) An order for restitution and repayment to the Applicants by the Respondents in the amount of $78,420,418 for breach of contract, unlawful misappropriation and unjust enrichment;

(iii) An order for restitution and repayment by the Respondents to the Applicants and/or the Schedule B Companies, as appropriate, in respect of the fees of Schonfeld Inc., in its capacity as Inspector and Manager in this proceeding, and of its counsel Goodmans LLP;

(iv) An interim order directing the Respondents to disclose any agreements not heretofore disclosed to cross-collateralize any obligations of the Schedule B Companies, the Schedule C Properties or 44 Park Lane Circle, Toronto, Ontario; and,

(v) An order that Schonfeld Inc. be appointed as Receiver over the Respondents, Norma Walton and Ronauld Walton, for the purpose of ensuring payment in accordance with any judgment of the Court in this proceeding.

[219] In the third iteration of the draft judgment and order filed by the Applicants at the July hearing, they sought orders granting the following additional relief:

(i) the continuation of the Orders of Newbould J dated October 4, 2013, October 25, 2013, November 5, 2013, December 18, 2013 and March 21, 2014, except as modified by any order made by these Reasons;

(ii) holding the Respondents 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 payment to the Applicants of the balance of those funds not otherwise recovered by the Applicants from the sale of the Schedule B Properties;

(iii) indemnification by the Respondents of the Schedule B Companies and Applicants for all principal amounts, plus interest, costs and penalties incurred by or on behalf of the Schedule B Companies, in respect of unauthorized mortgages registered on the Properties, with that amount to be fixed;

(iv) indemnification by the Respondents of the Schedule B Companies and Applicants for all amounts due and owing to creditors and lien claimants of the Schedule B Properties and Companies, including costs, penalties and interest, of the Schedule B Companies, with that amount to be fixed;

(v) declaring that the Applicants had priority over any unauthorized interests in the Schedule B Companies; and,

(vi) allowing the Applicants to elect to treat funds advanced by them to the Schedule B Companies, or any of them, as shareholder loans for the purposes of enforcement of their remedies.

Ms. Walton

[220] On her part, Ms. Walton requested orders containing the following relief:

(i) a declaration that the Respondents had provided a full accounting of Dr. Bernstein's invested funds in the Schedule B Companies in full satisfaction of the October 25, 2013 Order;

(ii) removal of The Rose and Thistle Group Ltd. from the operation of paragraphs 3(b) and (c) of the October 25, 2013 Order; and,

(iii) a determination by the Court, by way of the trial of an issue, of the amount of money due from the Schedule B Companies to The Rose and Thistle Group Ltd. for work done and not yet paid and an Order that the amount due be paid from sale proceeds of the Schedule B properties.

B. Analysis

B.1 Accounting

[221] I have found above that the Respondents have not provided the accounting mandated by this Court's October 25, 2013 Order.

[222] Ms. Walton sought to remove from the ambit of the October 25 Order the Respondent, The Rose & Thistle Group Ltd., on the basis that the company was owned jointly by her husband and herself and "no longer has any banking relationship with the Bernstein-Walton portfolio of properties." Since the Respondents have failed to provide the Court-ordered accounting, and since Rose & Thistle was the conduit through which funds of the Applicants were directed by the Waltons from the Schedule B Companies to Schedule C Companies, there is no basis to remove Rose & Thistle from the operation of paragraphs 3(b) and (c) of the October 25, 2013 Order. On the contrary, it is necessary that Rose & Thistle remain subject to that order so that tracing efforts can continue.

[223] Accordingly, I dismiss those portions of Ms. Walton's motion.

[224] The Applicants' request for an order that the Respondents disclose any cross-collateralization agreements not already disclosed is necessary for the proper performance of the accounting order, and I grant it.

B.2 Transfers between Rose & Thistle and Schedule B Companies

[225] I have found that of the $23.6 million in net transfers from Schedule B Companies to Rose & Thistle identified by the Inspector, the Respondents had only justified a reduction of $1 million in that number by reason of management fees billed. It follows that I dismsss Ms. Walton's audacious – but forensically unsupported – request for a trial of an issue of the amount of money the Schedule B Companies owed to Rose & Thistle. While in sports the best defence sometimes might be a good offence, that strategy does not work when parties who are subject to a court accounting order fail to comply with it. Ms. Walton seems to fail to appreciate the gravity of the situation in which she and her husband find themselves.

B.3 Restitution and damages

[226] The Applicants sought an order for restitution and repayment to them by the Respondents in the amount of $78,420,418 for breach of contract, unlawful misappropriation and unjust enrichment, which they translated in their draft order into a request for an order that the Respondents were 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

[227] I am not prepared to grant such an order at this time because I am not satisfied that adequate argument was placed before the Court on this issue. Applying the different measures of damages for breach of contract, unlawful misappropriation and unjust enrichment could result in quite different damage awards on the facts of this case. I think the Court requires more assistance on this point than was provided by the parties at this hearing, and I therefore defer to a later date consideration of this part of the Applicants' claim. For the same reason I am not prepared to grant, at this time, the Applicants' related request 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.

[228] However, I think the evidence justifies granting two forms of relief which relate to the entitlement as between the parties to sale proceeds.

[229] First, the Applicants sought an order that the issued and outstanding shares in the Schedule B Companies held by the Respondents be cancelled where they had not contributed shareholder equity. Ms. Walton submitted that the Respondents had paid $100 for their shares in

the Schedule B Companies,[40] as a result of which, she contended that the Waltons were entitled to an accounting of monies from the joint portfolio in the same way that Dr. Bernstein was.[41] Ms. Walton further submitted that Dr. Bernstein's claim to cancel the shares owned by the Waltons in Schedule B Companies was premature because the Inspector had not yet provided confirmation of the equity invested in the Schedule B Companies by Ms. Walton. Accordingly, Ms. Walton submitted that there was no basis for the cancellation of the shares.

[230] I reject Ms. Walton's argument. The various agreements Dr. Bernstein entered into with the Waltons stipulated that shares in a Schedule B Company would be issued on the basis of one share for each dollar of equity invested. For example, the October 4, 2012 agreement concerning Fraser Properties Corp. and Fraser Lands Ltd. (7-15 and 30 Fraser Avenue) provided that 16,572,063 shares would be issued to each of Dr. Bernstein and the Waltons, with Section 7 stating that the $33,144,124 of equity would be paid at stipulated times, with the Waltons' $14,107,062 payable "to the Company in a timely manner as required as the Project is completed". The payment of $100 by the Waltons to the Fraser companies would not support the issuance to them of 16,572,063 shares in those companies, but only the issuance of 100 shares. I therefore order 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; any other shares should be cancelled. From the evidence filed to date, that will result in *de minimis* shareholdings of the Waltons in most Schedule B Companies and therefore limit – quite properly – their ability to participate in any distributions from those companies once all creditors have been paid.

[231] Second, I grant the Applicants' request for an order appointing Schonfeld Inc. as Receiver over the Respondents, Norma Walton and Ronauld Walton, but with a somewhat different scope than that requested. The net worth statement filed by Ms. Walton on these motions represented that the only source of net worth available to the Waltons consisted of their equity in Schedule B and C Properties and Companies. Ms. Walton made it quite clear in her evidence that she wished to dispose of the Schedule C Properties in order to prefer her non-Bernstein creditors. In Section XI.D below I find that the Applicants have demonstrated a strong *prima facie* claim of unjust enrichment against the Waltons in respect of certain Schedule C Properties up to a possible claim of $22.6 million. Until proper consideration can be given to those claims and the respective interests of all creditors of the Waltons, it is necessary to ensure

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[40] Walton Factum, para. 72.

[41] In its Third Report the Inspector described Rose & Thistle invoices of $6.6 million to Tisdale and Red Door purportedly for the distribution to the Waltons of their portion of the equity in those companies. I rejected Ms. Walton's "earned equity" argument.

that the Waltons cannot dispose of their Schedule C Property. A receiver is required for that purpose.

[232] The Waltons have not complied with this Court's accounting order and, as I noted earlier in these Reasons, Ms. Walton failed to answer key undertakings about her personal finances, including failing to provide copies of her bank account statements. It is necessary to appoint a receiver over the books and records of the Waltons both to preserve information about their financial affairs and to make such information available to their creditors for tracing purposes who are faced with sorting out the mess created by the Waltons.

[233] Consequently, I appoint Schonfeld Inc. as receiver of all the property of the Waltons, of whatever kind, as well as of their books and records. However, the appointment of Schonfeld shall be on an interim basis only. In my view, a court officer, such as a receiver, should only be allowed to wear so many hats, otherwise unworkable conflicts of interest inevitably arise. Dr. Bernstein is not the only creditor of the Waltons. Accordingly, I order that Schonfeld Inc. be replaced as receiver of the Waltons within 120 days of the date of this order but, until then, Schonfeld Inc. can exercise the full powers of such a receiver.

B.5 Unauthorized mortgages indemnification request

[234] In respect of the Applicants' request for orders requiring the Respondents to indemnify them and the Schedule B Companies in respect of "unauthorized mortgages", insufficient specific evidence and argument was provided on this point to enable its consideration.

B.6 Priority of claims/shareholder loans

[235] I am not prepared to grant, at this point of time, the Applicants' request for an order that they have priority over "any unauthorized interests in the Schedule B Companies". The request was too vague, and the evidence and argument on this point was not adequately developed. As well, it was not clear whether any person who might be claiming such an "unauthorized interest" had been given notice of the motion.

[236] The Applicants sought an order that they be permitted to elect to treat funds advanced by them to the Schedule B Companies as shareholder loans for the purposes of enforcement of their remedies. Again, this point was not adequately developed. There were references in the evidence to the Applicants already having converted their equity advances into shareholder loans. If that in fact occurred, the need for a Court order is not apparent. In any event, the relief sought might affect the priority of claims by creditors of Schedule B Companies, and that issue is better left to the claims process administered by the Manager.

B.7 Inspector's fees

[237] Previous orders of this Court required the Waltons to pay for the costs of the Inspector. Save for a partial payment from the proceeds of the recent sale of one Schedule C Property, the Waltons have failed to do so. The Applicants have been left to fund the activities of the Inspector, a position they should not have been put in. Accordingly, I grant an order for restitution and repayment by the Respondents to the Applicants and/or the Schedule B Companies, as appropriate, in respect of the fees of Schonfeld Inc., in its capacity as Inspector in this proceeding, and of its counsel Goodmans LLP.

[238] As to the Applicants' request for a similar order in respect of the fees of the Manager and its counsel, I see no need to vary the terms of the Appointment Order at this time. The Applicants may renew their request, if the need arises, as the realization process conducted by the Manager comes closer to completion.

B.8 Continuation of prior orders of this Court

[239] Finally, for the sake of clarity, the Orders of Newbould J. dated October 4, 2013, October 25, 2013, November 5, 2013, December 18, 2013 and March 21, 2014 shall continue in full force and effect, except as otherwise modified by the specific orders made in these Reasons.

XI. Analysis: Relief involving Schedule C Companies and Properties

A. The relief sought

Applicants

[240] In their Notice of Motion the Applicants sought the following relief in respect of Schedule C Properties:

(i) An order that the Orders of this Court dated December 18, 2013 and March 21, 2014 be amended to add all the properties listed in Schedule C of the Notice of Motion;

(ii) An interim Certificate of Pending Litigation and a blanket charge respecting the property municipally known as 44 Park Lane Circle, Toronto, Ontario and the Schedule C Properties in which the Respondents have an interest;

(iii) A declaration that the property at 44 Park Lane Circle, Toronto, Ontario and the Schedule C Properties in which the Respondents have an interest and/or the proceeds from the sale of 44 Park Lane Circle, Toronto, Ontario and/or the Schedule C Properties in which the Respondents have an interest are subject to a constructive and/or resulting trust from the date of purchase in favour of the Applicants;

(iv) An order tracing the funds from the Applicants to and through the accounts of the Schedule B Companies, the accounts of Rose & Thistle, the personal accounts of Norma and Ronauld Walton, the trust account of Walton Advocates, the trust account of Devry Smith Frank LLP, former real estate counsel for the Waltons, and otherwise into 44 Park Lane Circle, Toronto, Ontario and the Schedule C Properties;

(v) An order declaring 44 Park Lane Circle, Toronto, Ontario and the Schedule C Properties in which the Respondents have an interest as the proceeds of the funds from the Applicants;

(vi) An order that the Applicants may seize and sell 44 Park Lane Circle, Toronto, Ontario and the Schedule C Properties in which the Respondents have an interest, subject to the enforceable rights of prior registered charges and liens on the properties;

(vii) An order that Schonfeld Inc. be appointed as Manager of the Schedule C Properties in which the Respondents have an interest for the purposes of the relief sought; and,

(viii) An order that the Respondents are jointly and severally liable 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 discharge from title of the property at 232 Galloway Road and payment of that amount to the Applicants

[241] In the third iteration of the draft judgment and order submitted by the Applicants at the July hearing, the Applicants requested the following additional relief:

(i) The amendment of the Orders of this Court dated December 18, 2013 and March 21, 2014 *nunc pro tunc* to include 26 specified Schedule C Properties, save and except those properties that have been sold pursuant to an order of this Court;

(ii) a declaration that the Respondents had not transferred the following Schedule C Properties to arm's-length third parties, but had retained an interest in 346C and D Jarvis Street, 14/17 Montcrest, 19 Tennis Crescent and 646 Broadview Avenue;

(iii) an order specifying that in respect of any Schedule C Property for which leave is granted to issue a certificate of pending litigation, a charge would be registered on title to those properties in favor of the Applicants, in subsequent priority to any security interests, trusts, liens, charges and encumbrances, statutory or otherwise in favor of any person validly registered on title as of the date of the order;

(iv) an order that the certificates of pending litigation and charges sought did not apply to ten Schedule C Properties in respect of which the Applicants had reached an understanding with the mortgagees of those properties;

(v) the imposition of a constructive trust on the following Schedule C Properties in favour of the applicants as at the date of purchase of the properties for the proportionate share of the purchase price that the following amounts represented and for any proportionate share of the increase in value to the date of realization:

a. 2454 Bayview Avenue: $1.6 million

b. 346E Jarvis Street: $937,000

c. 14 College Street: $1,314,225

d. 26 Gerrard Street: $371,200

e. 2 Kelvin Avenue: $221,000

f. 3270 American Drive: $1,032,000; and,

g. 44 Park Lane Circle: $2,337,850,

save and except those properties which had been sold pursuant to court order, and that the constructive trust so ordered in favour of the Applicants was subordinate only to *bona fide* secured creditors with valid registered security interests on title of the property;

(vi) the Respondents and the Schedule C Companies/Properties in which the Respondents had any interest as at July 16, 2014, the date of the hearing, were jointly and severally liable for all losses suffered by the Applicants in respect of funds advanced by the Applicants to the Schedule B Companies;

(vii) the Respondents and the Schedule C Companies/Properties in which the Respondents currently have an interest are jointly and severally liable in the amount of $23,680,852 for net proceeds diverted from the Schedule B Companies and received by the Schedule C Companies/Properties and shall pay to the Applicants the balance of those funds not otherwise recovered by the Applicants from the sale of the Schedule B Properties.

[242] As mentioned, at the July hearing the Applicants advised they were amending the relief sought in respect of certain Schedule C Properties based upon an understanding they had reached with the mortgagees of those properties: 19 Tennis Crescent; 1 William Morgan Drive; 44 Park Lane Circle; 346 Jarvis Street, Unit 2; 346E Jarvis Street; 777 St. Clarens Avenue; 260 Emerson Avenue; 3270 American Drive; 2454 Bayview Avenue; and, 30 and 30A Hazelton Avenue. Under the agreement, the Applicants would not pursue against those properties their requests for (i) certificates of pending litigation, (ii) the power to seize and sell those properties, and (iii) the

appointment of Schonfeld Inc. as Manager of those properties. In return, the draft provisions stipulated that the mortgagees would provide written notice to the Applicants forthwith upon receiving from the owner of the property a letter of intent, agreement of purchase and sale or a request to deliver a discharge statement of any applicable mortgages. The proceeds of the sale of any property sold by the owner and approved by the Court first would be paid to the mortgagee in such amounts necessary to satisfy all claims that the mortgagee might have on the property pursuant to the terms of the mortgage, with the balance to be paid to the Manager to be held in trust pending further order of the Court. Where a mortgagee sold the property, the proceeds would be paid out to satisfy any encumbrances, usual costs and expenses of the sale and all claims of the mortgagee, with the balance of the net proceeds of sale to be paid to the Manager.

Respondents

[243] Norma Walton sought orders containing the following relief in respect of the Schedule C Properties:

(i) The vacating of the second Order of March 21, 2014, in its entirety, and the Order of December 18, 2013, as they related to any restrictions being placed on the Respondents' ability to sell their Schedule C Properties;

(ii) in the alternative, an order approving the sales of the following Schedule C Properties in accordance with the agreements of purchase and sale attached to Ms. Walton's motion record: 2 Kelvin Avenue; 24 Cecil Street; 66 Gerrard Street East; 2454 Bayview Avenue; 3270 American Drive; 30 Hazelton Avenue; and 30A Hazelton Avenue;

(iii) payment of the net proceeds from sale of those Schedule C Properties to the shareholders of the Respondents and the creditors of the Respondents, as the Respondents may direct, until those shareholders and creditors are paid in full;

(iv) if the Court considered it to be helpful, an order that Froese Forensic Partners Ltd. be appointed as Monitor to review the Schedule C Properties and to provide oversight of the sales process on behalf of the Court, with its costs to be paid by the Respondents from sale proceeds; and,

(v) an order amending Schedule "C" in this proceeding *nunc pro tunc* to remove from Schedule "C" the following properties: 620 Richmond Street West; 875 Queen Street East; 3775 St. Clair Ave. E.; 14/17 Montcrest; 185 Davenport Road; 1246 Yonge Street; 17 Yorkville; 19 Tennis Crescent; 646 Broadview Avenue; 3 Post Road; and 2 Park Lane.

B. Which properties fall into the category of "Schedule C Properties"?

[244] The Applicants sought relief against properties in which they alleged the Waltons had an interest based on the Respondents' representation that those properties were Rose & Thistle projects on the website of that company. Disputes arose as to whether the Waltons had interests in certain properties. Before proceeding with the analysis of the requests for substantive relief in respect of Schedule C Properties, an identification of the properties against which relief should be granted must first be made.

B.1 Properties in respect of which there is no dispute

[245] In their initial February Notice of Motion the Applicants sought relief against 25 Schedule C Properties. Three of those properties were sold pursuant to Court order: 65 Front Street East; 26 Gerrard Street East; and 14 College Street. The Waltons were permitted by Court order to refinance 66 Gerrard Street East.

[246] There was no dispute that the Respondents possessed an interest in the following unsold Schedule C Properties: 3270 American Drive, Mississauga; 2 Kelvin Avenue; 346 Jarvis Street, Suites A, B and E; 1 William Morgan Drive; 324 Prince Edward Drive; 24 Cecil Street; 30 and 30A Hazelton Avenue; 777 St. Clarens Avenue; 252 Carlton Street and 478 Parliament Street; 66 Gerrard Street East; 2454 Bayview Avenue; 319-321 Carlaw; 0 Luttrell Ave.; 260 Emerson Avenue; and, 44 Park Lane Circle.

B.2 Removal of 16 Montcrest Blvd. and 346D Jarvis Street from the Applicants' request

[247] By letter dated July 25, 2014, counsel advised that the Applicants would not be pursuing relief against 16 Montcrest Blvd. and 346D Jarvis Street: the Applicants had agreed to discharge the certificates of pending litigation registered against those properties pursuant to my Interim Order.

B.3 No evidence of Walton interest in property

[248] At the hearing the Applicants advised that to date they had not discovered any interest held by the Waltons in the following properties which had been identified by them as Schedule C Properties: 3775 St. Clair Avenue East; 185 Davenport Road; 1246 Yonge Street; 17 Yorkville; 3 Post Road; and 2 Park Lane Circle Road.

B.4 Disputed properties

[249] The Applicants sought relief against the following three Schedule C Properties in respect of which disputes existed as to whether the Waltons continued to possess an interest in them: 346 Jarvis Street, Unit C; 646 Broadview Avenue; and 19 Tennis Crescent.

19 Tennis Crescent

[250] The title register for 19 Tennis Crescent listed 1673883 Ontario Inc. as the owner, as a result of a May 22, 2009 transfer of title from the Waltons and Carreiros. The corporate profile for 1673883 Ontario Inc. showed Ron Walton as a director and officer. Although it appears that he was the first director at the time of incorporation in September, 2005, Ron Walton has continued as a director and officer notwithstanding the subsequent appointment of other directors in 2011.

[251] Ms. Walton deposed that in 2011 they sold the holding company which owned that property and "if the purchasers have not changed the corporate records to remove my husband as a Director, that is news to me. Neither of us has had any ownership or management of that property since it was sold." That assertion is very difficult to reconcile with the inclusion of the 19 Tennis Crescent property on the December, 2013 list of "Our Investment Portfolio" shown on the Rose & Thistle website.

646 Broadview Inc.

[252] 646 Broadview Inc. is shown as the registered owner of 646 Broadview Avenue as a result of an April 29, 2014 transfer from 1636483 Ontario Inc. I accept the evidence of Mr. Reitan that the Waltons enjoyed functional control over 1636483 Ontario,[42] but I have no evidence that they continued to possess an interest in the property following the April, 2014 sale.

346 Jarvis Street, Unit C

[253] The parcel register for 346 Jarvis Street, Unit C, lists Carlos and Colette Carreiro as owners. Carlos Carreiro worked for Rose & Thistle for a period of time and was a co-director with Ms. Walton in a few companies – Urban Amish Interiors Inc., Loft Raum Inc. and Carcol. Mr. Carreiro filed an affidavit in support of the Respondents on these motion in which he listed his place of residence as 18 Sword Street, Toronto.

[254] In his affidavit Mr. Carreiro did not address the issue of the ownership of 346 Jarvis Street, Unit C. The parcel registers showed that the Carreiros acquired the unit on November 5, 2010 from the Waltons' company, 1780355 Ontario Inc., for the consideration of $666,514. A charge was then registered against title that same day in favor of the Equitable Trust Company in the amount of $559,872. On her cross-examination Ms. Walton undertook to produce any document showing the consideration paid for 346C Jarvis.[43] She did not fulfill that undertaking,

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[42] Reitan June 26, 2014 affidavit, paras. 98 to 101.
[43] Walton CX, Q. 218.

merely stating that "I have produced all documentation regarding that purchase evidencing the monies paid."

Order regarding disputed properties

[255] The evidence concerning these three properties disclosed that the Waltons at one point owned or controlled the properties and it was unclear whether the properties subsequently were transferred to *bona fide* arm's-length purchasers for value. I therefore intend to include the three properties within the ambit of the orders I make below concerning "Schedule C Properties", but I direct the Manager to give notice of this Order to the registered owners of those three properties within 15 days of the date of this Order. If, within 60 days of the date of this Order, the registered owner of a property provides the Manager with evidence that it acquired the properties from the Waltons for fair market value and that the Waltons no longer have any kind of interest in the property, then the property shall be released from the operation of this Order.

B.5 Conclusion

[256] For the balance of these Reasons, any reference to "Schedule C Properties" means those properties which are listed on Appendix "A" to these Reasons. As set out below, I will grant relief against those Schedule C Properties. As well, I vary the Orders of this Court made December 18, 2013 and March 21, 2014 to include all such Schedule C Properties.

C. Specific constructive trust claims

C.1 Governing legal principles

[257] Unjust enrichment claims have three elements: (i) an enrichment of the defendant; (ii) a corresponding deprivation of the plaintiff; and, (iii) the absence of a juristic reason for the enrichment. Enrichment involves the conferral of a tangible benefit – a payment or an avoidance of an expense – on the defendant. In *Garland v. Consumer Gas Co.* the Supreme Court of Canada set down a two-part approach to considering the element of want of juristic reason. First, the plaintiff must show that no juristic reason from an established category exists to deny recovery. The established categories which can constitute juristic reasons include a contract, a disposition of law, a donative intent, and other valid common law, equitable or statutory obligations. If there is no juristic reason from an established category, then the plaintiff has made out a *prima facie* case under the juristic reason component of the analysis. The *prima facie* case is rebuttable, however, where the defendant can show that there is another reason to deny recovery. Here, the court can look to all of the circumstances of the transaction in order to

determine whether there is another reason to deny recovery. Courts generally have regard to two factors: the reasonable expectations of the parties and public policy considerations.[44]

[258] The constructive trust is a remedial device available where an unjust enrichment has occurred and also as a remedy for oppressive conduct.[45] The remedial constructive trust is a broad and flexible equitable tool used to determine beneficial entitlement to property. In nature it is a proprietary remedy: where a claimant can demonstrate a link or causal connection between his or her contributions and the acquisition, preservation, maintenance or improvement of the disputed property, a share of the property proportionate to the unjust enrichment can be impressed with a constructive trust in his or her favour. The claimant must demonstrate a "sufficiently substantial and direct" link, a "causal connection" or a "nexus" between the plaintiff's contributions and the property which is the subject matter of the trust. The primary focus is on whether the contributions have a "clear proprietary relationship". The plaintiff must also establish that a monetary award would be insufficient in the circumstances, and in this regard the court may take into account the probability of recovery, as well as whether there is a reason to grant the plaintiff the additional rights that flow from the recognition of property rights. The extent of the constructive trust interest should be proportionate to the claimant's contributions.[46]

[259] Tracing is an identification process which can assist in ascertaining property over which a constructive trust may be imposed or property which represents the proceeds of other property subject to a constructive trust. Tracing is the process by which the plaintiff traces what has happened to his property, identifies the persons who have handled or received it, and justifies his claim that the money which they handled or received can properly be regarded as representing his property.[47] Accordingly, a claimant must demonstrate that the assets being sought in the hands of the recipient are either the very assets in which the claimant asserts a proprietary right or a substitute for them.[48] If there is confusion in the tracing, the onus is on the fiduciary to identify his own funds.[49]

[260] Finally, a remedial constructive trust is a discretionary remedy. Two consequences flow from that. First, a constructive trust will not be imposed where an alternative, simpler remedy is available and effective. Second, a constructive trust will not be imposed without taking into account the interests of others who may be affected by the granting of the remedy. On this point,

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[44] 2004 SCC 25, paras. 44 to 46.
[45] *C.I. Covington Fund Inc. v. White* (2000), 10 B.L.R. (3d) 173 (Ont. S.C.), para. 48.
[46] *Kerr v. Barranow*, 2011 SCC 10, paras. 50 to 53.
[47] *Boscawen v. Bajwa*, [1995] 4 All E.R. 769 (C.A.), p. 776.
[48] *B.M.P. Global Distribution Inc. v. Bank of Nova Scotia*, 2009 SCC 14, para. 75.
[49] See the tracing principles summarized in *Re Kolari* (1982), 36 O.R. (2d) 473 (D.C.J.), para. 33.

it is well-established that the beneficiary of a constructive trust cannot assert its proprietary interest against a person who came into possession of the property *bona fide* and for value.[50]

C.2 Application to the facts

[261] The Applicants rested their claim for the imposition of constructive trusts on two main grounds. First, the Applicants submitted that the Respondents had received benefits from the diversion of the Applicants' equity contributions by acquiring value in 44 Park Lane Circle and the Schedule C Properties without contributing their own funds. According to the Applicants, the Respondents' benefits corresponded directly with the Applicants' deprivation and no juristic reason existed for the Respondents' retention of the benefits conferred by the Applicants.

[262] Second, the Applicants submitted that the Waltons were directors of each of the Schedule B Companies, managed those companies' day-to-day affairs and exercised complete control over the funds invested by the Applicants in the Schedule B Companies. Under such circumstances, according to the Applicants, the Waltons owed fiduciary duties to the Schedule B Corporations to use the funds invested by the Applicants in the best interests of the corporations. Since those were closely-held, specific-purpose corporations, their best interests were shaped, in large part, by the terms of the agreements between the Applicants and Respondents. According to the Applicants, the diversion of funds out of the Schedule B Company by the Waltons for their own purposes was a breach of their fiduciary duties and constituted conduct which was oppressive to the Applicants' interests as shareholders.

[263] Ms. Walton opposed this part of the Applicants' claim on several grounds. First, Ms. Walton submitted that before the Applicants could seek such relief against the Schedule C Properties, including 44 Park Lane Circle, they should name as parties the companies which owned those properties and serve the companies' shareholders, mortgagees and lien holders. I disagree. The Waltons own or control the companies which own the Schedule C Properties, save perhaps for three properties for which I have made special provision in Section X1.B.4. So, the companies are on notice. The Applicants do not seek to prime existing interests registered against title to the Schedule C Properties. As to the preferred shareholders, many obviously have had notice of these motions since they filed affidavits and statements in support of the Waltons and the DeJongs made submissions opposing the relief sought by the Applicants. More importantly, I regard the issue of the priority of claims against a specific Schedule C Property as an issue for determination in the receivership which I intend to order over those properties.

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[50] *Tracy (Representative ad litem of) v. Instaloans Financial Solutions Centers (B.C.) Ltd.*, 2010 BCCA 357, para. 28.

[264] I accept the arguments made by the Applicants. The Waltons breached their contractual obligations to Dr. Bernstein and their fiduciary duties to the Schedule B Companies by pooling the funds advanced by the Applicants to the Schedule B Companies with Rose & Thistle and Schedule C Company funds. I have accepted, in large part, the tracing analysis performed by the Inspector and I have found that in the instances identified by the Inspector, in a brief period of time the Waltons directed the transfer of funds advanced by the Applicants from a Schedule B Company to a Walton-owned Schedule C Company, through Rose & Thistle, and the Schedule C Company used those funds in respect of a Schedule C Property. I specifically found that the following amounts of the Applicants' funds were used to purchase or discharge encumbrances on Schedule C Properties:

(i)	14 College Street:	$1,314,225;
(ii)	3270 American Drive:	$1.032 million;
(iii)	2454 Bayview:	$1.6 million;
(iv)	346E Jarvis St.:	$937,000;
(v)	44 Park Lane Circle:	$2.5 million;
(vi)	2 Kelvin Street:	$221,000;
(vii)	0 Trent:	$152,900; and,
(viii)	26 Gerrard Street:	$371,200.

The use by the Waltons of those funds of the Applicants to acquire those Schedule C Properties or to discharge registered encumbrances resulted in the unjust enrichment of the Waltons. There was absolutely no juristic reason for that use of the Applicants' funds. On the contrary, such use of the funds breached the Waltons' contractual obligations to the Applicants; in some cases I have found it amounted to fraud.

[265] The DeJongs argued that Dr. Bernstein did not suffer any detriment in respect of his funds used to acquire 3270 American Drive because in return for advancing those funds to a Schedule B Company – West Mall Holdings – Dr. Bernstein got what he had bargained for – issued shares of West Mall Holdings with its property encumbered as represented in the capital requirements terms of his agreement with the Waltons. I do not accept that submission. Dr. Bernstein did not get what he bargained for, which was the obligation of the Waltons only to use those funds for the development of the West Mall Holdings property. Instead of so doing, the Waltons stripped the funds out of West Mall Holdings to acquire 3270 American Drive, an unauthorized use of the funds which benefitted them.

[266] The DeJongs also opposed the granting of a constructive trust over 3270 American Drive on the basis that they were *bona fide* purchasers without notice of Dr. Bernstein's claim. I do not accept that submission. In January, 2013, the DeJongs advanced funds to United Empire Lands to purchase commons shares in the company. The Waltons transferred the Applicants' funds to United Empire Lands after the DeJongs had acquired their shares in United Empire Lands and just three days before that company acquired 3270 American Drive, with the result that the Applicants' constructive trust interest in the property arose after, not before, the DeJongs purchased their shares in United Empire Lands.

[267] Consequently, I grant constructive trusts in favour of the Applicants in respect of each of the Schedule C Properties listed above 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, except that no such trust shall attach to a property already sold and where no proceeds of sale remain in the hands of the Manager. I do not consider any other remedy to afford an effective alternative in the circumstances; the evidence disclosed that the potentially exigible assets of the Waltons were limited to their interests in the Schedule C Companies and related properties.

D. Claims for a receivership order and certificates of pending litigation

[268] The state of the evidence at this point of time does not permit the making of constructive trust orders for fixed amounts in respect of other Schedule C Properties. The Inspector's tracing analysis was limited to the properties above. However, two aspects of the evidence support making a finding, which I do, that the Applicants have demonstrated a strong *prima facie* case of unjust enrichment of up to a possible claim of $22.6 million against the Waltons in respect of the other Schedule C Properties.

[269] The first aspect of the evidence consists of the Inspector's findings, which I accepted, that during the period from October 2010 to October 2013 the Waltons directed the transfer of $23.6 million (net) from the Schedule B Company Accounts to a bank account belonging to Rose & Thistle and transfers of $25.4 million (net) from the Rose & Thistle Account to companies that they owned without the Applicants – the companies which owned the Schedule C Properties. The second aspect is the Inspector's conclusion, which I accepted, that the Waltons used new equity invested in, and mortgage amounts advanced to, the Schedule B Companies by the Applicants to fund the ongoing operations of Rose & Thistle and the Schedule C Companies and that the Applicants' investment in the Schedule B Companies was a major source of funds for the Walton Schedule C Properties/Companies.

[270] That evidence is sufficient to support an order, which I make, granting leave to the Applicants to issue certificates of pending litigation against all Schedule C Properties. Under section 103 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, a certificate of pending litigation may be issued by the court where a proceeding is commenced in which an interest in land is in

question. A court must exercise its discretion by looking at all of the relevant matters between the parties in determining whether or not to issue the certificate. If reasonable claims are put forward in an action for a constructive trust in respect of a property, a certificate of pending litigation may issue pending trial. The party seeking the certificate need not prove its case at this point. The test is met where there is sufficient evidence to establish a reasonable claim to an interest in the land based upon the facts and on which the plaintiff could succeed at trial.[51] The Applicants have met that test.

[271] As well, that evidence is sufficient to support an order, which I make, appointing Schonfeld Inc. as receiver – or "Manager", as in the case of Schedule B Properties – over all Schedule C Properties. While at this point of time the tracing analysis has not progressed to the stage to enable the granting of specific, fixed amount constructive trusts over the other Schedule C Properties, the evidence justifies the appointment of a receiver over all Schedule C Properties in order to sell them and deal with the competing claims against the proceeds of sale, including the Applicants' strong claims of constructive trusts over the remaining Schedule C Properties.

[272] Ms. Walton opposed the appointment of a receiver over the Schedule C Companies in part arguing that the money of innocent third parties, the preferred shareholders of the Schedule C Companies, should be protected by other means. Ms. Walton submitted that it was clear from the affidavits and statements filed by the preferred shareholders that "those 34 people are due money from the Waltons and those 34 people are trusting the Court not to permit Bernstein to take their money". Ms. Walton continued:

> None of those 34 people nor the DeJongs are supportive of the receivership over the Walton properties. All of those 36 people are familiar with the Waltons' real estate expertise, being investors with the Waltons. All of them have indicated they want the Waltons to be able to sell their properties themselves to garner from the properties maximum value to increase the amount of money available to pay them back their monies. The Waltons have already negotiated sales of a number of their properties, pending court approval for those transactions.

Ms. Walton also opposed the appointment of receiver over, or the issuance of a certificate of pending litigation against, any Schedule C Property because that could trigger a default in mortgages registered against those properties.

[273] I do not accept those arguments. The Waltons caused the current problems by ignoring their contractual obligations with, and fiduciary duties owed to, investors by co-mingling investment funds and appropriating some of the funds to their own benefit. The task now facing the Court is, in part, to put in place a process which will minimize the damage caused by the

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[51] *Transmaris Farms Ltd. v. Sieber*, [1999] O.J. No. 300, para. 62.

Waltons unlawful conduct and which will deal fairly with all competing interests. Ms. Walton, in her evidence, disclosed her intention to prefer improperly the interests of other creditors over those of Dr. Bernstein, for it was her position that the claims of preferred shareholders and debtors of Schedule C Companies should rank first in priority over any claim which Dr. Bernstein might have in the proceeds of sale from any Schedule C Property. As Ms. Walton put it, Dr. Bernstein should not be "permitted to leapfrog over the claims of the innocent third party investors". In paragraph 86 of her Factum Ms. Walton also stated that she intended to apply all proceeds of sale from the severed Park Lane Circle properties to pay her "investors and debtors", except for Dr. Bernstein. Further, quite unnecessary problems arose when Ms. Walton arranged the sale of the Gerrard Street and Front Street properties earlier this year; those problems resulted in parties incurring unnecessary expenses. In light of those circumstances, I see no basis upon which to allow Ms. Walton to exercise any control over the future operation of the Schedule C Properties. She and her husband must be removed from dealing with Schedule C Properties and that task put in the hands of a court-appointed receiver who will take into account the interests of all claimants against the properties.

[274] It follows from that conclusion that I do not grant that part of Ms. Walton's motion seeking court approval of contracts for the sale of the following Schedule C Properties: 24 Cecil; 66 Gerrard; 2 Kelvin Avenue; 2454 Bayview Avenue; and 30A Hazelton. The power to list and sell those properties now is placed in the hands of the Manager, Schonfeld Inc.

[275] The Applicants also seek an order tracing their funds through the accounts of the Schedule B Companies, the accounts of Rose & Thistle, the personal accounts of Norma and Ronauld Walton, the trust account of Walton Advocates, the trust account of Devry Smith Frank LLP concerning transactions involving the Waltons, and otherwise into 44 Park Lane Circle and the other Schedule C Properties.

[276] Ms. Walton opposed that request for several reasons. First, she submitted that Dr. Bernstein lacked the standing to bring a tracing claim on behalf of the Schedule B Companies because he was merely a shareholder in those companies. In her submission, only the Manager had such authority on behalf of the jointly owned companies. Second, Ms. Walton submitted:

> Dr. Bernstein's companies provided money to buy into the jointly owned properties in accordance with the pro forma and deal terms on offer. In exchange he received 50% of the equity and a shareholders loan back. He got what he bargained for. His shareholdings in the Schedule B Companies and properties have not yet been accounted for.
>
> …
>
> Bernstein's tracing claim appears to assert that the jointly owned companies did not get what they bargained for and that they are entitled to their money back from the Waltons. That is not a claim he can bring on their behalf because he does not control those companies; the Receiver does.

I reject those submissions. Dr. Bernstein advanced the funds to the Schedule B Companies; he is entitled to know what happened to his money which the evidence showed the Waltons had mis-used and mis-appropriated.

[277] Ms. Walton advanced a third ground in opposition to the granting of a tracing order, drawing upon the analysis of Froese. Ms. Walton submitted that one should look at the totality of the inter-company transfers, rather than one point in time, because often within a few weeks of certain transfers there were transfers back which eliminated any debt or tracing claim over all. Ms. Walton submitted that the analysis performed by Froese disclosed that, at most, the maximum amount of the tracing claim available to the Applicants was $1.968 million. She proposed that that sum could be paid into Court from the sale Schedule C Properties pending a trial of the issue. Ms. Walton continued:

> Walton submits that the best way to address these tracing issues is to prepare an accounting once all Schedule B Properties are sold showing what if anything is due from any of those companies to Rose and Thistle and vice versa. At that time monies due from Schedule B Companies to Rose and Thistle can be used to satisfy monies due from Rose and Thistle to other Schedule B Companies. Otherwise the risk of double counting and double recovery is significant. If Bernstein receives money from Walton's properties and then receives the same money back from the Schedule B Properties when the accounting is completed, that provides him with a double recovery.

I reject that argument. I have accepted, in large part, the tracing analysis performed by the Inspector and I have not accepted the criticism made by Froese of the Inspector's "snapshot" tracing analysis. Further, it was always open to the Waltons to provide the accounting directed by this Court last October, yet they failed to do so. Their failure to do so requires the granting of further relief.

[278] I conclude that it is necessary to grant the tracing order sought by the Applicants in order to gain, if possible, a better understanding of how the Waltons used the Applicants' funds. I therefore grant the order sought. To which I add that the order appointing Schonfeld Inc. as Manager of the Schedule C Properties shall also include a specific provision that the Schedule C Companies which own those properties provide to the Manager, within 15 days of the date of this Order, full access to all their books and records. That will ensure that all entities which were part of the system created by the Waltons to circulate and mis-use the Applicants' funds are subject to an obligation to make full disclosure of all their books and records so that a full tracing of the Applicants' funds can occur.

[279] Finally, as noted above, the Applicants reached an understanding at the hearing with the mortgagees of certain Schedule C Properties, identified in paragraph 3 of the draft order submitted to the Court on July 18, 2014. Although I have appointed a receiver over all those properties, I will give effect to part of the understanding reached by ordering that the standard stay of proceedings shall be lifted as against the mortgagees of those properties in respect of

which the understanding was reached – and any other mortgagee in respect of which a similar understanding may be reached hereafter - but only on the basis that the net proceeds of the sale of any such Schedule C Property sold by a mortgagee, or a private receiver appointed by a mortgagee pursuant to the rights available to it under its respective mortgage, shall be paid out as follows:

(i) 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 the property;

(ii) to satisfy all usual costs and expenses of the sale of the property, including but not limited to real estate commissions and legal fees;

(iii) 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,

(iv) the balance of the net proceeds of sale of any property shall be paid to the Manger, to be held in trust, pending further order of the Court.

Lifting the stay of proceedings on those terms should enable those mortgagees which are prepared to co-operate with the Manager to exercise their rights under their mortgages, while ensuring an orderly and fair realization of those properties.

E. The discharged Galloway mortgage

[280] There is no dispute that the Waltons discharged the Applicants' mortgage on the Galloway property without paying it off in full. Up until the eve of this litigation Ms. Walton was assuring Dr. Bernstein that she would pay the balance of the mortgage. She never did. Consequently, the Applicants are entitled to an order that the Respondents are jointly and severally liable 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 the title of the property at 232 Galloway Road, and the Respondents shall pay that amount to the Applicants.

F. The cross-motion by the DeJongs

F.1 Background and relief sought

[281] Christine DeJong Medical Professional Corporation ("CDJ"), C2M2S Holding Corp. ("C2M2S") and DeJong Homes Inc. brought a cross-motion for an order that the issued and outstanding shares of the Waltons in United Empire Lands (3270 American Drive, Mississauga), in which CDJ was a co-owner, be canceled because the Waltons had not contributed shareholder

equity or, alternatively, an order approving the transfer of the Waltons' interest in United Empire Lands to the DeJongs, free and clear of any claim by the Applicants, in accordance with a June, 2014 settlement agreement reached with the Waltons.

[282] Christine DeJong is an obstetrician and gynecologist whose practice is operated through CDJ. She and her husband, Michael DeJong, through their respective corporations, have been investing with the Waltons for the better part of a decade. Like Dr. Bernstein, CDJ had entered into agreements with the Waltons which contemplated equal shareholdings in corporations incorporated for the specific purpose of holding a particular piece of property. According to Ms. DeJong, CDJ holds common shares in United Empire Lands Ltd., Prince Edward Properties Ltd. and St. Clarens Holdings Ltd./Emerson Developments Ltd., as well as preferred shares in Lesliebrook Holdings Ltd. and Academy Lands Ltd. Ms. DeJong deposed that the value of the CDJ investments, based upon information provided by the Waltons, totaled $3.691 million. Ms. DeJong attached the share certificates issued to CDJ; she did not attach copies of the cheques or wire transfers recording her investment in the companies (save for a deposit receipt for an investment in United Empire Lands).

[283] Michael DeJong, through a February 25, 2013 cheque from C2M2S to Front Church Properties Ltd., invested with the Waltons and received, in return, preference shares in Academy Lands issued to C2M2S and DeJong Homes. According to information provided by the Waltons, the "value" of the original $617,000 investment was now $786,776.47.

[284] According to Ms. DeJong, in January, 2013, CDJ made a capital contribution of $992,750 to United Empire Lands to obtain 50% of the common shares in the corporation, the sole asset of which was to be the property at 3270 American Drive, Mississauga. CDJ infused $716,906 in new capital and, according to Ms. DeJong, transferred $275,844 from an existing investment in a Walton company which owned 2 Park Lane Circle and 3 Post Road. Evidence of the deposit of the $716,906 CDJ cheque into United Empire Lands' bank account was adduced. CDJ had entered into a February, 2013 agreement with the Waltons concerning that investment which was substantially similar in form and content to the agreements the Waltons used for Dr. Bernstein's investments. Christine and Michael DeJong became officers and directors of United Empire Lands on December 20, 2013.

[285] Ms. DeJong deposed that in January, 2014, Norma Walton, without consulting the DeJongs, exchanged the preferred shares held by CDJ in Lesliebrook Holdings (1131 and 1131A Leslie Road) for preferred shares in Academy Lands (2454 Bayview Avenue) and exchanged shares held by C2M2S and DeJong Homes in Front Church Properties (54 Front Street East) for shares in Academy Lands.

[286] Ms. DeJong deposed that in May, 2014, Mario Bucci, the CFO of the Rose & Thistle Group, provided her with bank statements for United Empire Lands which showed that no sooner had her investment of $716,906 been deposited into the United Empire Lands bank

account, than it was transferred out to the Rose & Thistle Group over the course of three days. Ms. DeJong complained that the Waltons had breached their agreement concerning the United Empire Lands because the Waltons had failed to make the capital contribution stipulated in that agreement. For that reason, Ms. DeJong sought the cancellation of the Waltons' shares in United Empire Lands.

[287] In May, 2014, the DeJong's counsel pressed Ms. Walton for an explanation about the use of the funds invested in United Empire Lands. Ms. Walton commissioned Froese Forensic Partners to prepare a May 23, 2014 report which reviewed the use of funds received from CDJ for investment in United Empire Lands. In the summary portion of its report Froese stated:

> DeJong proceeds of $716,906 were deposited to United Empire's credit union account on January 28, 2013 and $706,850 was transferred from that account to Rose & Thistle over the four-day period from January 28 to 31, 2013… The use of these funds by Rose & Thistle is summarized in Schedule 1. In summary, these funds were co-mingled with $230,850 from Schedule B Companies (companies owned jointly by Dr. Bernstein and the Waltons) and $25,610 from other sources. Of these co-mingled funds, $746,775 was transferred to Schedule B Companies.
>
> Assuming that deposits from Schedule B Companies were used to fund disbursements to Schedule B Companies, which is consistent with the timing of deposits and disbursements through the Rose & Thistle account, approximately $515,000 of the DeJong funds were transferred to Schedule B Companies and the balance to Walton-related companies.[52]

[288] The Waltons have offered to transfer their shares in the capital of United Empire Lands to the DeJongs in exchange for a release of the DeJongs' claims respecting the property at 3270 American Drive, Mississauga. The DeJongs have sought court approval for that June 20, 2014 settlement agreement. The DeJongs are concerned that should the settlement not be approved, the mortgagee of the property may exercise power of sale rights which would severely prejudice the interest of the DeJongs and their corporations. The DeJongs have completed an application to obtain takeout financing from Manulife.

F.2 Analysis

[289] I am not prepared to grant the relief sought by the DeJongs. The proposed settlement agreement would prefer the DeJongs' 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

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[52] I would note that this report prepared by Froese was not properly adduced as an expert's report in accordance with the *Rules of Civil Procedure*.

entitlement, if any, of the DeJongs, as preferred shareholders, to the proceeds from the sale of 3270 American Drive should be dealt with in the claims process for that property.

[290] Although I dismiss the DeJongs' motion, I will not order any costs against them. Like others, they stand at the receiving end of the Waltons' misconduct.

XII. Other relief sought

[291] Finally, the Applicants sought an order that the application commenced in Court File No. CV-14-501600 be transferred to the Commercial List and combined with the within application. Details of the application were not provided, save that the Notice of Motion described it as a "companion" application. Nevertheless, all proceedings as between Dr. Bernstein and the Waltons, and their respective companies, as well as any litigation involving Schedule B Companies/Properties and Schedule C Companies/Properties, should be managed together by one judge on the Commercial List. I therefore transfer Court File No. CV-14-501600 to the Commercial List and direct that steps be taken to transfer any other such kind of proceeding to the Commercial List. The parties should contact Newbould J. for the appointment of a new case management judge.

XIII. Conclusion

[292] For the reasons set out above, I have granted, in large part, the motions brought by the Applicants, and I have dismissed the motion brought by Ms. Walton. I have also dismissed the DeJongs' motion.

[293] I will not be returning to my office until September 3, 2014. However, I am prepared to review and issue the order implementing these Reasons before that date. Counsel and the parties shall consult on the form of order and send an electronic copy for my consideration through Mr. DiPietro at the Commercial List Office. If the parties are unable to settle the order, I am prepared to hold a brief telephone conference call to deal with the matter.

[294] Since the Applicants substantially succeeded on these motions, they may serve and file, to my attention through Judges' Administration, 361 University Avenue, written cost submissions by Wednesday, August 20, 2014. Ms. Walton may serve and file responding written cost submissions by Friday, August 29, 2014. The cost submissions shall not exceed 10 pages in length, excluding Bills of Costs.

[295] Finally, I wish to thank the parties for providing electronic copies of all materials filed on these motions. I cannot overstate the assistance which electronic copies bring to the judgment writing process, including the portability of the materials.

(original signed by)
D. M. Brown J.

Date: August 12, 2014

Appendix "A"

List of Schedule C Properties against which relief is granted

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

Appendix "B"

Evidence or Statements from Preferred Shareholders in Schedule C Companies

	Name of Shareholder	Schedule C Company	Amount
1.	Phil Aber	Front Church Properties	$100,000 "value"[53]
2.	John and Myrne Rawlings (parents of Norma Walton)	Not identified	$395,000 loans
3.	John and Myrne Rawlings	Front Church Properties	$165,500 "value"
4.	Maria and Joseph Memme	Academy Lands Ltd.	$281,000 "value"
5.	Maria and Joseph Memme	Rose & Thistle	$100,000 loan
6.	Saul Spears	1793530 Ontario Inc.	$67,648 "value"
7.	Peggy Condos	Cecil Lighthouse Ltd.	$10,000 "value"
8.	Dennis Condos	Front Church Properties and Cecil Lighthouse	$350,000 "value"
9.	Ange Boudle	Front Church Properties and Academy Lands	$400,960 "value"
10.	Triane Boudle	Front Church Properties	$125,000 "value"
11.	Mark Goldberg	Academy Lands	$150,000 "value"
12.	John Geikins	Rose & Thistle Group Ltd.	$50,000 "value"
13.	Vane Plesse	Cecil Lighthouse	$117,675 "value"
14.	Michelle Tessaro	Front Church Properties	$154,864 "value"
15.	Carlos Carreiro	Academy Lands	$285,000 "value"
16.	Howard Beck	1793530 Ontario Inc.	$101,472 "value"

[53] Some shareholders deposed to the "value" of their shares. They did not identify the amount which they had initially invested or provide evidence of that investment. They used the term "value" in a way which suggested that they were including anticipated capital appreciation and dividends promised or accrued in the amount of the "value".

17.	Danny Servos	Front Church Properties	$356,907 "value"
18.	Ken and Grace Bugg	Front Church Properties and Academy Lands	$650,000 "value"
19.	Gideon and Irene Levytam	Front Church Properties and Cecil Lighthouse	$730,000 "value"
20.	Michele Peng	Cecil Lighthouse	$62,800 "value"
21.	Sheila Korchynski	Front Church Properties	$52,525 "value"
22.	John and Sheila Korchynski	Front Church Properties	$105,000 "value"
23.	Cary Silber	1793530 Ontario Inc.	$16,912 "value"
24.	Duncan Coopland	Front Church Properties and Cecil Lighthouse	$721,500 "value"
25.	Barbara Naglie	Front Church Properties and 1793530 Ontario	$117,778 "value"
26.	Harvey Naglie	Front Church Properties	$225,788 "value"
27.	Carmen and Paul Duffy	The Rose & Thistle Group Ltd., 1793530 Ontario and Front Church Properties	$409,599 "value"
28.	Dian Cohen	Academy Lands	$100,000 "value"
29.	Jill Penny	Front Church Properties	$165,000 "value"
30.	Gerry Gotfrit[54]	Front Church Properties; 1793530 Ontario	$172,639 "value"
31.	Fareed Ansari	Atala Investments Inc., 30A Hazelton Inc.;[55] William Morgan Lands	$2.040 million "value"
	TOTAL "VALUE"		**$8,780,817**

[54] Two affidavits were filed by Mr. Gotfrit, with some overlap in the numbers. I have only included the information in the affidavit containing the highest "value".

[55] I would observe that in paragraphs 20(l) and (m) of her December 17, 2013 affidavit, Norma Walton made no mention of any other shareholders in this company apart from her husband and herself.

E

Court File No.: CV-13-1 0280-00CL

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

SECOND SUPPLEMENTAL REPORT TO THE TWENTY-SECOND REPORT OF THE MANAGER, SCHONFELD INC.

Contents

I. Introduction

1. This is the Second Supplemental Report to the 22nd Report of Schonfeld Inc. (the "**Manager**") in its capacity as Manager of certain companies listed at Schedule "B" to the Order of Justice Newbould dated November 5, 2013 (the "**Companies**")[1], together with the properties owned by the Companies (the "**Properties**")[2] and as manager/receiver of the Properties listed at Schedule "C" to the Order of Justice Brown dated August 12, 2014.

A. Purpose of this Report

2. The purpose of this Supplemental Report is to provide further information relevant to the Manager's motion as described in the 22nd Report.

B. Terms of reference

3. 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.

4. Capitalized terms not otherwise defined have the meaning ascribed to them in the Manager's 22nd Report.

C. Proposed Distribution to Creditors

5. In the 22nd Report, the Manager recommended distributions to creditors having approved claims against certain Companies. The Manager has completed two further claims processes and is now in a position to recommend a further distribution to creditors having approved claims against Skyway Holdings Ltd. ("**Skyway**") and Richmond Row Holdings Ltd. ("**Richmond**

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[1] Schedule "B" was amended by Order dated January 16, 2014.

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

Row"). The approved claims in respect of Skyway and Richmond Row are listed in Appendix A.

6. The Manager is holding sufficient proceeds in trust to pay all of Skyway's creditors in full. Payment to creditors of Richmond Row is complicated by the fact that Richmond Row's books and records show an outstanding shareholder loan from the Applicants (collectively, **"Bernstein"**). Pursuant to the Claims Procedure Order, Bernstein's claims are outside the scope of the Manager's claims process. However, if Bernstein's shareholder loan to Richmond Row is entitled to rank *pari passu* with the other creditors of Richmond Row then each creditor will not recover the full value of its approved claim. As discussed below, the Manager recommends that this issue be addressed by converting Bernstein's shareholder loan into shares of Richmond Row.

D. Proposed conversion of Richmond Row shareholder debt to equity

7. As noted above, the agreement between Bernstein and the Respondents (collectively, the **"Waltons"**) in respect of Richmond Row provided that Bernstein and the Waltons would provide funding in the form of shareholder loans. Bernstein advanced a total of $3,849,900 to Richmond Row in accordance with this agreement. The Manager has accepted a further $143,111.27 worth of claims from other creditors.

8. Bernstein has asked that their shareholder loan to Richmond Row be converted into equity. For the reasons described below, the Manager is of the view that Bernstein's request will benefit all stakeholders and should be granted.

9. The Manager's primary reason for supporting the debt to equity conversion proposed by Bernstein's request is that it will permit the payment in full of all of the claims that have been proven in respect of Richmond Row. If all other creditors are paid in full and the balance of the sale proceeds are paid as an equity distribution then Bernstein's recovery will be decreased but, if shares in Richmond Row are re-distributed in accordance with Bernstein's and the Waltons' financial contributions in accordance with the August 12 Order then Bernstein may be able to use the tax losses suffered by Richmond Row to offset other income.[3] Thus, both Bernstein and

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[3] The Manager has not investigated how such losses will be treated by the CRA, but Bernstein is of the view that the proposed conversion will have beneficial tax consequences.

other creditors will benefit from the proposed conversion. The Manager is not aware of any stakeholder that will be adversely affected by that conversion.

E. Proposed Interim Equity Distribution

10. As noted in the 22nd Report, and further described in the Supplemental Report, the Manager has recommended a distribution from seven Schedule "B" Companies (the "**Interim Distribution Companies**"). Each of these Companies owned a Property that was sold for an amount that was greater than the amount found to be owed to mortgagee(s), secured creditors and unsecured creditors. Accordingly, the Manager has recommended an interim equity distribution to the shareholders of each of the Interim Distribution Companies.

11. Each of the Companies is governed by an agreement (each, an "**Agreement**") between Bernstein and the Waltons. As noted in the 22nd Report, the August 12 Order required that the Waltons' shareholdings be recalculated in accordance with the Agreements, that the Waltons were only to entitled to the shares that they had paid for and that the balance of the Waltons' shares were to be cancelled. The Manager's analysis of the Waltons' contribution to the Interim Distribution Companies is set out below.

12. The Manager began its assessment of the Waltons' contributions by reviewing the books and records of the Interim Distribution Companies to identify either expenses borne on behalf of, or equity contributions to, the Interim Distribution Companies by the Waltons or Rose & Thistle Group Ltd. ("**Rose & Thistle**"). Most or all of the Waltons' contributions were made in the form of expenses paid from the Rose & Thistle's bank account (the "**Rose & Thistle Account**"). For the purposes of its initial analysis, which is summarized in the chart below, the Manager counted any payment to or on behalf of an Interim Distribution Company from the Rose & Thistle Account as a "**Recorded Contribution**" unless the funds used to make the payment were provided directly by Bernstein. In other words, if Rose & Thistle paid a deposit for a Property, the deposit was treated as a Recorded Contribution unless Bernstein provided the funds for that deposit directly to Rose & Thistle. In addition, the Recorded Contributions are net of shareholder distributions. These distributions were accounted for as "return of capital" and the Manager has, for the purpose of its analysis, assumed that each dollar "returned" to a shareholder reduced the number of shares owned by the shareholder by $1.

Company	DBDC Contribution	DBDC Percent	Recorded Contribution[4]	Walton Percentage
Donalda Developments Ltd.	13,308,000.00	100.0%	100.00	0.0%
Hidden Gem Development Inc.	1,166,150.00	93.8%	77,600.00	6.2%
Lesliebrook Holdings Ltd.	1,212,828.00	98.0%	25,100.00	2.0%
Liberty Village Properties Ltd.	1,980,059.00	97.5%	50,100.00	2.5%
Royal Agincourt Corp.	2,334,208.00	73.2%	454,500.00	26.8%
Royal Gate Holdings Ltd.	4,962,957.00	97.6%	120,100.00	2.4%
Tisdale Mews Inc.	1,480,000.00	100%	$0	0%
Skyway Holdings Ltd.	752,650.00	88.3%	100,100.00	11.7%

13. Quantification of Bernstein's and the Waltons' investments in the Schedule "B" Companies is complicated by the fact that, as is discussed at length in Justice Brown's Reasons For Decision dated August 12, 2014 (the "**August 12 Reasons**"), equity invested by Bernstein in the Schedule "B" Companies was routinely diverted by the Waltons to other Schedule "B" Companies, Schedule "C" Companies and themselves. As a result, payments recorded on the books and records of the Schedule "B" Companies as equity investments made by the Waltons may have been funded by equity investments made by Bernstein in another Schedule "B" Company or other sources. In such cases, funds were transferred to the Rose & Thistle Account and then either transferred to the relevant Company or used to fund expenses directly.

14. In light of the foregoing, the Manager conducted an investigation of the source of the funds used to make the Recorded Contributions. That analysis is described below.

15. The Manager notes that the accuracy with which a specific dollar contributed by Bernstein can be matched to a specific use depends primarily on the opening balance and the level of activity in the Rose & Thistle Account when the funds were transferred. When funds contributed to a Company were transferred into the Rose & Thistle Account, funds were also transferred into and/or out of the Rose & Thistle Account by or to other Companies or Walton

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[4] The Recorded Contribution and Walton Percentage provided in this Chart is before adjustments required based on the Manager's tracing analysis.

Companies. In such cases, it is possible to trace funds out of the Rose & Thistle Account into accounts held by the Schedule "B" Companies or the Schedule "C" Companies but it is not possible to match exactly the funds transferred out of the Rose & Thistle Account to the funds transferred as the funds have been comingled in the Rose & Thistle Account.

16. The tracing analysis described below also must be understood in the context of the findings of Justice Brown in his August 12 Reasons at paragraph 39 as follows:

(a) The Waltons directed the transfer of $23.6 million (net) from the Schedule "B" Company Accounts to a bank account belonging to Rose & Thistle during the period from October 2010 to October 2013;

(b) During the same period, the Waltons directed transfers of $25.4 million (net) from the Rose& Thistle Account to companies that they owned without Bernstein– the Schedule "C" Companies; and,

(c) In almost all cases, some or all of the amounts advanced to the Schedule "B" Companies by Bernstein were transferred almost immediately to the Rose & Thistle Account.

17. Since funds provided by Bernstein to fund the Schedule "B" Companies were constantly circulating through the Rose & Thistle Account, accounts relating to the Schedule "C" Companies and the Waltons' accounts, it is not possible to say for certain that any of the Recorded Contributions were made using the Waltons' own funds.

F. Hidden Gem Development Inc. ("Hidden Gem")

Company	DBDC Contribution	DBDC Percent	Recorded Contribution	Walton Percentage
Hidden Gem Development Inc.	1,166,150.00	93.8%	77,600.00	6.2%

18. The Recorded Contributions of $77,600 to Hidden Gem are comprised of certain deposits paid from the Rose & Thistle Account in respect of the Property owned by Hidden Gem ($200,000), less the funds provided by Bernstein to Rose & Thistle to fund these deposits ($122,500).

19. According to the Agreement dated January 11, 2012 between Bernstein and the Waltons, the Waltons and Bernstein had each provided $122,500 (total $245,000) to cover due diligence costs and deposits associated with the purchase of the Hidden Gem Property. This is not consistent with Hidden Gem's books and records, which shows only $200,000 worth of deposits.

20. Moreover, as described below, some or all of the Recorded Contributions appear to have been funded by equity contributions by Bernstein to Hidden Gem and other Companies which were transferred to Rose & Thistle and then used to fund the deposits described above.

21. On December 29, 2011, a cheque in the amount of $50,000 was issued from the Rose & Thistle Account to Metropolitan Commercial Reality. The opening balance in the Rose & Thistle Account on December 29, 2011 was $44,229. An amount of $187,500 was deposited to the account from the following:

368230 Ontario Limited equity advance for Ascalon Lands Ltd. ("Ascalon")	$65,000	
368230 Ontario Limited equity advance for Hidden Gem	122,500	(1/2 of $245,000)
	$187,500	

22. Therefore, the $50,000 cheque to Metropolitan Commercial Realty was partially or completely funded by equity funds advanced by Bernstein for Ascalon and Hidden Gem.

23. On January 31, 2012, a cheque in the amount of $150,000 was issued from the account of Hidden Gem payable to Metropolitan Commercial Realty. The cheque was funded by a transfer into the Hidden Gem account on January 30, 2012 in the amount of $150,000 from the Rose & Thistle Account.

24. The opening balance in the Rose & Thistle Account on January 30, 2012 was $5,613. A transfer in the amount of $285,100 was deposited from Ascalon, which was sourced from an equity advance from Bernstein to Ascalon on January 25, 2012. Therefore, the $150,000 cheque to Metropolitan Commercial Realty was funded by equity funds advanced by Bernstein to Ascalon which were transferred to Rose & Thistle.

G. Lesliebrook Holdings Ltd. ("Lesliebrook")

Company	DBDC Contribution	DBDC Percent	Recorded Contribution	Walton Percentage
Lesliebrook Holdings Ltd.	1,212,828.00	98.0%	25,100.00	2.0%

25. The Agreement relating to Lesliebrook indicated that Bernstein was to provide the $200,000 deposit for the purchase of 1131A Leslie (the "**Lesliebrook Property**") and that the Waltons had paid for the due diligence costs including all pre-purchase reports, mortgage placement fees and lender's legal fees totalling $100,000 prior to the date of the Agreement and would fund a further $100,000 for a total of $200,000 in Recorded Contributions.

26. On February 21, 2012, a cheque from 368230 Ontario Limited ("**368 Limited**", a company controlled by Bernstein) in the amount of $200,000 was deposited to the Rose & Thistle Account. Prior to this deposit, the balance in the account was $10,609. The balance in the account following this deposit was $210,609. On March 1, 2012, a cheque to CBRE for the deposit in respect of Lesliebrook in the amount of $200,000 cleared the Rose & Thistle Account.

27. The only due diligence cost shown on Lesliebrook's books and records is a $25,000 mortgage fee paid to IMC LP by Rose & Thistle on April 5, 2012. Significant funds were transferred into the Rose & Thistle Account from both Schedule "B" Companies and Schedule "C" Companies on and immediately before April 5, 2012. The transfers from Schedule "B" Companies significantly exceed those from Schedule "C" Companies. Accordingly, it is likely that the $25,000 payment was funded in whole or in part using funds invested by Bernstein in the Schedule "B" Companies.

28. The Manager notes that Lesliebrook's minute book, together with correspondence between Ms. Walton and her employees, indicates that there were 10 preferred shareholders in Lesliebrook but that the shares held by these shareholders were cancelled and replaced with shares in Rose & Thistle. The Manager has not be able to locate original share certificates or confirmation from the relevant shareholders that these shares were cancelled and replaced. The relevant share certificates and correspondence are attached as Appendix B.

H. Liberty Village Properties Ltd. ("Liberty Village")

Company	DBDC Contribution	DBDC Percent	Recorded Contribution	Walton Percentage
Liberty Village Properties Ltd.	1,980,059.00	97.5%	50,100.00	2.5%

29. According to the agreement between Bernstein and the Waltons dated August 19, 2011 with respect to Liberty Village Properties Ltd. (the **"Agreement"**), the Waltons provided the original deposit and Bernstein reimbursed the Waltons such that each party had provided 1/2 of the $300,000 deposit to purchase the property which amount was to form part of the equity contribution. According to the Statement of Adjustments with respect to the purchase of this Property, attached as Appendix C, Liberty Village only paid deposits totalling $200,000. In other words, the Agreement overstated the deposits paid by Walton by $100,000.

30. Liberty Village's books and records shows Recorded Contributions totalling $50,000. These contributions represent the Waltons' share of a deposit cheque written from the Rose & Thistle Account dated December 24, 2010.

31. A cheque was issued from Rose & Thistle dated December 24, 2010 in the amount of $100,000 payable to Borden Ladner Gervais for deposit on the Liberty Village property. The opening balance in the Rose & Thistle Account on December 24, 2010 was $66,017.35. The following transfers of funds into the account occurred:

From N. Walton	$44,500
From Front Church	11,200
From Urban Amish	5,200

32. Thus, the Recorded Contribution of $50,000 appears to be funded by Schedule "C" Companies and from Norma Walton's personal account. However, as noted above, given the consistent pattern of net transfers from the Schedule "B" Companies to the Schedule "C" Companies, it is not possible to determine the ultimate source of these funds.

33. Another cheque was issued from Rose & Thistle dated February 18, 2011 in the amount of $100,000 payable to Borden Ladner Gervais. The opening balance in the Rose & Thistle Account on February 18, 2011 was $20,447. On February 18, 2011, an amount $1,200,000 was transferred from MTCC No 1037 to Rose & Thistle. MTCC No. 1037 is the condominium corporation incorporated to manage the property at 18 Wynford Drive. As described in the Manager's Second Report, which is attached as Appendix D, the Waltons' transferred the condominium corporation's reserve fund to Rose & Thistle in early 2011. It appears that these funds were used to pay the second deposit relating to Liberty Village.

I. Royal Agincourt Corporation ("RAC")

Company	DBDC Contribution	DBDC Percent	Recorded Contribution	Walton Percentage
Royal Agincourt Corp.	2,334,208.00	73.2%	454,500.00	26.8%

34. The Manager's preliminary analysis shows Recorded Contributions relating to RAC totalling $454,500, which is comprised of transfers into RAC from Rose & Thistle totalling $854,500 to fund deposits less $400,000 paid by Bernstein to re-imburse Rose & Thistle for half of these deposits. As is described below, the deposits apparently funded by Rose & Thistle were in fact funded through the transfer of funds from other Schedule "B" Companies and (other investors)[5], to a lesser extent, Schedule "C" Companies.

a. September 9, 2011 Deposit

35. On September 9, 2011, a cheque was issued by Rose & Thistle in the amount of $200,000 to Bennett Jones in Trust.

36. This cheque (and several other cheques and transfers) was funded from transfers into the Rose & Thistle Account as follows:

From Twin Dragons	$109,600

[5] These investors appear to have been preferred shareholders in RAC, each of whom subsequently exchanged their shares in RAC for shares in Rose & Thistle or in other companies controlled by the Waltons. Documents relating to the surrender of the shares are attached at Appendix E.

From Wynford	14,200
From Riverdale	313,900

37. On the same day, Bernstein (368230 Ontario Ltd.) had advanced mortgage funds as follows:

Riverdale	$313,958
Twin Dragons	$97,839

38. Therefore, mortgage funds provided by Bernstein to Riverdale and Twin Dragon were transferred to Rose & Thistle and used, in part, to fund the Rose & Thistle cheque to Bennett Jones in Trust.

b. October 12, 2011 Deposit

39. On October 12, 2011, a cheque was issued by Rose & Thistle in the amount of $300,000 to Bennett Jones in Trust.

40. On October 11, 2011, the opening balance in the Rose & Thistle Account was $75,155. The following transfers from both Schedule "B" and Schedule "C" Companies into the account occurred as follows:

From Schedule B Companies

Liberty Village	$107,400
Bannockburn	27,200
Wynford	182,500
	$317,100

From Schedule C Companies

Ye Old Telegram Bldg	$77,900
Highland Creek	29,800
Plexor Plastics	550
	$108,250

41. On October 6, 2011, $890,194 was deposited in the account of Liberty Village Properties from a mortgage advance from 368 Limited. The transfer of $107,400 from Liberty Village to Rose & Thistle was funded from the deposit of the mortgage funds.

42. On October 11, 2011, $177,300 was deposited in the account of Wynford from a mortgage advance from 368 Limited.

43. Therefore, mortgage funds provided by Bernstein to Liberty Village and Wynford were transferred to Rose & Thistle and used to fund the cheque to Bennett Jones in Trust.

c. November 9, 2011 Deposit

44. On November 9, 2011, a cheque was issued from Rose & Thistle in the amount of $300,000 to Bennett Jones in Trust.

45. On November 8, 2011, the opening balance in the Rose & Thistle Account was $133,132. An amount of $488,950 was deposited to the Rose & Thistle Account, which was a transfer from the Liberty Village Properties account. An amount of $488,966 had been deposited to the Liberty Village Properties account from a mortgage advance from 368230 Ontario Limited.

46. Therefore, mortgage funds provided by Bernstein to Liberty Village were transferred to Rose & Thistle and used to fund the cheque to Bennett Jones in Trust.

J. Royal Gate Holdings Ltd. ("Royal Gate")

Company	DBDC Contribution	DBDC Percent	Recorded Contribution	Walton Percentage
Royal Gate Holdings Ltd.	4,962,957.00	97.6%	120,100.00	2.4%

47. According to the Agreement between Bernstein and the Waltons dated March 14, 2013, Walton had paid the deposits and due diligence and severance costs in the amount of $1,322,500 and Bernstein had provided the sum of $1,500,000, and these amounts were to form part of each of their equity contributions.

48. The Manager's initial analysis identified Recorded Contributions totalling $120,100. These amounts are comprised of $20,000 paid to Trez Capital on March 5, 2013 and $100,000

paid to "Fasken Martineau DuMoulin LLP" ("**Fasken**") in Trust on March 11, 2013. The cheque to Trez Capital cleared the Rose & Thistle Account on March 11, 2013.

49. The day before the payment of $100,000 to Fasken, Rose & Thistle received transfers from Schedule "B" Companies as follows:

West Mall	$1,032,000
Liberty Village	27,050
Red Door	7,950
Fraser	7,550
Donalda	3,850
Double Rose	24,750
Red Door	12,900
Dupont	2,600
West Mall	197,050
	$1,315,700

50. Also on March 10, 2011 (the day before the cheque to Fasken cleared the Rose & Thistle Account), Rose & Thistle received transfers totalling $6,000 from Schedule C Companies. Therefore, both the cheque to Trez and the cheque to Fasken were funded by funds advanced by Bernstein to Schedule B Companies which were transferred to Rose & Thistle.

51. A payment of $600,000 in respect of the Royal Gate Property was made by wire transfer from the Rose & Thistle Account on April 5, 2013. This amount was to be funded by a Bernstein equity contribution of $1,500,000, which was paid into the Rose & Thistle Account on March 11, 2013. Accordingly, the $600,000 payment was not treated as a Recorded Contribution.

52. Bernstein's equity contribution was not, in fact, used to the fund the $600,000 payment on April 5, 2013. Instead, Bernstein's contribution was diverted into West Mall Holdings Ltd., then to United Empire Lands (a Schedule "C" Company) and used to fund the purchase of a Property at 3270 American Drive. A Bernstein mortgage advance to another Schedule "B" Company, Cityview Industrial Ltd. ("**Cityview**"), was then used to fund the $600,000 payment on April 5, 2013. Particulars of these transactions are as follows:

(a) Prior to the deposit of Bernstein's $1,500,000 equity contribution, the balance in the Rose & Thistle Account was $28,488. Following the deposit, the balance in the account was $1,528,488.

(b) During the period March 11, 2013 to March 13, 2013 there were various transfers to and from Schedule "B" and Schedule "C" companies, including a transfer of $1,100,000 to West Mall, following which the balance in the Rose & Thistle Account was $134,179.

(c) As described in the Fourth Report of the Inspector, on March 7, 2013, Bernstein paid $1,649,063 as an equity investment in West Mall. These funds were deposited to the West Mall account. On March 7 and 8, 2013, $1,649,050 was transferred to the Rose & Thistle Account, in individual transfer amounts of $197,050, $420,000 and $1,032,000. On March 8, 2013, an amount of $1,032,000 was transferred from Rose & Thistle to United Empire Lands. On March 11, 2013, 3270 American Drive was purchase by United Empire Lands.

(d) It appears therefore that the funds provided by Bernstein for Royal Gate Holdings in the amount of $1,500,000 were used to "repay" funds from his equity investment in West Mall which had been transferred to Rose & Thistle and used to fund the purchase of American Drive by United Empire Lands.

(e) On April 5, 2013, $636,400 was transferred to Rose & Thistle from Cityview. Rose & Thistle then transferred $600,000 to the Royal Gate Account to fund a wire transfer to Fasken in Trust in the amount of $600,000. The source of funds to Cityview was a mortgage advance of $636,403 from 368230 Ontario Limited. This mortgage was granted for the specific purpose of funding construction costs relating to Cityview.

K. Tisdale Mews Inc. ("Tisdale")

Company	DBDC Contribution	DBDC Percent	Recorded Contribution	Walton Percentage
Tisdale Mews Inc.	1,480,000.00	100%	$0	0%

53. The Manager did not identify any Recorded Contributions from Tisdale.

54. The Manager does note that the Agreement relating to Tisdale, which is attached as Appendix F, is different from the balance of the Agreements (apart from the Agreement relating to Red Door Developments Inc.) because Bernstein invested in the Company after the Waltons had owned it for a significant period of time. The Manager (in its capacity as Inspector) reported on the transaction relating to Tisdale in its Third Report, which is attached as Appendix G.

L. Skyway

Company	DBDC Contribution	DBDC Percent	Recorded Contribution	Walton Percentage
Skyway Holdings Ltd.	752,650.00	88.3%	100,100.00	11.7%

55. According to the Agreement between Bernstein and the Waltons dated February 14, 2013, each party had provided the sum of $100,000 towards the deposits and due diligence expenses required, which amounts will form part of each of their equity contribution.

56. On November 28, 2012, a cheque in the amount of $50,000 paid to Avison Young cleared the Rose & Thistle Account. The opening balance in the Rose & Thistle Account on November 28, 2012 was $295.67. The account was funded on that date by the following transfers:

Schedule B

Wynford	$2,600
Liberty Village	124,900
Riverdale	850
Fraser Properties	5,700
Double Rose	7,200
Fraser Lands	26,650
Total	$167,900

Schedule C

Handy Home	8,750
MTCC	1,950
Urban Amish	5,300
Cecil Lighthouse	1,200
Total	17,200

57. Therefore, the $50,000 cheque from Rose & Thistle to Avison Young was mainly funded by transfers into the account from Schedule B Companies. The Manager has not identified any further contributions from the Waltons in respect of Skyway.

58. On January 11, 2013, an amount of $100,000 from Bernstein was deposited to Skyway and used to fund a cheque in the amount of $50,000 payable to Avison Young for deposit on Skyway.

M. Richmond Row

59. According to the Agreement between Bernstein and the Waltons dated June 27, 2013, Bernstein had provided $650,000 to cover deposit costs, mortgage fees and due diligence expenses to purchase the property as a shareholder loan. Bernstein was to provide on June 27, 2013 a further shareholder loan of $3,200,000 and a remaining shareholder loan of $1,970,388 once a commercial tenant has been secured or building renovations begin. Walton was to provide the sum of $5,820,388 in shareholders loans thereafter as the project required.

60. According to the Statement of Adjustments, there was a first deposit made in the amount of $100,000. On April 15, 2013 a cheque in the amount of $100,000 from Rose & Thistle paid to Morcap Corporation Brokerage cleared the Rose & Thistle Account. The opening balance in the Rose & Thistle Account on April 15, 2013 was $2,437. The account was funded by the following transfers:

Schedule B Companies

Dewhurst (from Bernstein equity investment)	$641,500
Eddystone (from Bernstein equity investment)	866,700
Wynford	2,950
Donalda	8,400

Total	1,519,500

Schedule C Companies

Cedar Street	2,100
Handy Home	8,300
Total	10,400

61. Therefore, the $100,000 payment to Morcap was mainly funded by transfers from Schedule B companies, the largest amounts being from Bernstein equity investments in Dewhurst and Eddystone.

62. There were no further Recorded Contributions from the Waltons in respect of Richmond Row.

II. Final Equity Distribution from Donalda Developments Ltd. ("Donalda")

Company	DBDC Contribution	DBDC Percent	Recorded Contribution	Walton Percentage
Donalda Developments Ltd.	13,308,000.00	100.0%	100.00	0.0%

63. Pursuant to the Order of Justice Newbould dated December 17, 2014, the Manager made an interim equity distribution of $1,850,000 to Bernstein from Dupont.

64. The Manager retained funds totalling $1.235 million from Donalda to satisfy Donalda's potential future obligations, including its potential corporate tax obligations. Bernstein is now the sole shareholders of Donalda and the Manager has been discharged from any responsibilities in respect of Donalda. Accordingly, Bernstein will assume responsibility for the preparation and filing of Donalda's corporate tax returns.

65. In light of the foregoing, the Manager recommends that the balance of the funds held by the Manager be distributed to Bernstein.

III. Conclusions and Recommendations

66. For the reasons set out in this Report, the Manager respectfully recommends granting the relief sought in its Notice of Motion.

All of which is respectfully submitted this 7th day of January, 2015.

SCHONFELD INC.

In its capacity as Manager pursuant to the Order of Newbould, J. dated November 5, 2013

Per: _____
James Merryweather CPA, CGA
Authorized Signing Officer

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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

FOURTH SUPPLEMENTAL REPORT TO THE TWENTY-SECOND REPORT OF THE MANAGER, SCHONFELD INC.

A. Introduction

1. This is the Fourth Supplemental Report to the 22nd Report of Schonfeld Inc. ("**Schonfeld**") in its capacity as Manager of certain companies listed at Schedule "B" to the Order of Justice Newbould dated November 5, 2013 (the "**Companies**")[1], together with the properties owned by the Companies (the "**Properties**")[2] and as manager/receiver of the Properties listed at Schedule "C" to the Order of Justice Brown dated August 12, 2014.

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[1] Schedule "B" was amended by Order dated January 16, 2014.

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

B. Purpose of this Report

2. The purpose of this Supplementary Report is to provide facts relevant to Norma Walton's motion for $200,000 to fund litigation and living expenses.

3. The Manager takes no position with respect to whether Ms. Walton's motion should be granted or whether she is entitled to funding. However, Ms. Walton has suggested that this funding be paid from the proceeds of the sale of various Schedule "B" Properties in which the Waltons claim to have equity. For the reasons described below, the Manager does not believe that it is appropriate for Schedule "B" sale proceeds to be used for Ms. Walton's living or litigation expenses.

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 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.

5. Capitalized terms not otherwise defined have the meaning ascribed to them in the Manager's 22nd Report.

D. Tracing completed to date with respect to the Interim Distribution Properties

6. As noted in the 22nd Report, the August 12 Order required that the Waltons' shareholdings be recalculated in accordance with the Agreements, that the Waltons were only entitled to the shares that they had paid for and that the balance of the Waltons' shares were to be cancelled. The Manager's analysis of the Waltons' contribution to the Interim Distribution Companies is set out in the Second Supplemental Report to Manager's the 22nd Report.

7. As is noted in its 22nd Report and the Second Supplementary Report thereto, the Manager sought authority to make an interim distribution from certain Companies (the "Interim Distribution Companies"). In support of this motion, and in order to determine the Applicants'

and Respondents' shareholdings in accordance with the August 12 Order, the Manager has conducted an analysis of how each of the Interim Distribution Companies was funded.

8. The Manager's analysis showed that most of the funds contributed to the Interim Distribution Companies were paid by the Applicants either directly (in the form of an equity contribution to the relevant Interim Distribution Company) or indirectly (in the form of an equity contribution or mortgage advance to another Schedule "B" Company that was diverted by the Waltons to the relevant Interim Distribution Company). Thus, the Manager's analysis can be divided into two stages:

(a) the Manager began its assessment of contributions from the Applicants' and Respondents recorded in the books and records of the Interim Distribution Companies. All of the Waltons' purported contributions were made in the form of expenses paid from the Rose & Thistle's bank account (the "**Rose & Thistle Account**"). For the purposes of its initial analysis, the Manager counted any payment to or on behalf of an Interim Distribution Company from the Rose & Thistle Account as a "**Recorded Contribution**" unless the funds used to make the payment were provided directly by the Applicants.[3] Equity Contributions by the Applicants are referred to below as "**Direct DBDC Contributions**".

(b) The Manager subsequently analyzed the source of the Recorded Contributions. In all but one case, the Manager concluded that it was likely that the Recorded Contributions were funded, in whole or in part, by funds diverted from the Applicants. Funds contributed by the Applicants to one Company and diverted for use in one of the Interim Distribution Companies are referred to below as "**Indirect DBDC Contributions.**"

9. Based on the guidance received from the Court at the attendance on January 6, 2015, the Manager has compiled a further chart, which is below, that shows both Direct DBDC Contributions, Indirect DBDC Contributions and Recorded Contributions where the source cannot be identified based on the work completed to date.

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[3] In some cases, the Applicants' equity contributions were paid to the Rose & Thistle Account because the relevant company did not yet have a bank account.

Company	Direct DBDC Contributions	Indirect DBDC Contributions	Other Recorded Contributions[4]	Total DBDC Percentage of contributions
Hidden Gem Development Inc.	$1,166,150	$77,600	$0	100%
Lesliebrook Holdings Ltd.	$1,212,828.00	$25,100.00	$0	100%
Liberty Village Properties Ltd.	$1,980,059.00	$0	$50,100.00	97.5%
Royal Agincourt Corp.	$2,334,208.00	$454,500.00	$0	100%
Royal Gate Holdings Ltd.	$4,962,957.00	$120,100.00	$0	100%
Tisdale Mews Inc.[5]	$1,480,000.00	$0	$0	100%
Skyway Holdings Ltd.	$752,650.00	$90,090[6]	$10,010	99%

10. The Manager notes that the accuracy with which a specific dollar contributed by Bernstein can be matched to a specific use depends primarily on the opening balance and the level of activity in the Rose & Thistle Account when the funds were transferred. When funds

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[4] The Manager did not trace the source of de minimus contributions in the amount of $100 made by Respondents in and around October 2013.

[5] The Respondents have taken the position that they are entitled to 50% of the equity in Tisdale Mews Inc. notwithstanding the imbalance in financial contributions because the Applicants invested in the company after the Respondents had owned it for several years and the Applicants' investment was based on a higher property value than was originally paid by the Respondents. This is a legal dispute between the Applicants and the Respondents that will ultimately be resolved by the Court. The figure in the chart above is based entirely on financial contributions and does not account for the increased value alleged by the Respondents.

[6] When the Recorded Contributions from Skyway were made, the Rose & Thistle Account received funds from both Schedule "B" and Schedule "C" companies. The Recorded Contribution has been allocated based on the fact that 90% of the funds were received from Schedule "B" Companies.

contributed to a Company were transferred into the Rose & Thistle Account, funds were also transferred into and/or out of the Rose & Thistle Account by or to other Companies or Walton Companies. In such cases, it is possible to trace funds out of the Rose & Thistle Account into accounts held by the Schedule B Companies or the Schedule C Companies but it is not possible to match exactly the funds transferred out of the Rose & Thistle Account to the funds transferred as the funds have been comingled in the Rose & Thistle Account. In considering whether a particular Recorded Contribution is an Indirect DBDC Contribution, the Manager has assessed whether, based on its analysis it is more likely than not that the funds used to make a Recorded Contribution originated with the Applicants. This is the same basis on which the Inspector traced the funds

11. The Manager also notes that the Recorded Contributions that cannot be traced to the Applicants based on the work done to date were not necessarily made using the Waltons' own funds. Since funds provided by Bernstein, as well as funds provided by other investors and revenues from the various Schedule B Companies and Schedule C Companies, to fund the Schedule B Companies were constantly circulating through the Rose & Thistle Account, accounts relating to the Schedule C Companies and the Waltons' accounts, it is not possible to say for certain that any of the Recorded Contributions were made using the Waltons' own funds.

12. In order to determine with certainty how each of the Recorded Contributions were funded, the Manager would need to complete significant further tracing work. In the Manager's view, the cost of a complete tracing exercise would be disproportionate in light of the relatively limited funds available for distribution.

13. In light of the foregoing, the Manager does not agree with Ms. Walton's assertion that she is entitled to an equity distribution from the Interim Distribution Companies and that this distribution ought to be made available to fund her litigation and living expenses.

E. Proceeds from the sale of Schedule "C" Properties

14. To date, the Manager has sold three Schedule "C" Properties. The sale proceeds from these properties, net of mortgages, are listed below.

Property	Net Proceeds
66 Gerrard Street East	$271,429
324 Prince Edward Dr.	$741,502
24 Cecil Street	$987,308
Total	$2,027,381

15. The Manager has not yet conducted claims processes to identify unsecured creditors having claims against the entities that own the Properties listed above.

F. Answers to undertakings

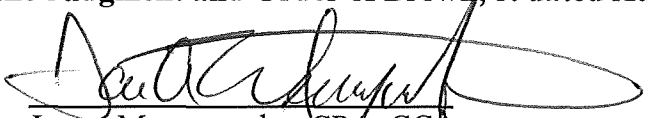
16. At the 9:30 chambers appointment on January 6, 2015 to schedule Ms. Walton's motion, Ms. Walton was ordered to answer outstanding undertakings from an examination conducted in April 2014 with respect to her finances.

17. Ms. Walton subsequently delivered Answers to Undertakings stating, in each case, that she does not have access to the information that she undertook to provide and taking the position that such information is in the possession of Schonfeld Inc. or Ira Smith Trustee & Receiver Inc. in its capacity as receiver of the Waltons personally. Ms. Walton's answers are attached as Appendix "A".

All of which is respectfully submitted this 27th day of January, 2015.

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

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Court File No.: CV-13-1 0280-00CL

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

SECOND REPORT OF THE MANAGER, SCHONFELD INC.

Contents

I. Introduction

1. This is the Second Report of Schonfeld Inc. (the "Manager") in its capacity as Manager pursuant to the Order of Justice Newbould dated November 5, 2013 (the "November 5 Order"), a copy of which is attached as Appendix 1.

2. The Manager was appointed Manager of certain companies listed at Schedule "B" to the November 5 Order (the "Companies"), together with the real estate properties owned by the Companies (the "Properties"). The circumstances giving rise to the appointment of the Manager are described in the Endorsement of Justice Newbould dated November 5, 2013 (the "November 5 Endorsement") a copy of which is attached as Appendix 2.

A. Purpose of this Report

3. There are several motions returnable on Thursday January 16, 2014 in these proceedings (collectively, the "January 16 Motions"), including motions by certain mortgagees seeking to have the stay lifted and to be "carved out" from the November 5 Order, a motion by Ms Walton for permission to refinance certain properties not subject to the November 5 Order and a motion by the Manager for certain relief including:

(a) approval of an arrangement negotiated between the Manager and the Applicants to provide funding for the Manager's fees and disbursements and the limited ongoing operation of the Companies generally comprised of mortgage, utilities and security costs and certain construction obligations;

(b) an Order authorizing and directing the Manager to post pleadings, orders and other publicly filed information relating to this matter on its website;

(c) an Order permitting persons claiming to be entitled to liens under the *Construction Lien Act*, R.S.O. 1990, c.C.30 to be exempted from the stay provisions of the November 5 Order solely to allow them to register claims for liens against the Properties and to issue and serve statements of claims to perfect and protect their alleged security interests;

(d) an Order amending Schedule "B" to the November 5 Order to correct the names of certain Companies as they appear in Schedule "B";

(e) an Order directing the Respondents to provide independent documentation confirming the balance of the Reserve Fund held by or on behalf of Metropolitan Toronto Condominium Corporation 1037 ("MTCC 1037") on or before January 20, 2014;

(f) approval of the Manager's activities since its appointment as described below; and

(g) approving the Manager's fees and those of its counsel, Goodmans LLP ("Goodmans").

4. The purpose of this Second Manager's Report is to provide information regarding these proceedings, report on the activities of the Manager and to provide certain recommendations relating to the January 16 Motions.

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, to the extent that this Report contains any financial information of Companies, the Manager has not audited, or otherwise attempted to independently verify the accuracy or completeness of this financial information. Accordingly, the Manager expresses no opinion or other form of assurance in respect of the financial information.

6. The Manager has not reviewed the validity of any claims asserted, or security registered, against the Companies. Nothing in this report constitutes recognition of the validity or priority of any such claim or registration. Similarly, the Manager has not assessed, and nothing in this report constitutes recognition of, any contractual obligation that is alleged to bind the Companies or the Properties.

II. Marketing of the Properties

7. The Companies own a diverse real estate portfolio comprised of industrial, residential and commercial revenue producing properties in various stages of planning, rezoning and development located throughout the GTA. These Properties fell into three very broad categories when the Manager was appointed:

(a) twenty four (24) Properties had not been marketed for sale;

(b) five Properties were the subject of existing Agreements of Purchase and Sale; and

(c) three Properties were the subject of listing agreements with real estate brokers and in the process of being marketed for sale.

8. Since its appointment, the Manager has worked to secure and stabilize the Properties, evaluate the Properties, formulate a strategy for maximizing realization and implement that strategy. These efforts are described below.

A. Properties not previously marketed

9. The Properties that have not been exposed to the market include income-producing properties, partially tenanted properties and untenanted properties in the early stages of development.

a. Request for proposals

10. The Manager engaged N. Barry Lyons Consultants Limited ("NBLC"), a leading multi-disciplinary real estate consulting firm, to help assess the Properties, formulate a marketing strategy and assist with the assembly of due diligence materials. With the assistance of NBLC, the Manager decided to list the properties listed below (the "Initial Listing Properties"):

(a) 241 Spadina Ave;

(b) 18 Wynford Dr;

(c) 32 Atlantic Ave;

(d) 5770/5780 Highway #7 W;

(e) 1131A Leslie St;

(f) 1450 Don Mills Rd;

(g) 1500 Don Mills Rd;

(h) 295 The West Mall; and

(i) 165 Bathurst St/620-624 Richmond St. W.

11. The Initial Listing Properties were selected because, in the Manager's judgment, they are in a state of development that will facilitate expeditious sales. Most due diligence materials are available and explicable and there are no significant impediments to sale for these properties. There were certain issues with other properties (including, for example, ongoing environmental remediation and ongoing municipal planning applications) that, in the Manager's judgment, required more time or consideration, relative to the Initial Listing Properties, before the commencement of active marketing could be properly undertaken.

12. The Manager prepared a Request for Proposals (the "RFP") dated December 5, 2013 to solicit listing proposals in respect of the Initial Listing Properties from the five largest brokerage firms in the GTA. The RFP, which is attached as Appendix 3, was sent to the following firms:

(a) Avison Young;

(b) Cushman & Wakefield;

(c) Colliers;

(d) DTZ Barnicke; and

(e) CBRE Limited ("CBRE").

13. The Manager received responses to the RFP from each of these firms and scored each proposal based on team qualifications and experience, remuneration, marketing timeline and marketing approach.

14. CBRE achieved the highest score on the Manager's analysis. CBRE is a fortune 500 company and the world's largest commercial real estate services firm. The transaction team identified in CBRE's proposal has significant experience, including direct experience with two of the properties. Moreover, CBRE presented a well-thought out marketing plan that will, in the Manager's judgment, maximize realizations from the Initial Listing Properties.

15. The Manager provided its analysis, together with CBRE's response to the RFP, to the Applicants, Respondents and third party mortgagees with interests in the Initial Listing Properties and advised these parties of its intention to enter into a listing agreement with CBRE. Neither the Applicants nor the mortgagees objected to retaining CBRE.[1] The Manager is presently discussing the terms of a formal retainer with CBRE.

b. Initial Listing Properties

16. The Manager, in consultation with CBRE, has determined that, for marketing purposes, the Initial Listing Properties fall into three separate asset classes. Buyers will be encouraged to bid on individual assets or by class of assets, although in the latter case the offereror will be required to submit a property by property allocation of the offer price with its bid. The asset classes group together similar assets in order to facilitate a clear investment strategy for each asset class. The proposed asset classes are as follows:

(a) **Downtown West Office:** this asset class is comprised of 32 Atlantic Avenue, 241 Spadina Avenue and 620-624 Richmond Street West. These are all brick and beam office assets located relatively close together west of downtown Toronto. Based on CBRE's advice, the Manager's judgment is that grouping these assets together for marketing purposes, while also encouraging individual bids, will maximize demand and realization;

(b) **Suburban Office:** this asset class is comprised of 1450 Don Mills Rd, 1500 Don Mills Rd, 1131A Leslie St and 295 The West Mall. All of these properties except for 295 The West Mall (which is located in the Highway 427 Corridor) are located in the DVP South office node in Toronto. Since there are similar leasing

[1] Two mortgagees did raise concerns through counsel with respect to the sale process generally but did not object to the selection of CBRE. Ms Walton's motion for certain relief relating to the appointment of CBRE was denied.

and marketing dynamics and potential management synergies among these buildings, the Manager believes that grouping them together while also encouraging individual bids will maximize demand and realization. Although 18 Wynford Dr is in a similar location to some of the Companies' suburban office properties, the asset consists of certain units in a commercial condominium building which requires different considerations; and

(c) **Industrial:** 5770-5780 Hwy 7 W is the only industrial asset among the Initial Listing Properties. The Manager, in consultation with CBRE, is of the view that sale of this asset will be maximized if it is principally marketed separately from the other Initial Listing Properties.

c. Expressions of interest in a portfolio sale

17. In her affidavit sworn January 5, 2014, Ms Walton expressed her belief that the value of the Properties would be maximized if they were sold together. For the reasons described above, CBRE has advised that taking the Initial Listing Properties to market in three separate offerings (and inviting bids on some or all of each asset class) will maximize demand. NBLC has also recommended against marketing the Properties as a single portfolio and certain mortgagees have specifically opposed a portfolio marketing campaign.

18. Based on the foregoing, the Manager has determined that it will not engage in an active marketing campaign or sales process designed to solicit *en bloc* offers.

19. The Manager does not, however, intend to foreclose the possibility of a portfolio sale. The purchasers that contacted Ms Walton are free to bid to purchase some or all of the Properties as part of any sale process.

20. The Manager notes that on January 6, 2014 counsel for one or more of the Respondents raised a concern that if the Manager retained CBRE as broker to sell the Initial Listed Properties, there would be a possibility of two commissions being payable – both to CBRE and to Colliers, the broker with whom Ms Walton had held discussions concerning a portfolio sale. Attached as Appendix 4 is a copy of an email from counsel to Colliers confirming to the Manager that Colliers views itself as acting for potential purchasers and, as such, is not looking to the Manager

for any commission and has dealt with its own clients on that basis. There is no impediment to Colliers' clients coming forward with a proposal to purchase any number of the Properties. To date, no such proposal has been received by the Manager.

21. Colliers' counsel also advised the Manager that Ms Walton had provided certain valuations prepared by Colliers' appraisers to the portfolio purchasers identified in her January 5, 2014 affidavit. Colliers' sales staff do not have access to these valuations and asked that the Manager grant permission for Colliers' valuation staff to share their work with its sales staff and clients. The Manager opposes such disclosure and is concerned that selective disclosure of potentially confidential information to some potential purchasers could have an adverse effect on the sales process.

d. Other Properties not yet marketed for sale

22. Apart from the Initial Listing Properties, 10 other Properties have not yet been formally exposed to the market. The Manager is presently discussing these Properties with the relevant stakeholders to determine when and how these Properties should be exposed to the market. The Manager expects these Properties to be listed as soon as possible.

e. Unsolicited offers

23. The Manager has received a number of unsolicited offers to purchase various Properties since its appointment. The Manager is of the view that, in order to fulfill its obligations, it is required to engage in an orderly marketing process where circumstances allow. The Manager has therefore advised most of the unsolicited offerors that the relevant Property will be brought to the market in the near future and that they will have an opportunity to resubmit their offers at that time. The Manager has, however, engaged in discussions with some unsolicited offerors after consulting with affected stakeholders in certain specific circumstances.

B. Properties subject to pre-existing Agreements of Purchase and Sale

24. When the Manager was appointed, five Companies had already entered into Agreements of Purchase and Sale (the "Existing APS"). The Applicants, Respondents and affected mortgagees have supported completion of the transactions contemplated by the Existing APS. Although none of these transactions are ready to close at this stage, the Manager hopes that one or more sales will be completed in the near future. The Manager will continue to keep all

affected stakeholders apprised of its progress in this regard and will provide a detailed report on each sale once it is ready to close.

C. Properties subject to listing agreements

25. When the Manager was appointed, three Companies had entered into listing agreements with real estate brokerage firms and the Properties owned by these Companies were in the process of being marketed. These properties are listed below:

(a) 875/887 Queen Street;

(b) 1 Royal Gate; and

(c) 1185 Eglinton.

a. 875/887 Queen Street

26. The Property at 875 and 887 Queen Street (collectively the "Queen Street Property") is owned by Red Door Developments Inc. ("Red Door 1", which owns 875 Queen) and Red Door Lands Ltd. ("Red Door 2", which owns 887 Queen). Red Door 1 and Red Door 2 are referred to collectively as the Red Door Owners. The following encumbrances are registered on title to the Queen Street Property:

(a) an option to purchase the retail portion of the Queen Street Property in favour of Trinity Urban Properties Inc. ("Trinity");

(b) a $7 million mortgage in favour of RioCan Mortgage Corp. ("RioCan") (first mortgage on 875 Queen Street, second mortgage on 887 Queen Street); and

(c) A $1.2 million mortgage in favour of Woodgreen Management Inc. (first mortgage on 887 Queen Street).

27. In addition, the Queen Street Property is presently leased to the Woodgreen Family Red Door Shelter ("Red Door Shelter"), a non-profit organization that provides shelter services for families. In June 2010, Red Door Shelter entered into an agreement with Ronauld and Norma Walton whereby the Waltons agreed to make a substantial donation to, and build Red Door Shelter a new facility for, Red Door Shelter. In her affidavit sworn October 31, 2013, Ms

Walton deposed that she had negotiated an agreement to build this new facility on another Property located at 450 Pape (the "Riverdale Property") owned by Riverdale Mansion Ltd. ("Riverdale Mansion"). It does not appear that any construction work has occurred at the Riverdale Property and Riverdale Mansion does not have sufficient funds to complete such construction. As a result, it is highly unlikely that Red Door Shelter will be able to move to the Riverdale Property when its current lease expires on June 30, 2014.

28. The Manager is sympathetic to Red Door Shelter's situation and, following discussions with counsel to Red Door Shelter, required prospective purchasers of the Queen Street Property to agree to extend Red Door Shelter's existing lease to March 31, 2015.

29. The Queen Street Property was subject to an exclusive listing agreement with Colliers when the Manager was appointed. At that time, significant efforts to market the Queen Street Property had already occurred. More specifically:

(a) A marketing flyer inviting prospective purchasers to execute a Confidentiality Agreement and receive a Confidential Information Memorandum was widely circulated on October 17, 2013;

(b) 39 proponents executed confidentiality agreements and were provided with a copy of a Confidential Information Memorandum and access to a data site with respect to the Queen Street Property;

(c) Six bids and one verbal note of interest were received on November 21, 2013; and

(d) the two top bidders from the first round were invited to submit further offers.

30. After consulting with Colliers, the Manager determined that one offer was preferable to the other offers and proceeded to negotiate and execute an Agreement of Purchase and Sale with that bidder (the "Queen Street APS"). The Queen Street APS is subject to a due diligence condition and a closing date of July 31, 2014.

31. The Queen Street APS requires that the buyer recognize the option registered on title by Trinity and the proceeds of the Queen Street APS would be sufficient to pay RioCan's mortgage in full. Counsel to Trinity and RioCan has been advised of the offer. The Manager is not

seeking approval of the sale at this time because the due diligence condition has yet to be waived.

b. 1 & 20 Royal Gate

32. The Property at 1 & 20 Royal Gate (the "Royal Gate Property") is owned by Royal Gate Nominee Inc. ("Royal Gate Inc."). Computershare Trust Company of Canada ("Computershare") has registered a mortgage on title to the Royal Gate Property in the amount of $16.8 million. The Manager understands that Computershare registered this mortgage as nominee for Trez Capital Limited Partnership ("Trez Capital").

33. Royal Gate Inc. retained CBRE to market the Royal Gate Property for sale pursuant to a listing agreement dated November 1, 2013. CBRE conducted a formal marketing campaign beginning in October 2013. This campaign included e-mails to CBRE's private database, follow-up calls to potentially interested parties, listings on MLS, REALNET, Loopnet and Private Capital Investor Database. Four potential purchasers toured the Royal Gate Property and the Manager ultimately received two offers for the Property. The Manager is engaged in negotiations with an offeror but no Agreement of Purchase and Sale has been concluded.

c. 1185 Eglinton Ave E

34. The Property at 1185 Eglinton Ave E in Toronto was recently rezoned for a residential condominium. This Property has been listed for sale since October 2013 with Colliers and the Manager has engaged in discussions with potential purchaser groups through Colliers. To date, no Agreement of Purchase and Sale has been negotiated. The Manager, after consultation with the parties and notice to the relevant third party mortgagee, intends to proceed as recommended by Colliers.

III. Other Activities

A. Bank accounts and cash management

35. Immediately after its appointment, the Manager worked with Meridian Credit Union Limited, where the Companies' bank accounts are held, to transfer signing authority over these accounts to the Manager. The Manager has had control over the Companies' receipts and disbursements since on or around November 6, 2013.

36. The Manager stopped the co-mingling of funds that occurred prior to its appointment. The revenues (if any) generated by each Property are used to fund expenses relating to that Property and are held in a separate bank account in the name of the owner Company.

37. Prior to the appointment of the Manager, the Companies' books and records were kept using QuickBooks accounting software. QuickBooks is a basic accounting package that is primarily marketed to small businesses. The Companies did not have any:

(a) comprehensive financial accounting and reporting system;

(b) cash flow forecasting, budgeting or reporting systems; or,

(c) systematic cash controls.

38. In addition, the accounting records for a number of Companies were significantly out of date.

39. The Manager manages the Companies' finances, projects receipts and disbursements for all Companies several weeks in advance and assesses the Companies' funding needs based on these projections. As discussed below, the Applicants agreed to provide the funding required by the Companies between the Manager's appointment and January 31, 2014.

40. A copy of the Manager's Receipts and Disbursements, divided by Company, is attached as Appendix 5.

B. Property management

41. The Manager entered into a Property Management Agreement dated November 15, 2013 (the "Property Management Agreement") with Briarlane Rental Property Management Inc. ("Briarlane"). The Property Management Agreement is attached as Appendix 6. Briarlane is now managing all of the Properties except for the Property at 620 Richmond Street West (the "Richmond Property").

42. Briarlane is responsible for, among other things, lease renewals and amendments, listing space for lease where no leasing agent has been retained, ordinary course repairs to the Properties and day-to-day interactions with tenants. In addition, since mid-December 2013,

Briarlane has been responsible for maintaining the Companies' books and records under the Manager's supervision. Briarlane is in the process of transitioning the Properties to more sophisticated industry-specific software from QuickBooks.

43. The Manager supervises Briarlane's activities and addresses any critical issues that arise with respect to the Properties. The Manager is also engaged with the Companies' trade creditors and suppliers to ensure that necessary goods and services continue to be provided to the Properties.

44. On December 16, 2013, 165 Bathurst Financial Inc. ("Financial") served a motion for, among other things, an Order enjoining the Manager from terminating the Property Management Agreement between 165 Bathurst Inc. (the owner of the Richmond Property) and Esbin Property Management Inc. ("Esbin") in respect of the Richmond Property. The Manager understands that Financial has registered a vendor take-back mortgage over the Richmond Property and that Esbin has significant experience managing the Richmond Property. Accordingly, the Manager, Financial and the parties agreed that Esbin would continue to manage the Richmond Property subject to the Manager's oversight and supervision. The Manager is responsible for maintaining Richmond Property's books and records.

C. Construction and development

45. Several Companies own Properties that are in various stages of construction and development. The Manager has instructed the contractors and consultants carrying out work on the Properties to stop work pending further instruction from the Manager. The two exceptions to this prohibition are the Property at 1485 Dupont Avenue (the "Dupont Property") and the Heward Property.

46. The first stage of a multi-stage environmental remediation of the Dupont Property was partially completed when the Manager was appointed. The Manager determined that it was in the interest of all stakeholders to complete the first stage of this remediation before halting construction. The Manager has also determined that certain ongoing environmental remediation efforts at the Heward Property should be continued.

47. Both of these remediation efforts have been funded by the Applicants and the Respondents.

48. In addition, certain Companies entered into leases that required the construction of new buildings or substantial modifications to existing buildings to suit a particular tenant. The most significant commitments are set out below:

(a) Northern Dancer Lands Ltd. ("Northern Dancer") entered into a lease with a private school, MPS Etobicoke, which requires that Northern Dancer build a school to suit MPS Etobicoke in accordance with agreed-upon timelines. Northern Dancer is not able to fund this construction and MPS Etobicoke introduced the Manager to a potential purchaser that may be willing and able to build the required school. In the circumstances, and with the support of the parties, the Manager determined that it is appropriate to engage in discussions with this potential purchaser. However, these discussions have not yet resulted in an executed Agreement of Purchase and Sale.

(b) By Commercial Lease dated August 23, 2013, Dupont Developments Ltd. ("Dupont Developments") agreed to lease a substantial portion of the Dupont Property to an animation school, Maxx the Mutt Animation Inc. (the "Maxx Lease"). Pursuant to the Maxx Lease, Dupont Developments agreed to, among other things, remediate certain environmental issues affecting the Dupont Property and substantially renovate the Dupont Property. The Manager determined that Dupont Developments cannot fund the necessary renovations and, accordingly, it has reprobated the Maxx Lease.

D. Communication with third party mortgagees

49. Once the November 5 Order was issued and entered, the Manager obtained contact information for third party mortgagees with interests registered against the Properties from the Respondents. The Manager wrote to these mortgagees on November 19, 2013. A copy of this form of letter is attached as Appendix 7. The Manager then conducted title searches against the Properties, identified any registered mortgagees that had not received notice of the November 5 Order on November 19, 2013 and wrote to these mortgagees on November 22, 2013. A copy of

this form of letter is attached as Appendix 8. A list of the mortgages and construction liens registered on title to the Properties is attached as Appendix 9.

50. The Manager has been contacted by a number of mortgagees, either directly or through counsel, and has spent substantial time seeking to facilitate a resolution between the mortgagees and the Applicants with respect to the terms of the November 5 Order. Although the concerns expressed by the mortgagees varied, many mortgagees objected to the priority of the Manager's Charge and the Manager's Borrowing Charge (as defined in the November 5 Order).

51. To date, at least five mortgagees have served motions to either remove the Property against which they had registered an interest from, or substantially vary the terms of, the November 5 Order. A number of other mortgagees advised that they may seek similar relief if their concerns were not addressed. The Applicants, the Manager and three of the moving mortgagees have reached what is, in the Manager's view, a series of reasonable compromises. These compromises were reflected in the Consent Orders dated December 24, 2013 (the "December 24, Order") and January 6, 2014 (the "January 24 Order"). The December 24 Order and the January 6 Order include similar key terms. More specifically, the relevant parties agreed that:

(a) the relevant mortgagees would withdraw their motions;

(b) the Manager's Charge and Manager's Borrowing Charge would be subordinated to pre-existing security interests validly registered on title to each Property;

(c) revenues derived from a Property would only be used to fund expenses relating to that Property and would not be co-mingled with revenues from other Properties; and

(d) the relevant Properties would be sold according to pre-established timelines and the mortgagees would have defined rights to participate in, or consent to, the sale process.

52. In light of the funding arrangement described below, the Manager consented to the agreements reflected in the December 24 Order and the January 6 Order and is of the view that these agreements can and should serve as a framework for the other Properties.

E. Funding

53. The mortgagees' objections to the Manager's Charge and the Manager's Borrowing Charge posed a significant problem. Several Properties do not generate revenue or do not generate enough revenue to fund the obligations of the relevant owner Company. The Manager advised the parties early in these proceedings that it would not comingle funds between the various Companies and, accordingly, the Companies that did not generate revenue required an outside funding source.

54. Ms Walton advised the Manager that the Respondents were prepared to provide some of the funding required by the Companies. To date, the Respondents have provided total funding of approximately $710,250, primarily to fund mortgage payments owed by Companies that do not generate revenue. In the Manager's view, it is not advisable to rely exclusively on funding from the Respondents.

55. In light of the foregoing, the Manager negotiated with the Applicants to borrow funds on the following basis:

(a) the Applicants agreed to advance the aggregate amount of $1,352,000 to the Manager in installments between December 20, 2013 and January 31, 2014;

(b) amounts advanced by the Applicants will accrue interest at the rate of 15% per annum, calculated and compounded monthly not in advance;

(c) amounts advanced by the Applicants will be subrogated to a proportionate share of the Manager's Charge and the Manager's Borrowing Charge. The priority of the Manager's Charge and the Manager's Borrowing Charge will be amended to rank behind pre-existing registered charges; and

(d) the Applicants have no obligation to advance further amounts unless agreed to in writing or ordered by the Court but any further advances will be governed by the terms described above.

56. In the Manager's judgment, this borrowing represents the best available option for funding the continued limited operation of the Companies and the Manager's mandate pending

an orderly disposition of the Properties and strikes an appropriate balance between the various interests at play.

F. Overdue payables

57. The Manager has also assessed the Companies' accounts payable balances. Many of the Companies (including those that generate positive revenues) have significant overdue payables including amounts due to utility companies and tax authorities. The Manager has sought to pay down overdue payables to the extent permitted by cash flow.

b. 18 Wynford Dr

58. One of the Companies, Wynford Professional Centre Ltd. ("Wynford Professional") purchased the majority of the commercial condominium units in a condominium located at 18 Wynford Dr in Toronto ("18 Wynford") in early 2011. Since it owns the majority of the units at 18 Wynford, Wynford Professional exercises significant control over the condominium corporation that owns and operates the building, MTCC 1037. In or around February 2011, the condominium corporation retained The Rose & Thistle Group Ltd ("Rose & Thistle") as the property manager for 18 Wynford.

59. On or about December 17, 2013, the Manager was contacted by a representative of the Ontario Lung Association (the "OLA"), which also owns units at 18 Wynford. The OLA asked the Manager to confirm the status of MTCC 1037's property manager, the statutory reserve fund and its accounting records. Since the financial health of MTCC 1037 will likely be relevant to a purchaser of some or all of the units owned by Wynford Professional, the Manager has sought to confirm that the condominium corporation's financial records are up to date, that Wynford Professional has paid all outstanding condominium fees and that the condominium's reserve fund was being appropriately maintained, that the board of MTCC 1037 function and that it is current on all other statutory obligations. The results of these efforts are described below.

60. Between its appointment as property manager in 2011 and the appointment of the Manager in November 2013, Rose & Thistle, as property manager, collected common element and maintenance fees from the other unit owners at 18 Wynford but did not collect fees from Wynford Professional. By invoice dated December 29, 2012 (but presented to the Manager on or about January 6, 2014), a copy of which is attached as Appendix 10, Rose & Thistle purported

to invoice Wynford Professional for all common areas payments owing for 2012. No amounts have been billed or paid for 2011 or 2013.

61. When Wynford Professional purchased its units in early 2011, the reserve fund in the amount of approximately $1.4 million was provided to Ms Walton or The Rose & Thistle Group Ltd. Work was subsequently performed by Rose & Thistle or its related companies to upgrade 18 Wynford's common elements, although the Manager has not been provided with any records showing what entity performed this work, how much it cost or how it was funded. Further it appears that no Annual General Meeting has been held since 2011, no financial statements have been prepared since 2010, and no board meeting has been convened since December 13, 2011

62. By e-mail dated December 31, 2013, Mr. Schonfeld asked Ms Walton to provide evidence of the balance in the reserve fund. In her response, Ms Walton did not address the request for evidence of the reserve fund's balance and location. Ms Walton did not respond to Mr. Schonfeld's second request for such evidence. These exchanges between Ms Walton and Mr. Schonfeld are attached as Appendix 11.

63. By email dated January 9, 2014, a copy of which is attached as Appendix 12, counsel for the Manager wrote to counsel for the Respondents demanding information concerning the status of the MTCC 1037 reserve fund and concluding as follows:

> Stating clearly and simply, the Manger [sic] requires that Ms Walton and Rose & Thistle Group Ltd. Immediately advise it of the amount that either of them or any entity related to or controlled by either of them holds on deposit in the MTCC 1037 statutory reserve and that they provide evidence by way of a copy of the most current bank or credit union account statement or investment certificate evidencing the current MTCC 1037 reserve fund balance. In the Manager's view, any uncertainty regarding 18 Wynford's statutory reserve fund is a significant issue. Condominium unit owners are entitled to an accounting for their funds held in trust as required by the Condominium Act. Prospective purchasers are likely to inquire into the status of 18 Wynford's reserve fund as part of any due diligence process. Furthermore, if Wynford Professional has not paid its condominium fees issues of claims and priorities may be arise...

64. By email dated January 10, 2014, at 3:00 p.m. Mr. Schible responded for Ms Walton, stating that "I am advised that Ms. Walton and Mr. Schonfeld are actively addressing the matter of the reserve fund". Counsel or the Manager responded with an email at 3:13 p.m. as follow:

> Your response that Mr. Schonfeld and Ms Walton are addressing the MTCC 1035 reserve fund issue is not acceptable. It has not been addressed to the Manger's satisfaction hence my email below. Where is the reserve fund and what is its current balance?
>
> It exists or it is gone. If it exists, please produce a current bank statement or certificate. We have seen bank statements showing the deposit of the initial amount received in trust by your client and withdrawals of the full amount from that bank account. The funds are being held in trust somewhere else or they have been consumed. Which is it? This is a matter of importance in which clarity and forthrightness is required. We are all lawyers dealing with statutory trust funds that currently cannot be located. If you or your clients have them or know where they are, please advise and provide the evidence sought below. If the trust funds are gone, it is incumbent upon counsel to say so.
>
> A copy of these emails is attached as Appendix 13

65. There has been no further response received from anyone on behalf of Ms Walton. To date, the status of MTCC 1037's reserve fund remains unclear. Accordingly, the Manager respectfully requests an Order directing the Respondents to provide evidence of the balance in the reserve fund no later than January 20, 2014 so that the Manager can assess the effect, if any, that this issue will have on efforts to sell units in 18 Wynford and to inform the other unit owners in the condo corp.

G. Construction Liens

66. The Manager has been contacted by several contractors that have registered, or intend to register, construction liens against one or more of the Properties. These contractors, together with the amount that they claim and the Property against which each lien is registered are listed at Appendix 14.

67. The November 5 Order permits the registration of construction liens but stays all proceedings against the Companies. The Manager understands that, in order to perfect and protect a lien once it is registered, the lien claimant must issue and serve a Statement of Claim seeking certain relief from the relevant Company. The Manager has agreed to lift the stay provided for in the Order to allow lien claimants to take the steps necessary to perfect their security. The Manager does not consent to any further steps being taken by the construction lien claimants other than the service of their Statement of Claim. Determination of the validity and priority of the liens claimed can be dealt with summarily in these proceedings as Properties are

sold and all encumbrances are reviewed. Accordingly, once the lien claimants have served their respective Statements of Claim, their lien actions should be stayed pending the outcome of these proceedings or further order of the Court.

H. Distribution of materials

68. The November 5 Order prohibits the Manager from posting information relating to this proceeding on its website. As a result, the Manager has received requests for copies of material filed to date from a large number of stakeholders. That material is voluminous, ever-increasing and inconvenient to transmit. The Manager is of the view that posting materials filed in these proceedings on its website will allow for a more efficient flow of information to interested parties, will avoid the need for duplicative distribution of materials and ensure that all stakeholders are able to stay informed as these proceedings move forward.

I. Incorrectly named companies

69. In addition, the Manager understands that the owners of certain Properties are not named or were mis-named in the November 5 Order. In particular:

(a) Royal Gate Holdings Ltd. is listed in Schedule "B". This company does not hold title to any of the Properties. Title is held by Royal Gate Nominee Inc. (in respect of the Royal Gate Property and Royal Gate (Land) Nominee Inc. (in respect of the parking lot adjacent to the Royal Gate Property);

(b) El-Ad Limited is listed in Schedule "B". The Manager understands that this entity is controlled by the former owners of 1500 Don Mills and that the current owner of that property is El-Ad (1500 Don Mills) Limited; and

(c) Liberty Village Properties Inc. is named in Schedule "B". The Manager understands that the owner registered on title is Liberty Village Properties Ltd.

70. The Manager respectfully recommends that Schedule "B" be corrected to address these errors.

J. Communications with Ms Walton

71. On January 9, 2014, Ms Walton advised Mr. Schonfeld by email that she had been contacted by a realtor expressing interest in one of the Properties and that, in response, she had directed the realtor to the Manager and suggested a purchase price to the realtor. By letter dated January 9, 2014, counsel to the Manager re-iterated that Ms Walton is not entitled to do anything regarding prospecting purchasers other than direct them to the Manager. This letter is attached as Appendix 15. The response received from Ms Walton's counsel is attached as Appendix 16.

K. Fees

72. Attached hereto as Appendix 17 is the Affidavit of Mr. Schonfeld sworn January 14, 2014, attesting to the fees and disbursements of the Manager for the period from November 5, 2013 to December 31, 2013 in the amount of $277,033.29 inclusive of HST.

73. Attached hereto as Appendix 18 is the Affidavit of Fred Myers sworn January 14, 2014, a partner of Goodmans, attesting to the fees and disbursements of Goodmans acting on behalf of the Manager, from November 5, 2013 to December 13, 2013 in the amount of $172,469 inclusive of HST.[2]

74. The Manager has received and reviewed Goodmans' invoice. The Manager confirmed that the fees and disbursements set out in Goodmans' invoice relate to advice sought by the Manager and that, in the Manager's view, Goodmans' fees and disbursements are reasonable.

IV. Conclusions and Recommendations

75. For the reasons set out in this Report, the Manager respectfully recommends:

(a) permitting the Manager to post information relating to this matter on its website;

(b) permitting entities that register construction liens against the Properties to issue and serve statements of claims for the sole purpose of perfecting and protecting their alleged security interests;

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[2] Goodmans' invoices relate to work performed on behalf of Schonfeld Inc. in its capacity as Manager and Inspector pursuant to the Order of Justice Newbould dated October 4, 2013. The amount of $11,628.85 billed by Goodmans has been allocated to the Inspector mandate and will be dealt with separately.

(b) permitting entities that register construction liens against the Properties to issue and serve statements of claims for the sole purpose of perfecting and protecting their alleged security interests;

(c) amending Schedule "B" to the November 5 Order to include certain companies that appear to have been inadvertently omitted from the November 5 Order;

(d) directing the Respondents to provide independent documentation confirming the balance of the Reserve Fund held by or on behalf of MTCC 1037 on or before January 20, 2014;

(e) granting Orders consistent with the December 24 Order and the January 6 Order in respect of the remaining Properties;

(f) approving the Manager's activities since its appointment as described above; and

(g) approving the Managers fees and those of its counsel, Goodmans.

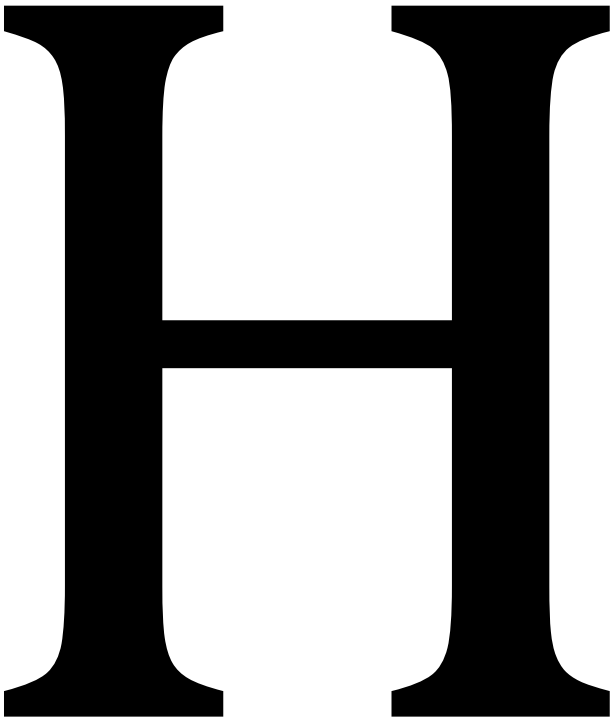
All of which is respectfully submitted this 14th day of January, 2014.

SCHONFELD INC.

In its capacity as Manager pursuant to the Order of Newbould, J. dated November 5, 2013

Per:_____

S Harlan Schonfeld CPA, CIRP



Court File No.: CV -13-1 0280-00CL

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", TO BE BOUND BY THE RESULT

FIFTH REPORT OF THE INSPECTOR, SCHONFELD INC.

I. Introduction

1. This is the Fifth Report of Schonfeld Inc. (the "Inspector") in its capacity as inspector pursuant to subsection 161(2) of the *Business Corporations Act (Ontario)* and the Order of Justice Newbould dated October 4, 2013 (the "Appointment Order").

2. The Inspector has previously filed its First Interim Report dated October 21, 2013 (the "First Report"), its Supplemental Report to the First Report dated October 24, 2013 (the "Supplemental Report") on October 24, 2013, its Second Interim Report dated October 31, 2013 (the "Second Report"), its Third Interim Report dated January 15, 2014 (the "Third Report"), its Fourth Interim Report on April 23, 2014 (the "Fourth Report"), its Supplemental Report to the Fourth Report dated April 25, 2014 and its Second Supplemental Report to the Fourth Report dated May 5, 2014.

A. Purpose of this Report

3. The purpose of this Fifth Report is to advise this Honourable Court of the status of the Inspector's investigation to date.

B. Status of the Investigation

4. Pursuant to the Appointment Order, the Inspector was authorized and directed to investigate a number of companies listed at Schedule "B" to the Appointment Order (the "Companies"). More specifically, the Inspector was directed to investigate and report to the Court upon the financial position of the Companies including, but not limited to:

(a) the financial position of the Companies and the properties and projects that they each own (the "Properties");

(b) the equity and debt of the Companies including secured debt;

(c) the revenues and expenses of the Companies;

(d) any intercompany amounts owed by or to the Companies;

(e) any related party transactions;

(f) the acquisition, purchase, financing, management, development and operations of the Properties; and

(g) the results of tracing any amounts to and from the bank accounts of the Companies (the "Company Accounts") and the bank accounts of Rose & Thistle Group Ltd. ("Rose & Thistle") or any other accounts under Rose & Thistle's control (the "Rose & Thistle Accounts").

5. The Fourth Interim Report noted that the Inspector's investigation is not complete. In particular, the Inspector had not completed the tracing analysis described in paragraph 4(g) of that report. That analysis had, however, progressed to the point that, in the Inspector's view, the findings to date should be reported to the parties and this Honourable Court. The Inspector's tracing analysis has continued and, although still not complete, further findings are now being reported to the parties and this Honourable Court.

C. Terms of Reference

6. In preparing this report, the Inspector has relied upon documents and information provided to it by the parties and has not verified the authenticity or accuracy of these documents. The Inspector has assumed that the documents provided to it (other than the parties' internal accounting records) are authentic and accurate. For example, the Inspector has assumed that documents purporting to be bank statements are true copies of statements provided by the relevant financial institution and that these statements accurately describe the transactions in the relevant accounts.

7. The Inspector has not performed an audit or other verification of the internal accounting documents provided to it by the parties. Some of the parties' internal accounting records have been reconciled with the documents referenced in paragraph 6 above (including bank statements and government registrations) but the internal records remain subject to further verification once sufficient information is provided.

II. Summary of conclusions to date

8. The Inspector's analysis to date supports the following conclusions:

(a) The Respondents directed transfers of $23.6 million (net) from the Company Accounts to a bank account belonging to the Rose & Thistle Group Limited (the "Rose & Thistle Account") during the period from October 2010 to October 2013. These transfers occurred on a regular and ongoing basis during the period examined;

(b) During the same period, the Respondents directed transfers of $25.4 million (net) from the Rose & Thistle Account to companies that they own without the Applicants (the "Walton Companies"). These transfers also occurred on a regular and ongoing basis during the period examined;

(c) In almost all cases, some or all of the amounts advanced to the Companies by the Applicants were transferred almost immediately to the Rose & Thistle Account;

(d) In seven instances identified by the Inspector, all of the following occurred in a brief period of time:

(i) funds were transferred from one or more Company Accounts;

(ii) funds were then transferred to a Walton Company; and

(iii) relevant Walton Company purchased a property.

9. Based on the foregoing analysis, and the analysis set out below, the Inspector has concluded that the Respondents used new equity invested in, and mortgage amounts advanced to, the Companies by the Applicants to fund the ongoing operations of other Companies and the Walton Companies. Almost every time the Applicants advanced funds to one of the Companies, a significant portion of those funds was transferred to Rose & Thistle. In some instances, funds could be traced directly into a Walton Company. In other instances, funds could not be traced directly because the Applicants funds were co-mingled with other funds in the Rose & Thistle Account. However, the Inspector has concluded that the Applicants' investment in the Companies was a major source of funds for the Walton Companies.

10. The Respondents have sought to justify the movement of funds from the Companies to Rose & Thistle on the basis that these transfers were payments for services rendered by the Respondents to the Companies. To date, the Respondents have not provided evidence to substantiate the majority of the alleged fees and the Inspector has found evidence that is not consistent with this explanation. In particular:

(a) the transfer of funds observed by the Inspector is more consistent with funds being taken as needed to fund obligations in the other Companies and the Walton Companies

than funds being taken as payment for services rendered. In some cases, funds were transferred by Companies immediately after those Companies acquired Properties and/or invoices were rendered for the exact amount transferred from a particular Company during the preceding period;

(b) there is no evidence that the Respondents possessed sufficient funds to pay for both the construction activity that they allege to have carried out and the transfers observed to the Walton Companies; and

(c) in some cases, funds have been transferred from Companies, and the Respondents have delivered invoices for construction work, where little or no work had been done on the relevant Property. Moreover, the various Companies owned Properties in different stages of construction and development but none of the Companies retained any substantial cash reserve from the Applicants' initial investment to fund future construction costs.

III. The Arrangement between the parties

11. The contracts entered into between the Applicants and the Respondents in respect of each Company are very similar. These contracts include the following terms:

(a) A Company was incorporated to own each Property;

(b) Each of Dr. Bernstein and the Waltons would directly or indirectly own 50% of the shares of the company;

(c) Dr. Bernstein would invest 50% of the anticipated cost of acquiring the Property and completing development and construction at the outset of each Project; and,

(d) the Waltons would invest further equity as it was required.

12. The Respondents provided the Applicants with a pro forma setting out the anticipated cost of completing planned development and/or construction on each Project. The Applicants invested 50% of the budget shown on the pro forma but these funds were dispersed among the Companies and Walton Companies. Accordingly, the funds invested by the Applicants in a Company did not remain available to that Company.

13. Since the Companies did not retain the amounts that the Applicants invested, almost every Company required outside funding in order to complete the work shown on the relevant pro forma. These funds appear to have been drawn in some cases (including those illustrated in Appendix F to the Fourth Report) from new equity investments and mortgage advances by the Applicants. In other words, new advances to one Company appear to have been used to fund the existing obligations of other Companies or Walton Companies.

IV. Tracing Analysis

A. Concerns raised by the Respondents

14. At their request, the Inspector met on June 3, 2014 and June 10, 2014 with the forensic accounting firm retained by the Respondents, Froese Forensic Partners ("Froese"), to respond to concerns expressed by Froese with respect to the Inspector's tracing analysis. Froese expressed two primary concerns:

(a) that the tracing exercises illustrated at Appendix F to the Fourth Report (the "Tracing Charts") were potentially misleading because some funds advanced to Rose & Thistle by the Companies were later returned by Rose & Thistle to the relevant Company;

(b) that two amounts shown in two charts included Appendix F, namely Chart 1 (Twin Dragons) and Chart 3 (Bannockburn), showed the transfer of funds that may have been advanced by third parties and not by the Applicants.

15. The letter from Froese setting out these concerns is attached as Appendix "A"

16. The Inspector has carefully considered the concerns raised by Froese and conducted certain further analysis in response to these concerns, which are described below.

B. Specific Transactions Identified by Froese

a. Twin Dragons Corporation ("Twin Dragons")

17. Regarding Twin Dragons, Chart 1 of Appendix F set out a tracing of the Applicants' funds provided on October 18, 2010 for equity investment in Twin Dragons. As is set out below, the Inspector has determined that:

(a) the Respondents solicited equity investments from third parties and recorded these investments as investments by the Waltons on the books and records of Twin Dragons;

(b) the contract between the Applicants and the Respondents prohibits any third party investors in Twin Dragons and the Respondents assert that the third party investments were deposited into the Twin Dragons bank account in error. However, Twin Dragons' books and records are not consistent with this assertion;

(c) A portion of the funds deposited by either the Applicants or these third party investors was subsequently used to fund the Waltons' share of the deposit on the Property at 18 Wynford Drive. This deposit payment was also treated as if it had been made by the Waltons on the relevant Company's records.

18. By way of background, in an agreement dated September 24, 2010 (the "Twin Dragons Agreement") and attached as Appendix "B", the Applicants and the Respondents agreed to each provide $1,120,500 to the Company to purchase, renovate, lease and refinance the Property at 241 Spadina Avenue, Toronto, Ontario. The Twin Dragons Agreement stated that the Applicants and Respondents were to be the only owners of Twin Dragons.

19. The Twin Dragons Agreement stated the Respondents had contracted to purchase the Property with the purchase scheduled to close on October 14, 2010 and had already provided $300,000 as a deposit towards the purchase. The Applicants were to provide $1,120,500 on or before October 14, 2010 and the Respondents would provide a further $820,500 in a timely manner as required. Each party was to provide 50% of whatever additional capital over and about the $1,120,500 that was required to complete the project.

Appendix A to the Agreement states that the total capital required was as follows:

Total capital required	$8,541,000
Mortgage (Applicants are the Mortgagee)	$6,300,000
Bernstein	$1,120,500
Waltons	$1,120,500

20. Chart 1 of Appendix F indicates that, on October 18, 2010, Applicants' funds in the amount of $1,120,500 were deposited to the bank accounts for Twin Dragons. The Inspector's review of the

accounting records of Twin Dragons related to these transactions indicates that the funds received from the Applicants ($1,120,500) were deposited to a Twin Dragons bank account and recorded in the accounting records as the Applicants' common share equity.

21. The chart also notes that, between October 25, 2010 and October 29, 2010, $251,350 was transferred from the bank accounts in the name of Twin Dragons to the Rose and Thistle bank account.

22. Froese provided the Inspector with an analysis of the funds entitled "Twin Dragons-Tracing of Dr. Bernstein's Equity Funds-October 18, 2010 Equity Deposit", which is attached as Appendix "C". The Froese analysis indicates that deposits were made between October 25 and October 29, 2010 to the Twin Dragons bank accounts sourced from Teresa and Joe Memme ("Memme") ($100,000) and Duncan Coopland ("Coopland") ($150,000) and referred to in the analysis as "share subscription".

23. According to Froese, Memme and Coopland were actually supposed to be investors in a Walton Company, not Twin Dragons. Immediately following the deposits from Memme and Coopland, transfers in the same amounts were made from the Twin Dragons bank account to the Rose & Thistle bank account.

24. The Inspector has reviewed the accounting and banking records of Twin Dragons for these transactions and agrees that some of the funds transferred to Rose & Thistle from the Twin Dragons bank accounts during the time period depicted on Chart 1 of Appendix F were provided by the other parties identified by Froese. However, the Inspector's review of the accounting for these transactions in the books and records of Twin Dragons and Rose & Thistle and the underlying documents indicates that the accounting treatment is not consistent with the explanation that the funds from these other parties were deposited in error in the Twin Dragon's bank account, as further described below.

25. On October 27, 2010, $100,000 was deposited from Memme to a Twin Dragons bank account and the transaction was recorded as a credit to share subscription receivable, which is an account to record equity owing which has not yet been funded. Attached as Appendix "D" is a copy of the Memme cheque dated October 27, 2010 paid to the order of Twin Dragons Corporation. On October 29, 2010, $150,000 was deposited from Coopland and the transaction was also recorded as a credit to share subscription receivable. Attached as Appendix "E" is a copy of the Coopland cheque dated October 26, 2010 paid to the order of Twin Dragons Corporation.

26. The Inspector noted that two other deposits from parties other than the Applicants or Respondents to a Twin Dragon bank account were made earlier, in September, 2010, as explained further herein. On September 1, 2010, $50,000 was deposited to a Twin Dragons bank account. According to the Twin Dragon accounting records, this was recorded as a credit to the share subscriptions receivable account for an amount received from Gideon and Irene Levytam. Attached as Appendix "F" is a copy of the cheque dated September 1, 2010 from Gideon and Irene Levytam paid to the order of Twin Dragons Corporation. The cheque includes the notation "Irene & Gideon Levytam Investment in 241 Spadina". Immediately following the deposit of the Levytam cheque, the funds were transferred from the Twin Dragon's bank account to Norma Walton's personal account.

27. On September 30, 2010, $50,945 was deposited to a Twin Dragons bank account. According to the Twin Dragon accounting records, $50,000 was recorded as a credit to the share subscription receivable account for an amount received from Ange Boudle (the funds received were apparently in US$, resulting in $945 foreign exchange) for, according to the Twin Dragons accounting records, "investment in Twin Dragons". Attached as Appendix "G" are:

(i) A cheque (in US$) dated September 30, 2010 from Ange Boudle in the amount of $10,000 paid to the order of Twin Dragons; and

(ii) A cheque (in US$) dated September 30, 2010 bearing the apparent signature of Ange Boudle in the amount of $40,000 paid to the order of Twin Dragons.

28. The accounting records of Twin Dragons indicate that the equity to be paid by the Waltons (as per the Agreement described above), in the amount of $1,120,500, was recorded as an amount owing from shareholders. The amount, however, was reduced to $770,500 as the $350,000 received from the four parties noted above was credited against the amounts owing from the Waltons. In particular:

(a) Accounting entries dated December 31, 2010 reversed the $350,000 recorded as credits to the share subscriptions receivable account with the description "to reclassify funds owed by Ron and Norma Walton" and credited the amount owing by the Waltons for their share of equity ($1,120,500);

(b) As a result, the amount showing on the books of Twin Dragons as owing from the Waltons related to their equity requirement is $770,500 ($1,120,500 minus $350,000).

29. Regarding Twin Dragons (Chart 1 of Appendix F) the $1,120,500 provided by the Applicants and deposited to the Twin Dragons bank account on October 18, 2010, most of the funds appear to have been used to close the acquisition of the property. However, an amount of $150,000 from these funds was transferred from the Twin Dragons bank account to the Rose & Thistle bank account and was used to fund a cheque to Pointmark Real Estate in the amount of $150,000. According to Froese, this cheque relates to a deposit on the Property at 18 Wynford, which is owned by Wynford Professional Centre Limited (one of the Companies). The Inspector agrees with this aspect of the Froese analysis.

30. The Froese analysis also documents a transfer, also in the amount of $150,000, being transferred back from the Rose & Thistle bank account to the Twin Dragons bank account on October 29, 2010. The Froese analysis then shows these funds being used to fund a payment from the Twin Dragons bank account to Carcol, with the payment being recorded in the accounting records of Twin Dragons as "CIP"- construction in progress.

31. An Ontario Corporation Profile Report indicates that Carcol Ltd. ("Carcol") was incorporated on January 9, 2003 and shows the Directors as Carlos Carreiro and Norma Walton. In the Agreement between the Applicants and Respondents related to Twin Dragons, described above, Carlos Carreiro is described as a member of the management team of Rose & Thistle Group as Director of Construction and Maintenance.

32. The payment to Carcol on November 1, 2010 appears to be for an invoice rendered by Carcol dated November 1, 2010 in the amount of $130,735.50 plus HST total $147,731.12 for "work completed from October 11 to October 31, 2010". The Inspector notes that the closing date for the property acquisition was October 18, 2010. The Inspector notes that a total of eight invoices were received from and paid to Carcol over the period November, 2010 to June, 2011 totalling approximately $1.9 million (including HST).

33. There is further reference to Mr. Boudle in the Twin Dragons accounting records. An accounting entry dated October 2, 2012 indicates a cheque was issued to Mr. Boudle in the amount of $40,000 with the description "partial return of capital return-241 Spadina". An accounting entry dated February 1, 2013 indicates a cheque was issued to Mr. Boudle in the amount of $35,000 with the

description “repayment of capital and pref share dividend”. These entries would support that Mr. Boudle was, in fact, an investor in Twin Dragons.

34. Mr. Boudle has provided information to the Inspector that he was an investor in Twin Dragons in the amount of $50,000 for preferred shares. He indicated that, rather than receiving monthly or quarterly payments related to this investment, he was told he would share in the “upside” of the building’s subsequent value. He indicated that he did receive his original investment of $50,000 back along with $25,000 as a share in the upside of the building. (This would seem to correspond to the payments made to Mr. Boudle in October, 2012 and February, 2013 noted above.) Mr. Boudle’s e-mail is attached as Appendix “H”

35. Mr. Boudle has also informed the Inspector that he was a preferred share investor in Lesliebrook, and made this investment in April 2012.

36. The Inspector has reviewed a letter from Jim Reitan to Norma Walton dated June 7, 2013 outlining a number of concerns Mr. Reitan had about the Applicants’ investments. The letter is attached as Appendix “I”. In the letter, Mr. Reitan discusses the $350,000 received from the four parties discussed above (Levytam, Boudle, Memme and Coopland) and notes that “the equity applied to Walton was received from third parties after execution of the agreement” and also that, in the case of the Levytams, the cheque indicates the funds were for “investment in 241 Spadina”. Mr. Reitan asserts that third party investments are a violation of the Agreement between the Applicants and the Respondents.

37. The Inspector has also reviewed a letter from Norma Walton to Jim Reitan dated June 13, 2013 responding to Mr. Reitan’s June 7, 2013 letter. The letter is attached as Appendix “J”. With regards to the issue of outside investors, she wrote:

> “we do not have outside investors in the properties we jointly own with Dr. Bernstein. As Mario explained, before Dr. Bernstein became a 50% owner of Spadina and Highway 7, we had attracted investment from third parties. The moment he became an investor, we shifted all of those responsibilities over to the Rose & Thistle Group Ltd. and that is where they remain. We would not dilute ownership in a project with Dr. Bernstein.”

38. The Inspector notes that Dr. Bernstein became an investor in Twin Dragons (the Spadina property) pursuant to an Agreement signed September 24, 2010, before the date of all but one of the advances described above.

39. In all, the documents reviewed and accounting treatment of the foregoing investments is not consistent with an erroneous investment in the wrong company as alleged by Ms. Walton.

b. Bannockburn Lands Inc. ("Bannockburn")

40. Froese also raised questions about Chart 3 of Appendix F, which relates to Bannockburn. The Inspector conducted a further review of the banking and the accounting records of Bannockburn and Rose & Thistle and the closing documents pertaining to the acquisition of the Bannockburn property and has concluded that the information depicted on Chart 3 of Appendix F is accurate, as explained below.

41. The Inspector has also noted that, in the case of the Bannockburn, Rose & Thistle transferred funds invested by the Applicants and not required to purchase the relevant property almost immediately to Rose & Thistle (before any invoices were issued to Bannockburn) and subsequently issued invoices in the exact amount of the transfers.

42. Chart 3 indicates that the Applicants made an equity investment in Bannockburn on December 17, 2010 in the amount of $1,750,000. The Applicants' cheque was made payable to Walton Advocates and a net amount of $628,630 was transferred to the Rose & Thistle bank account on the same day. The Chart also indicates that the funds transferred to Rose & Thistle were used, in part, to fund a payment from Rose & Thistle to 364808 Ontario Limited in the amount of $484,349.

43. Froese questioned how the Inspector could be certain that the funds transferred to Rose & Thistle were the Applicants' funds. Froese indicated that their review had identified another mortgage as part of the Bannockburn transaction and suggested that the mortgage could have possibly been a source of funds for the transfer. However, this is not correct. As is set out below, the mortgage in question is a vendor take back mortgage and no funds were advanced.

44. By way of background, an agreement dated December 13, 2010 (the "Bannockburn Agreement"), attached as Appendix "K", indicated that the Applicants and the Respondents agreed to purchase 1185 Eglinton Avenue East, Toronto, Ontario (the "Bannockburn Property") on or about

December 17, 2010. Each party agreed to provide $2,501,900 in equity. The Bannockburn Agreement indicates that the purchase was scheduled to close on December 17, 2010 and that each of the parties had provided one-half of the $300,000 deposit to purchase the property.

45. The Applicants agreed to provide $1,750,000 on or before December 17, 2010; the Respondents agreed to provide $1,750,000 in a timely manner as required. The Agreement also provides that "if and when the vendor take-back mortgage of $500,000 is required to be paid back, prior to the completion of the Project, both Bernstein and Walton will provide a further $250,000 each as required to pay out the vendor take-back mortgage".

46. The Inspector has reviewed the accounting and banking records of Bannockburn and Rose & Thistle concerning the Bannockburn transactions. The records indicate that three payments were made by Rose & Thistle to The Behar Group, each in the amount of $100,000, on September 28, 2010, November 3, 2010 and December 8, 2010, totalling the amount due for the deposit ($300,000).

47. On October 10, 2010, the Applicants provided a cheque in the amount of $150,000 to Walton Advocates in Trust, one-half of the required deposit. On December 17, 2010, the Applicants provided a cheque to Walton Advocates in trust in the amount of $1,750,000 for equity investment, pursuant to the Agreement described above. Therefore, the total cash provided by the Applicants related to this transaction was $1,900,000. This was recorded in the accounting records of Bannockburn as the Applicants' investment in common shares. The accounting records also indicate that the remaining amount to be paid by the Applicants, $601,900 ($2,501,900 less $1,900,000), was recorded as share subscription receivable.

48. The Applicants also provided a cheque to Horwitz Finder in Trust in the amount of $6,800,000 which was recorded in the accounting records of Bannockburn as a mortgage payable. Therefore, the total amount of funding that had been provided by the Applicants as at the closing date was $8,700,000.

49. The closing adjustments schedule for the purchase indicates that, after accounting for the deposits ($300,000, of which the Applicants had provided $150,000), vendor take back mortgage ($500,000) and other adjustments, the balance due on closing was $7,713,991.91. The trust ledger statement of Walton Advocates also indicates that the amount received from the Applicants for closing was $7,713,991.91. However, as noted above, the Applicants had provided funds at closing in excess

of this amount ($1,750,000 to Walton Advocates plus $6,800,000 for the mortgage – total $8,550,000). After accounting for other costs related to the acquisition and financing, a net amount of $628,630.52 was transferred from Walton Advocates to Rose & Thistle on December 17, 2010.

50. This was recorded in the accounting records of Bannockburn as a decrease in the amount showing as owing from Bannockburn to Rose & Thistle. Rose & Thistle had previously paid some costs related to the acquisition of the property totalling $9,691 as well as the Respondents' share of the deposit ($150,000). Therefore, immediately before the transfer of the $628,630.52 of excess Applicants funds from Walton Advocates to Rose & Thistle, the intercompany account between Bannockburn and Rose & Thistle indicated that Bannockburn owed Rose & Thistle an amount of $159,691. Just after the transfer, the intercompany account showed that Rose & Thistle now owed Bannockburn $468,939 ($628,630 less $159,691).

51. As the mortgage referred to on the closing adjustments schedule was a vendor take back mortgage, no cash was provided from this mortgage. Therefore, the funds of $628,630 transferred from Walton Advocates to Rose & Thistle can be directly traced to funds provided by the Applicants and this is consistent with the recording of the transaction in the accounting records of Bannockburn.

52. As described above, in the accounting records of Bannockburn, the $628,630 transfer from Walton Advocates to Rose & Thistle was applied against amounts that had been paid on behalf of Bannockburn by Rose & Thistle ($159,691), resulting in a balance owing from Rose & Thistle to Bannockburn as at December 17, 2010 (the closing date) of $468,939. The Bannockburn accounting records show credits totalling $1,219.53 applied against this balance for other costs paid for by Rose & Thistle related to the acquisition, leaving a balance owing by Rose & Thistle to Bannockburn in the amount of $467,719.61.

53. Accounting entries in the books of Bannockburn dated December 31, 2010, eliminate this receivable through the recording of an invoice from Rose & Thistle to Bannockburn in the amount of $467,719.61 for "work completed at 1185 Eglinton Ave E. from Dec 7 to Dec 31, 2010".

The second page of the Rose & Thistle invoice provides the following additional description:

(a)	Demolition and disposal	$35,480.00
(b)	Development approval expenses	$389,719.64

(c) Project management fees $ 42,519.97

(d) Total $467,719.61

54. The Inspector makes the following observations about this invoice:

(a) The invoice indicates that the work was carried out during the period commencing December 7, 2010 but the property was not acquired until December 17, 2010.

(b) The quantum of the invoice exactly matches the "excess" cash provided by the Applicants not required on closing in the amount of $628,630.52 minus several costs paid for by Rose & Thistle prior to closing related to the transaction and the Respondents' share of the deposit. The "excess" cash was transferred from Walton Advocates to Rose & Thistle on December 17, 2010, two weeks before the date of the invoice.

55. It appears, therefore, that the amounts on the invoice were calculated based on eliminating the intercompany receivable account between Bannockburn and Rose & Thistle which arose largely because of the cash transfers made from Bannockburn to Rose & Thistle. The Inspector has found other instances similar to this, which are discussed further in this report.

56. Chart 3 of Appendix F indicates that a major use of funds by Rose & Thistle around the time period of the $628,630 transfer from Walton Advocates was for payments to 364808 Ontario Ltd. totalling $484,349. The Inspector's further review indicates that the balance in the Rose & Thistle bank account prior to the transfer was $3,111.35 and following the transfer it was $631,741.87. Therefore, the Applicants' funds can be traced through to Rose & Thistle and were used to fund these payments to this Walton Company.

57. According to a decision dated July 25, 2013, in the matter of The Law Society of Upper Canada v. Norma Jean Walton, 364808 Ontario Limited, which owned a property at 185 Davenport Road, Toronto, was purchased on July 5, 2002 by Norma and Ron Walton. The Inspector is unaware of any connection between this property and the Applicants.

C. Cash transfer analysis

58. The pattern of transfers between the Company Accounts, the Rose & Thistle Accounts and the Walton Company Accounts is consistent with the conclusion that a significant portion of the Applicants' advances to the Companies were used to fund the Walton Companies. Although funds circulated regularly among the Company Accounts, the Rose & Thistle Account and Walton Company Accounts, this circulation consistently resulted, on a net basis, in funds flowing out of the Companies and into the Walton Companies.

59. Froese questioned whether the tracing charts appended as Appendix F to the Fourth Report were misleading because some of the funds removed from the Company Accounts may have been subsequently returned. This concern is based on an apparent misunderstanding of the purpose of the tracing exercise at Appendix F to the Fourth Report. The tracing charts at Appendix F are intended to provide a snapshot of activity at a particular point in time. Funds transferred to or from the relevant Company outside of the time period are not captured. However, all of the transfers between each Company and the Rose & Thistle Account are summarized in the net transfer analysis attached as Appendix B to the Fourth Report and all transfers between the Rose & Thistle Account and each Company are shown in Appendix A to the Fourth Report, which was produced in electronic form due to its size.

60. In any event, the Inspector's analysis shows a consistently increasing net transfer from the Companies to Rose & Thistle. In other words, even if *some* amounts were transferred to the Companies by Rose & Thistle, these returns did not keep pace with the steady flow of funds from the Companies to Rose & Thistle and from Rose & Thistle to the Walton Companies.

61. As noted above, the net amount transferred from Company accounts to Rose & Thistle during the period October, 2010 to December, 2013 was $23.68 million. Based on the tracing performed by the Inspector, the transfers occurred on a regular basis throughout that period, whereby a portion of the Applicants' funds that was deposited to the Companies' bank accounts would be immediately transferred to Rose & Thistle. Also, as previously noted, the net amount transferred from Rose & Thistle to Walton Companies during the same time period was $25.37 million.

62. The Inspector has prepared the chart and graph attached as Appendix "L" comparing the net amount of transfers from Companies to Rose & Thistle with the net amount of transfers from Rose &

Thistle to Walton Companies for each month from October 2010, the month when the Applicants made their first investment, to December 2013. The graph depicts the net amount transferred as at the end of each month. The graph indicates a steady trend upwards. That is, the net amount transferred from Companies increased, on a month over month basis for most months. The transfers from Rose & Thistle to Walton Companies increased in most months in a similar ratio. Appendix "L" does not include the proceeds of the mortgages against 1450 Don Mills and 1500 Don Mills as these proceeds are addressed at paragraphs 42-46 and Appendix "M" to the First Interim Report of the Inspector.

63. The timing and quantum of the transfers described above is not consistent with the Respondents' contention that the transfers to Rose & Thistle represent payment for, among other things, more than $20 million worth of construction work performed by or on behalf of Rose & Thistle for the benefit of the Companies.

64. If the transfers had been related to construction work, a substantial portion of the funds taken from the Companies would have to have been used to pay construction costs, including contractors (if the work was sub-contracted) or suppliers and labour (if the work was performed by Rose & Thistle). Only the profit earned by Rose & Thistle on the construction would have been available for transfer to the Walton Companies. However, throughout the period examined, the amount transferred to the Walton Companies and the amount transferred from the Companies increased at approximately the same pace. In every month examined, the amounts transferred to the Walton Companies represented a significant percentage of the amount transferred from the Companies. There is no evidence that the Respondents had sufficient resources to fund both the transfers to the Walton Companies and the work shown on the invoices that they have proffered to justify those transfers.

65. The Inspector described in the Fourth Report specific instances where the Applicants' funds can be traced to a Walton Company around the time of a property acquisition or refinancing. The Inspector has expanded this analysis to cover other months in which Applicants' funds were transferred to Rose & Thistle and subsequently transferred to Walton Companies. The Inspector has reviewed the activity for some of the months showing the largest transfers, both from Schedule B to Rose & Thistle and from Rose & Thistle to Walton Companies. The Inspector has found that, in many cases, the transfers from Schedule B accounts to Rose & Thistle can be traced to transfers from Rose & Thistle to Walton Companies.

June 2011

66. During June 2011, the net amount transferred from Companies to Rose & Thistle was $935,000. The net amount transferred from Rose & Thistle to Walton Companies was $801,000. The Inspector reported in the Fourth Interim Report, that funds totalling approximately $330,750, primarily sourced from funds paid to the Companies by the Applicants were transferred to the Rose & Thistle account on June 30, 2011 and then transferred to the Walton Company College Lane. Shortly after this transfer, College Lane purchased a property at 14 College Street, Toronto.

August 31, 2011

67. During August 2011, the net amount transferred from Companies to Rose & Thistle was $1,320,440. The net amount transferred from Rose & Thistle to Walton Companies that month was $1,323,674. Two of the significant transfers were to 110 Lombard in the amount of $463,300 and Plexor Plastics in the amount of $423,000.

September 2011

68. During September 2011, the net amount transferred from Companies to Rose & Thistle was $1,842,000. The net amount transferred from Rose & Thistle to a number of Walton Companies that month was $1,146,000.

April 2012

69. During April 2012, the net amount transferred from Companies to Rose & Thistle was $2,166,000. The net amount transferred from Rose & Thistle to a number of Walton Companies that month was $2,097,000.

V. Invoices provided by the Respondents

70. The Respondents assert that Rose & Thistle is entitled to payments totalling approximately $27.2 million for services provided to, and expenses incurred on behalf of, the Companies and that they were entitled to transfer funds to themselves from the Companies to satisfy those debts. As is discussed below, the Inspector has concluded that the flow of funds between the Companies, Rose & Thistle and the Walton Companies is more consistent with the transfer of funds to satisfy obligations in the Companies and Walton Companies than with payment for services rendered.

71. As a preliminary matter, the Inspector notes that the Respondents' position that they are owed funds by the Companies is premised on the assumption that every Company is responsible for every other Company's debts to Rose & Thistle. The Respondents assert that if Company A owed Rose & Thistle $1 million and Company B had $1 million in its bank account, they were entitled to take payment from Company B for the debt owed by Company A. This is significant since the contract governing investment into each Company provided that the Respondents were to provide equity funding once the Applicants' equity investment was exhausted. The co-mingling of funds therefore had two important consequences: (i) the Applicants' equity investments were exhausted much more quickly because they were used to fund alleged obligations across the portfolio and not only to fund one Company; (ii) the Respondents were able to delay their own equity contributions by transferring funds from other Companies instead of injecting new equity into the relevant Company.

72. In addition, the Inspector's analysis is impaired by the fact that the Respondents have not provided back-up documentation, including third party invoices, proof of payment and progress draws relating to the majority of the alleged construction expenses. Accordingly, the Inspector cannot perform a detailed reconciliation of the alleged construction expenses to the cash transfers to determine whether these transfers related to construction work that had been performed. The Respondents have instead provided reports from third party quantity surveyors, which will be addressed in a supplemental report.

73. The Inspector notes that there is no apparent correlation between the amount of construction work performed on a Property and the volume of funds transferred from that Property. The most striking example of this pattern is the Property at 7-15 and 30 Fraser Avenue in Toronto ("Fraser"), which is owned by Fraser Lands Ltd. and Fraser Properties Ltd (the "Fraser Companies"). The Fraser Companies made net transfers of approximately $9.2 million to Rose & Thistle. However, little or no construction work was completed on the Fraser Properties before the Manager was appointed. By contrast, Twin Dragon, which successfully renovated and leased 241 Spadina, received a net transfer from Rose & Thistle of approximately $1.3 million.

74. The Inspector has reviewed in detail certain of the invoices rendered by Rose & Thistle to the Companies and has noted a pattern whereby the amounts invoiced appear to match the amount of cash previously transferred from the Company to Rose & Thistle. For example, as described above, the amount of the Applicants' equity funds provided as at the date of the closing of the Bannockburn

transaction in December, 2010 exceeded the amount required for closing. The "excess" funds transferred to Rose & Thistle were accounted for through the issuance by Rose & Thistle of an invoice for services rendered in an amount exactly equal to the excess. The Inspector has found that this type of situation occurred on subsequent occasions, as further described herein.

75. The Inspector's review of the accounting records for Rose & Thistle and Bannockburn indicates that, at various times during 2011, Rose & Thistle paid for certain expenses on behalf of Bannockburn and received cash transfers from Bannockburn. The net amount of $99,330 was recorded as owing from Rose & Thistle to Bannockburn in the accounting records of Rose & Thistle and in the accounting records of Bannockburn.

76. An invoice rendered by Rose & Thistle to Bannockburn in the amount of $99,330 plus HST dated December 31, 2011 was used to offset the amount owing from Rose & Thistle which was largely comprised of the net transfer of cash from Bannockburn to Rose & Thistle during 2011. The invoice from Rose & Thistle describes the services provided as development approval expenses ($90,300) and project management service ($9,030), totalling $99,330, the exact amount of the intercompany account.

77. Based on the above, it appears that the amounts invoiced from Rose & Thistle to Bannockburn in 2010 and 2011 were calculated to match the net cash transferred from Bannockburn to Rose & Thistle during the year.

78. Similarly, the December 31, 2011 invoices from Rose & Thistle to Wynford appear to be based largely on net cash transferred from Wynford to Rose & Thistle during the year rather than the value of work actually performed by Rose & Thistle. A review of the intercompany account between Wynford and Rose & Thistle indicates a balance owing from Rose & Thistle to Wynford of approximately $4.1 million. This amount arose largely through the net cash transferred from Wynford to Rose & Thistle during the year. Three invoices from Rose & Thistle to Wynford dated December 31, 2011 essentially eliminated this intercompany balance.

79. Another example of the apparent practice of matching invoices to cash transfers is the December 31, 2011 invoices from Rose & Thistle to Riverdale Mansion Ltd. ("Riverdale"). In that case, Rose & Thistle transferred approximately $1.1 million to itself from Riverdale and issued an

invoice for the same amount to Riverdale. The invoice essentially eliminated the intercompany debt owed by Rose & Thistle to Riverdale.

80. As noted in the Inspector's First Interim Report, Rose & Thistle provided the Inspector with invoices addressed to Riverdale totalling $1.18 million. The invoices listed, among other things, expenses related to "deposits for materials", "project management services", "site plan deposits and applications" and "steel rebar ordered and installed".

81. The Inspector asked for documentation, including third party invoices, to support the amounts invoiced to Riverdale. Ms. Walton advised the Inspector that Rose & Thistle did not have third party invoices for many of the invoiced expenses because Rose & Thistle performed much of the work itself and some of the expenses have not yet been incurred. This would appear to be inconsistent with her statement that transfers from the Companies to Rose & Thistle were in the nature of payments for services that had been provided but not yet invoiced. The Inspector requested that documents, such as material invoices and payroll records, be provided to validate the cost of work performed by Rose & Thistle and invoiced to Riverdale. No such documentation has been provided.

82. The Inspector did receive a Credit Note from Rose & Thistle which showed the invoices to Riverdale had been reversed except for $257,065.62 charged for work performed in 2011. The Credit Note was not accompanied by any return of funds. This would appear to reinforce the Inspector's conclusion that invoices rendered by Rose & Thistle to the Companies were calculated based on the net cash transferred from the Companies to Rose & Thistle rather than on the value of actual work, if any, performed by Rose & Thistle

VI. Examination of Ms. Walton

83. By Order of Justice Newbould dated March 21, 2014, the Inspector was directed to examine the Respondents as a result of their non-payment of fees outstanding pursuant to the Order of Justice Newbould dated November 1, 2014. The Inspector began its examination of Ms. Walton on April 11, 2014 and adjourned the examination pending delivery by the Respondents of further documents. A chart listing the undertakings given by Ms. Walton is attached as Appendix "M" to the Fourth Report.

84. Ms. Walton did not produce any documentation relating to her financial situation in advance of her examination and gave numerous undertakings to produce such documentation. To date, Ms.

Walton has fulfilled or partially fulfilled 8 of the 39 undertakings given at her examination. The remaining 31 undertakings remain entirely unsatisfied. Among other things, Ms. Walton undertook to provide copies of bank statements relating to the Walton Companies but has not yet done so. The documents produced by Ms. Walton in answer to her undertakings are attached as Confidential Appendix "N". Ms. Walton has advised that she would answer the balance of her undertakings once she filed her evidence for the July 16th and 17th hearings.

85. Lastly, the Inspector notes that the Respondents have paid $100,000 to the Inspector and $55,000 to the Inspector's counsel in satisfaction of their obligation pursuant to the Order of Justice Newbould dated November 1, 2013 to pay the fees of (i) the Inspector in the amount of $58,451.97 for the period October 4-20, 2013 and $34,281.38 for the period of October 21-30, 2013; and (ii) Goodmans LLP in the amount of $60,975.94 for the period up to October 30, 2013. The Respondents have not paid any further amounts with respect to the Inspector's mandate.

All of which is respectfully submitted this 1st day of July, 2014.

Schonfeld Inc.

In its capacity as Inspector pursuant to section 161(2) of the *Business Corporations Act* (Ontario)

Per:_____

S Harlan Schonfeld CPA·CIRP

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

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

THE HONOURABLE MR JUSTICE D.M. BROWN	)))	**WEDNESDAY**, THE **18TH** DAY OF **JUNE**, 2014

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

CLAIMS PROCEDURE ORDER

THIS MOTION, made by Schonfeld Inc. in its capacity as the Court-appointed manager (the "**Manager**") of certain companies listed in Schedule "B" to the Order of Justice Newbould dated November 5, 2013 (the "**Companies**") together with the real estate properties owned by the Companies (the "**Properties**"), as amended by Order of Justice Newbould dated January 16, 2014, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Notice of Motion, the 13th Report of the Manager dated June 12, 2014, and on hearing the submissions of counsel for the Manager and , and no one appearing for any other person on the service list:

SERVICE

1. THIS COURT ORDERS that the time for service of the Notice of Motion and the Motion Record filed in support of this Motion be and it is hereby abridged such that the Motion is properly returnable today and hereby dispenses with further service thereof.

DEFINITIONS

2. The following terms shall have the following meanings ascribed thereto:

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

   (b) "**Claim**" means any right of any Person against the applicable Company in connection with any indebtedness, liability or obligation of any kind of the applicable Company, whether liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, present, future, known, or unknown, by guarantee, surety or otherwise and whether or not such right is executory in nature, including the right or ability of any Person to advance a claim for contribution or indemnity or otherwise with respect to any matter, action, cause or chose in action, and including any indebtedness, liability or obligation of any kind arising out of the restructuring, termination, repudiation or disclaimer of any lease, contract, employment agreement or other agreement (each a "**Claim**", and collectively, the "**Claims**"), provided however, that "Claim" shall not include an Excluded Claim;

   (c) "**Claimant**" means any Person asserting a Claim;

   (d) "**Claims Bar Date**" means 4:00 p.m. (Toronto Time) on the date that is 30 days from the applicable Claims Notice Date, or such later date as may be ordered by the Court;

(e) "**Claims Notice Date**" means the date on which the Manager sends the Proof of Claim Document Package to the Known Creditors of the applicable Company pursuant to paragraph 5(a) this Order;

(f) "**Claims Process**" means a process for the purposes of identifying and determining Claims of Creditors of a particular Company against such Company commenced and conducted by the Manager in accordance with the terms of this Order;

(g) "**Companies**" shall have the meaning ascribed to such term in the recitals hereto;

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

(i) "**Creditor**" means any Person having a Proven Claim;

(j) "**Dispute Notice**" means a written notice to the Manager, in substantially the form attached as Schedule "G" hereto, delivered to the Manager by a Claimant who has received a Notice of Disallowance, of its intention to dispute such Notice of Disallowance and provide further evidence to support its claim;

(k) "**Excluded Claim**" means the following claims, whether liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, present, future, known or unknown:

(i) claims secured by any court-ordered charge in these proceedings;

(ii) claims between any two of the Companies or between any of the Companies and any of the Applicants or Respondents;

(iii) claims by any of the Applicants or the Respondents, including those arising from the disputes between the Applicants and the Respondents that are the subject of other litigation in these proceedings; and,

(iv) to the extent not already included in (iii) above, any claims arising from or relating to an equity interest in the Companies, including but not limited to

the ownership of shares issued by the Companies or the right to acquire or receive shares in the capital of the Companies.

(l) "**Instruction Letter**" means the instruction letter to Claimants, in substantially the form attached as Schedule "D" hereto;

(m) "**Known Creditors**" means:

(i) those Creditors which the books and records of the applicable Company disclose were owed monies by the applicable Company as of five Business Days prior to the Claims Notice Date and which monies remain unpaid in whole or in part;

(ii) any Person who commenced a legal proceeding against the applicable Company which legal proceeding was commenced and served upon the applicable Company prior to five Business Days prior to the Claims Notice Date;

(iii) any Person who is party to a lease, contract, employment agreement or other agreement of the applicable Company which was terminated or disclaimed by the applicable Company prior to five Business Days prior to the Claims Notice Date other than Persons whose claim has been satisfied and released; and

(iv) any other Creditor actually known to the applicable Company as at five Business Days prior to the Claims Notice Date;

(n) "**Manager**" shall have the meaning ascribed to such term in the recitals hereto;

(o) "**Notice of Disallowance**" means the notice, in substantially the form attached as Schedule "F" hereto, advising a Claimant that the Manager has revised or rejected all or part of such Claimant's Claim set out in the Proof of Claim;

(p) "**Notice to Creditors**" means the notice to Creditors for publication in substantially the form attached as Schedule "C" hereto;

(q) "**Person**" means any individual, partnership, joint venture, trust, corporation, unincorporated organization, government or agency or instrumentality thereof, or any other juridical entity howsoever designated or constituted;

(r) "**Proof of Claim**" means the form of Proof of Claim in substantially the form attached as Schedule "E" hereto;

(s) "**Proof of Claim Document Package**" means a document package that includes a copy of the Instruction Letter, a Proof of Claim, and such other materials as the Manager may consider appropriate or desirable;

(t) "**Properties**" shall have the meaning ascribed to such term in the recitals hereto;

(u) "**Property Sale**" shall have the meaning ascribed to such term in paragraph 4 of this Order; and

(v) "**Proven Claim**" means the amount of a Claim of a Creditor against the applicable Company as finally accepted and determined in accordance with the provisions of this Order.

MANAGER'S ROLE

3. THIS COURT ORDERS that the Manager, in addition to its rights and obligations under the Order of Justice Newbould dated November 5, 2013, as supplemented, amended or varied from time to time, is hereby directed and empowered to take such other actions and fulfill such other roles as are authorized by this Order.

COMMENCEMENT OF A CLAIMS PROCESS

4. THIS COURT ORDERS that, following the completion of the sale of a Company's Property (each, a "**Property Sale**"), the Manager is hereby authorized, but not required, to commence and conduct a Claims Process, without further Order of the Court, in respect of such Company upon determination by the Manager, in its sole discretion, that such a Claims Process is appropriate in the circumstances, and the Manager shall

commence and conduct each such Claims Process in accordance with the terms of this Order.

NOTICE TO CREDITORS

5. THIS COURT ORDERS that:

(a) following the completion of a Property Sale and the determination by the Manager that a Claims Process in respect of the applicable Company is appropriate in the circumstances, the Manager shall post a copy of the Proof of Claim Document Package on http://www.schonfeldinc.com and deliver on behalf of the applicable Company to each of the Known Creditors of such Company (for which it has an address) a copy of the Proof of Claim Document Package;

(b) the Manager shall cause the Notice to Creditors to be published in the National Post once on or before the date that is ten (10) days after the applicable Claims Notice Date; and

(c) the Manager shall, provided such request is received prior to the applicable Claims Bar Date, deliver as soon as reasonably possible following receipt of a request, a copy of the Proof of Claim Document Package to any Person claiming to be a Creditor of the applicable Company and requesting such material.

CREDITORS' CLAIMS

6. THIS COURT ORDERS that Proofs of Claim shall be filed with the Manager and that any Creditor that does not file a Proof of Claim in respect of all of its Claims as provided for herein such that such Proof of Claim is received by the Manager on or before the applicable Claims Bar Date (a) shall be and is hereby forever barred from making or enforcing any Claim against the applicable Company; and (b) shall not be entitled to any further notice, or to participate as a creditor in these proceedings.

DETERMINATION OF CLAIMS

7. THIS COURT ORDERS that the amount and status of every Claim of a Creditor as finally determined in accordance with this Order, including any determination as to the nature, amount, value, priority or validity of any Claim shall be final for all purposes, including without limitation for any distribution made to Creditors of the applicable Company pursuant to further Order of the Court.

PROOFS OF CLAIM

8. THIS COURT ORDERS that:

   (a) the Manager may, where it is satisfied that a Claim has been adequately proven, waive strict compliance with the requirements of this Order as to completion and execution of Proofs of Claim; and

   (b) any Claims denominated in any currency other than Canadian dollars shall, for the purposes of this Order and the applicable Claims Process, be converted to, and constitute obligations in, Canadian dollars, such calculation to be effected by the Manager using the Bank of Canada noon spot rate as at the applicable Claims Bar Date.

REVIEW OF PROOFS OF CLAIM

9. THIS COURT ORDERS that the Manager shall review all Proofs of Claim filed on or before the applicable Claims Bar Date and shall accept or disallow (in whole or in part) the amount and/or status of the Claim set out therein. At any time, the Manager may request additional information with respect to the Claim, and may request that the Creditor file a revised Proof of Claim. The Manager shall notify each Claimant who has delivered a Proof of Claim by the applicable Claims Bar Date as to whether such Claim has been revised or rejected, and the reasons therefor, by sending a Notice of Disallowance.

10. THIS COURT ORDERS that, where a Claim has been accepted by the Manager as a Proven Claim, such Claim shall constitute such Creditor's Proven Claim for all purposes, including for the purposes of distribution by the Manager pursuant to further Order of the Court.

11. THIS COURT ORDERS that, where a Claim has been disallowed (in whole or in part), the disallowed Claim (or disallowed portion thereof) shall not be a Proven Claim unless the Claimant has disputed the disallowance and proven the disallowed Claim (or portion thereof) in accordance with paragraphs 12 to 16 of this Order.

DISPUTE NOTICE

12. THIS COURT ORDERS that any Claimant who intends to dispute a Notice of Disallowance shall file a Dispute Notice with the Manager as soon as reasonably possible but in any event such that such Dispute Notice shall be received by the Manager on or before 4:00 p.m. (Toronto Time) on the day that is fourteen (14) days after the Manager sends the Notice of Disallowance in accordance with paragraph 19 of this Order. The filing of a Dispute Notice with the Manager within the time set out in this paragraph shall constitute an application to have the amount or status of such Claim determined as set out in paragraphs 14 to 16 of this Order.

13. THIS COURT ORDERS that where a Claimant that receives a Notice of Disallowance fails to file a Dispute Notice with the Manager within the time limit set out in paragraph 12 of this Order, the amount and status of such Claimant's Claim shall be deemed to be as set out in the Notice of Disallowance and such amount and status, if any, shall constitute such Claimant's Proven Claim.

RESOLUTION OF CLAIMS

14. THIS COURT ORDERS that as soon as practicable after the delivery of the Dispute Notice to the Manager, the Claimant and the Manager shall attempt to resolve and settle the Claimant's Claim.

15. THIS COURT ORDERS that in the event that the dispute between the Claimant and the Manager is not settled within a time period or in a manner satisfactory to the Manager, the Manager may bring the dispute before the Court for determination.

16. THIS COURT ORDERS that the determination of a Claim by the Court shall be final and binding for all purposes.

NOTICE OF TRANSFEREES

17. THIS COURT ORDERS that if, after November 5, 2013, the holder of a Claim on November 5, 2013, or any subsequent holder of the whole of a Claim, transfers or assigns the whole of such Claim to another Person, neither the applicable Company nor the Manager shall be obligated to give notice to or to otherwise deal with a transferee or assignee of a Claim as the Claimant in respect thereof unless and until actual notice of transfer or assignment, together with satisfactory evidence of such transfer or assignment, shall have been received by the Manager, at least five (5) Business Days prior to any distribution by the Manager pursuant to a further Order of the Court, and thereafter such transferee or assignee shall for the purposes hereof constitute the "Creditor" in respect of such Claim. Any such transferee or assignee of a Claim, and such Claim, shall be bound by any notices given or steps taken in respect of such Claim in accordance with this Order prior to receipt by the Manager of satisfactory evidence of such transfer or assignment.

DISTRIBUTION

18. THIS COURT ORDERS that the distribution to Creditors of any funds held by the Manager in respect of the sale of any of the Properties in these proceedings shall be subject to further Order(s) of the Court. Nothing herein shall prevent the Manager from seeking an order, by way of motion on notice to the Applicants and Respondents and affected parties, authorizing a partial distribution to satisfy, in whole or in part, Proven Claims with respect to any of the Companies, prior to any final determination of the Excluded Claims.

SERVICE AND NOTICE

19. THIS COURT ORDERS that the Manager shall be at liberty to deliver the Proof of Claim Document Package, and any letters, notices or other documents to Creditors, Claimants or other interested Persons, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or electronic or digital transmission to such Persons at the address as last shown on the records of the applicable Company and that any such service or notice by courier, personal delivery or electronic or digital transmission shall be deemed to be received on the next Business Day following the date of forwarding thereof, or if sent by mail, on the second Business Day after mailing.

20. THIS COURT ORDERS that any notice or other communication (including, without limitation, Proofs of Claim and Dispute Notices) to be given under this Order by a Claimant or a Creditor to the Manager shall be in writing in substantially the form, if any, provided for in this Order and will be sufficiently given only if given by prepaid ordinary mail, courier, personal delivery or electronic or digital transmission addressed to:

Schonfeld Inc.
Court-appointed Manager of the Companies
438 University Avenue
21st Floor
Toronto, ON M5G 2K8

Attention:	S. Harlan Schonfeld
Telephone:	416-862-7785, Extension 1
E-mail	harlan@schonfeldinc.com
Fax:	416-862-2136

Any such notice or other communication by a Claimant or Creditor shall be deemed received only upon actual receipt thereof by the Manager during normal business hours on a Business Day.

MISCELLANEOUS

21. THIS COURT ORDERS that nothing in this Claims Procedure Order shall be taken to determine the priorities between the claims made in the Notice of Application in this proceeding and the Proven Claims of any Creditor.

22. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the 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.

6317672.4

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

JUN 19 2014

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

NOTICE TO CREDITORS OF [THE COMPANY], BEING THE FORMER OWNER OF THE PROPERTY MUNICIPALLY KNOWN AS [ADDRESS]

(hereinafter referred to as the "Company")

RE: NOTICE OF CLAIMS PROCESS AND CLAIMS BAR DATE

NOTICE IS HEREBY GIVEN that pursuant to an Order of the Ontario Superior Court of Justice made ●, 2014 (the "**Claims Procedure Order**"), a claims process has been commenced for the purpose of identifying and determining Claims against the Company.

PLEASE TAKE NOTICE that the claims process applies only to the Claims described in the Claims Procedure Order. The Company's creditors should have received Proof of Claim Document Packages, if those creditors are known to the Company and if the Company has a current address for such creditors. Any creditor who has not received a Proof of Claim Document Package and who believes that he, she or it has a Claim against the Company under the Claims Procedure Order must contact the Manager by telephone (416-862-7785) or by fax (416-862-2136) in order to obtain a Proof of Claim form. Creditors may also obtain copies of the Claims Procedure Order and Proof of Claim forms from the Manager's website: http://www.schonfeldinc.com.

THE CLAIMS BAR DATE is 4:00 p.m. (Toronto Time) on [INSERT DATE, being 30 days from the Claims Notice Date pursuant to the Claims Procedure Order]. Completed Proofs of Claim must be received by the Manager by the Claims Bar Date. It is your responsibility to ensure that the Manager receives your Proof of Claim by the above-noted time and date.

CLAIMS OF CREDITORS WHO DO NOT FILE A PROOF OF CLAIM IN RESPECT OF SUCH CLAIMS BY THE CLAIMS BAR DATE SHALL BE FOREVER EXTINGUISHED AND BARRED.

DATED at Toronto this _____ day of _____, 2014.

SCHONFELD INC.,
in its capacity as Court-appointed
Manager of the Company

SCHEDULE D

INSTRUCTION LETTER FOR THE CLAIMS PROCESS FOR CREDITORS OF [THE COMPANY]

(hereinafter referred to as the "Company")

A. CLAIMS PROCESS

By Order of the Ontario Superior Court of Justice made ●, 2014 (the "**Claims Procedure Order**"), Schonfeld Inc., in its capacity as Court-appointed Manager, has been authorized to conduct a claims process in respect of Claims against the Company (the "**Claims Process**"). A copy of the Claims Procedure Order and other related information can be obtained from the Manager's website: http://www.schonfeldinc.com.

This letter provides general instructions for completing a Proof of Claim form in connection with the Claims Process. Capitalized terms not defined within this instruction letter shall have the meaning ascribed thereto in the Claims Procedure Order.

The Claims Process is intended to identify and determine the amount of Claims against the Company. Please review the Claims Procedure Order for the full terms of the Claims Process.

If you have any questions regarding the Claims Process, please consult the website of the Court-appointed Manager provided above, or contact the Manager at the address provided below.

All notices and enquiries with respect to the Claims Process should be addressed to the Court-appointed Manager by prepaid ordinary mail, courier, personal delivery or electronic or digital transmission addressed at:

Schonfeld Inc.
Court-appointed Manager of the Company
438 University Avenue
21st Floor
Toronto, ON M5G 2K8

Attention:	S. Harlan Schonfeld
Telephone:	416-862-7785, Extension 1
E-mail	harlan@schonfeldinc.com
Fax:	416-862-2136

B. FOR CREDITORS SUBMITTING A PROOF OF CLAIM

If you believe that you have a Claim against the Company, you must file a Proof of Claim with the Manager. The Proof of Claim must be received by the Manager **by 4:00 p.m. (Toronto Time) on [INSERT DATE, being 30 days from the Claims Notice Date pursuant to the Claims Procedure Order], the Claims Bar Date.** It is your responsibility to ensure that the Manager receives your Proof of Claim by the above-noted time and date.

IF YOU DO NOT FILE A PROOF OF CLAIM IN RESPECT OF ANY SUCH CLAIMS BY THE CLAIMS BAR DATE, YOUR CLAIMS SHALL BE FOREVER EXTINGUISHED AND BARRED.

All Claims denominated in a currency other than Canadian dollars shall be converted by the Manager to Canadian dollars at the Bank of Canada noon spot rate as at the Claims Bar Date.

C. ADDITIONAL PROOF OF CLAIM FORMS

Additional Proof of Claim forms and other related information, including the Claims Procedure Order establishing the Claims Process, can be obtained from the Manager's website at http://www.schonfeldinc.com, or by contacting the Manager at the telephone and fax numbers indicated above.

DATED at Toronto this _____ day of _____, 2014.

SCHONFELD INC.,
in its capacity as Court-appointed
Manager of the Company

SCHEDULE E

**PROOF OF CLAIM RELATING TO [THE COMPANY],
BEING THE FORMER OWNER OF THE PROPERTY MUNICIPALLY KNOWN AS
[ADDRESS]
(hereinafter referred to as "the Company")**

A. PARTICULARS OF CREDITOR:

1. Full Legal Name of Creditor: _____

_____

(the "Creditor"). (Full legal name should be the name of the original Creditor of the Company, notwithstanding whether an assignment of a Claim, or a portion thereof, has occurred).

2. Full Mailing Address of the Creditor (the original Creditor not the assignee):

_____

_____

_____

3. Telephone Number: _____

4. E-Mail Address: _____

5. Facsimile Number: _____

6. Attention (Contact Person): _____

7. Has the Claim been sold or assigned by the Creditor to another party (check one)?

Yes: ☐ No: ☐

B. PARTICULARS OF ASSIGNEE(S) (IF ANY):

8. Full Legal Name of Assignee(s):

_____

(If Claim (or a portion thereof) has been assigned, insert full legal name of assignee(s) of Claim (or portion thereof). If there is more than one assignee, please attach a separate sheet with the required information.)

9. Full Mailing Address of Assignee(s):

_____

_____

_____

10. Telephone Number of Assignee(s): _____

11. E-Mail Address: _____

12. Facsimile Number: _____

13. Attention (Contact Person): _____

C. PROOF OF CLAIM:

I, _____
[name of Creditor or Representative of the Creditor], of

_____ do hereby certify:
(city and province)

(a) that I (check one)

☐ am the Creditor of the Company; OR

☐ am _____ (state position or title) of

_____

(name of Creditor)

(b) that I have knowledge of all the circumstances connected with the Claim referred to below;

(c) the Creditor asserts its claim against the Company; and

(d) the Company was and still is indebted to the Creditor $ _____ : (Claims denominated in a currency other than Canadian dollars shall be converted by the Manager to Canadian Dollars at the Bank of Canada noon spot rate as at the Claims Bar Date.)

D. NATURE OF CLAIM

(check and complete appropriate category)

☐ A. UNSECURED CLAIM OF $_____

That in respect of this debt, I do not hold any security.

☐ B. SECURED CLAIM OF $ _____

That in respect of this debt, I hold security valued at $ _____ particulars of which are as follows:

(Give full particulars of the security, including the date on which the security was given and the value at which you assess the security, and attach a copy of the security documents.)

E. PARTICULARS OF CLAIM:

Other than as already set out herein the particulars of the undersigned's total Claim are attached.

(Provide all particulars of the Claim and supporting documentation, including amount, description of transaction(s) or agreement(s) giving rise to the Claim, name of any guarantor(s) which has guaranteed the Claim, date and amount of invoices, particulars of all credits, discounts, etc. claimed, description of the security, if any, granted by the Company to the Creditor and estimated value of such security.)

F. FILING OF CLAIM

This Proof of Claim must be received by the Manager by no later than 4:00 p.m. (Toronto Time) on [INSERT DATE, being 30 days from the Claims Notice Date pursuant to the Claims Procedure Order], the Claims Bar Date, by prepaid ordinary mail, courier, personal delivery or electronic or digital transmission at the following address:

Schonfeld Inc.
Court-appointed Manager of the Company
438 University Avenue
21st Floor
Toronto, ON M5G 2K8

Attention:	S. Harlan Schonfeld
Telephone:	416-862-7785, Extension 1
E-mail	harlan@schonfeldinc.com
Fax:	416-862-2136

FAILURE TO FILE YOUR PROOF OF CLAIM AS DIRECTED BY THE CLAIMS BAR DATE WILL RESULT IN YOUR CLAIM BEING BARRED AND IN YOU BEING PREVENTED FROM MAKING OR ENFORCING A CLAIM AGAINST THE COMPANY. In addition, you shall not be entitled to further notice, and shall not be entitled to participate as a creditor, in these proceedings.

Dated at _____ this ____ day of _____, 2014.

_____

Signature of Creditor

SCHEDULE F

NOTICE OF DISALLOWANCE RELATING TO [THE COMPANY]

(hereinafter referred to as "the Company")

TO: **[insert name and address of creditor]**

The Court-appointed Manager hereby gives you notice that it has reviewed your Claim and has revised or rejected your Claim as follows:

	The Proof of Claim as Submitted	**The Proof of Claim as Accepted**
Claim		

A. Reasons for Disallowance or Revision:

[insert explanation]

If you do not agree with this Notice of Disallowance, please take notice of the following:

If you dispute this Notice of Disallowance, you must, by no later than 4:00 p.m. (Toronto Time) on [INSERT DATE, being fourteen (14) days after the Notice of Disallowance is sent by the Manager pursuant to the Claims Procedure Order], notify the Manager by delivery of a Dispute Notice to the following address:

Schonfeld Inc.
Court-appointed Manager of the Company
438 University Avenue
21st Floor
Toronto, ON M5G 2K8

Attention: S. Harlan Schonfeld
Telephone: 416-862-7785, Extension 1
E-mail harlan@schonfeldinc.com
Fax: 416-862-2136

The form of Dispute Notice is enclosed. If you do not deliver a Dispute Notice by the above-noted time and date, your Claim shall be deemed to be as set out in this Notice of Disallowance.

IF YOU FAIL TO TAKE ACTION WITHIN THE PRESCRIBED TIME PERIOD, THIS NOTICE OF DISALLOWANCE WILL BE BINDING UPON YOU.

DATED at Toronto, this _____day of _____, 2014.

SCHONFELD INC.,
in its capacity as Court-appointed
Manager of the Company

SCHEDULE G

DISPUTE NOTICE RELATING TO [THE COMPANY]

(hereinafter referred to as "the Company")

A. PARTICULARS OF CREDITOR:

1. Full Legal Name of Creditor: _____

_____ _____

(Signature of individual completing this Dispute Notice) Date

2. Full Mailing Address of the Creditor:

_____

_____

_____

3. Telephone Number: _____

4. E-Mail Address: _____

5. Facsimile Number: _____

B. REASONS FOR DISPUTE:

We hereby give you notice of our intention to dispute the Notice of Disallowance dated _____, 2014.

(Provide full particulars of the Claim and supporting documentation. Attach additional page if necessary.)

_____

This Dispute Notice must be returned by prepaid ordinary mail, courier, personal delivery or electronic or digital transmission and be received by the Manager by no later than **4:00 P.M. (TORONTO TIME) ON [INSERT DATE, being fourteen (14) days after the Notice of Disallowance is sent by the Manager pursuant to the Claims Procedure Order]** at the following address:

Schonfeld Inc.
Court-appointed Manager of the Company
438 University Avenue
21st Floor
Toronto, ON M5G 2K8

Attention:	S. Harlan Schonfeld
Telephone:	416-862-7785, Extension 1
E-mail	harlan@schonfeldinc.com
Fax:	416-862-2136

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

GOODMANS LLP
Barristers & Solicitors
333 Bay Street, Suite 3400
Toronto, Canada M5H 2S7

Brian Empey LSUC#: 30640G
Mark Dunn LSUC#: 55510L
Tel: 416.979.2211
Fax: 416.979.1 234

Lawyers for the Manager

DBDC SPADINA LTD., et al Applicants	NORMA WALTON, et al Respondents	Court File No. CV-13-10280-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

Proceeding commenced at Toronto

MOTION RECORD OF THE MANAGER, SCHONFELD INC.

(Motion for Discharge of Manager re: Bannockburn Lands Inc., Richmond Row Holdings Ltd., Hidden Gem Development Inc. and Liberty Village Properties Ltd., returnable December 21, 2015)

GOODMANS LLP
Barristers & Solicitors
Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, Canada M5H 2S7

Brian Empey LSUC#: 30640G
Mark S. Dunn LSUC#: 55510L
Tel: (416) 979-2211
Fax: (416) 979-1234

Lawyers for the Manager

File No. 14-0074