

April 8, 2019

**Delivered via facsimile**

Roger Bilodeau, QC  
Registrar, Supreme Court of Canada  
301 Wellington Street  
Ottawa, Ontario K1A 0J1

Dear Mr. Bilodeau:

**Re: Christine DeJong Medicine Professional Corporation v. DBDC Spadina Ltd. et al.**  
**SCC File No. 38051**

We are counsel to Schonfeld Inc., in its capacity as court-appointed Inspector and Receiver/Manager in these proceedings (“**Schonfeld**”). We write in reply to the Memorandum of Argument of the Appellant, filed in response to Schonfeld’s motion to be added as a Respondent Party or, in the alternative, for leave to intervene.

Schonfeld participated extensively in these proceedings before the Application Judge and the Ontario Court of Appeal without any objection from the Appellant. The Appellant now alleges, for the first time, that Schonfeld’s participation is neither necessary nor helpful. The Appellant’s primary arguments, and Schonfeld’s response to them, are set out below.

**Schonfeld takes no position on the legal questions at issue in this appeal.**<sup>1</sup> Schonfeld appeared before the Application Judge and Ontario Court of Appeal, without taking a position on the legal dispute between the Appellant and Respondents and without any objection from the Appellant. If its motion is granted, Schonfeld will play a similar role before this Court.

**Schonfeld’s submissions will be restricted to the facts and must be confined to the evidentiary record as it currently stands.** The Appellant asserts that the evidentiary record cannot be expanded on appeal absent a motion for fresh evidence.<sup>2</sup> Schonfeld agrees. Its submissions will be limited to the existing evidentiary record, as they were in the courts below.

The Appellant also alleges that factual submissions are unnecessary because the facts are not in dispute.<sup>3</sup> However, the majority decision at the Ontario Court of Appeal found the application judge made factual errors and both the dissenting and majority decisions address the evidentiary record in some detail. This Court may also find that an examination of the factual record is relevant to its analysis.

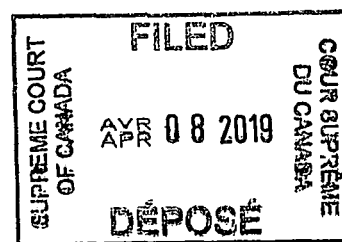
**This is a private dispute between the Appellant and the Respondents.**<sup>4</sup> This assertion by the Appellant is not entirely correct. Schonfeld is currently holding approximately \$2.6 million in trust

<sup>1</sup> Memorandum of Argument of the Appellant at para. 20.

<sup>2</sup> Memorandum of Argument of the Appellant at para. 23.

<sup>3</sup> Memorandum of Argument of the Appellant at paras. 21-22.

<sup>4</sup> Memorandum of Argument of the Appellant at para. 24.



pending the outcome of this appeal. Only \$1.9 million relates directly to the DeJong Companies. The outcome of this appeal will determine how all of the funds held by Schonfeld are distributed, not just the funds the Appellant, is or may be, entitled to.

**Schonfeld, as a court officer, is not a necessary or proper party.** Respectfully, the authorities cited by the Appellant do not establish a rule that court officers are not necessary or proper parties on appeal.<sup>5</sup> In *Abitibi*,<sup>6</sup> this Court dismissed the Monitor's motion to be added as a party but granted leave to intervene. There were no reasons given, and so *Abitibi* does not establish the broad principle advanced by the Appellant.

**The Appellant's attack on Schonfeld.** The Appellant seeks to bolster its new opposition to Schonfeld's participation by attacking Schonfeld's conduct and neutrality. Some of the Appellant's criticisms are so vague that no response is possible.<sup>7</sup> Another criticism was specifically rejected by the Ontario Court of Appeal, in a decision that was not appealed.<sup>8</sup> Its other criticisms are both irrelevant to this motion and based on a misapprehension of the facts.

For example, the Appellant asserts that Schonfeld was appointed "exclusively" to assist Dr. Bernstein.<sup>9</sup> This is not correct. Schonfeld was appointed by the Court, and it is responsible to the Court. Its mandate is clearly articulated in the court orders appointing it.<sup>10</sup> Schonfeld's activities have been closely supervised by experienced Commercial List judges over the course of more than 200 court appearances, without any criticism of its conduct by any judge of any court.

The Appellant also implies that Justice Brown expressed concern about Schonfeld acting as receiver-manager of both the DBDC Companies and the DeJong Companies. In fact, Justice Brown appointed Schonfeld as receiver-manager of the DeJong Companies in the *very* decision relied on by the Appellant. The concerns cited by the Appellant related only to the length of Schonfeld's appointment as receiver of the Waltons' personal property and are not relevant to the issues before this Court.<sup>11</sup>

The Appellant has itself participated actively in these proceedings since early 2014, with the assistance of capable and experienced counsel. If it had legitimate concerns about Schonfeld's conduct, or its participation in these proceedings, then it could have and should have raised those concerns below. Schonfeld respectfully submits that these concerns are not appropriately addressed on this motion.

Yours truly,



Mark Dunn

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<sup>5</sup> Memorandum of Argument of the Appellant at paras. 26-27.

<sup>6</sup> *AbitibiBowater Inc. Re*, 2010 CarswellQue 8859 [*Abitibi*].

<sup>7</sup> The Appellant asserts, for example, at paragraph 40 of its Memorandum of Argument that it would have tendered an affidavit addressing Schonfeld's neutrality if it had more time to respond to this motion but it does not explain what the affidavit would have said, why it could not be tendered in the time provided or how the evidence would have been relevant to the motion.

<sup>8</sup> The Appellant criticizes the scope of the Inspector's tracing analysis, but that very criticism was rejected by the Ontario Court of Appeal.

<sup>9</sup> Memorandum of Argument of the Appellant at para. 10.

<sup>10</sup> Order of Justice Newbould dated October 4, 2013, AR, Vol. III, Tab 20, pp. 102-106; Order of Justice Newbould dated November 5, 2013, AR, Vol. III, Tab 24, pp. 146-155.

<sup>11</sup> Reasons for Decision of Justice D.M. Brown dated August 12, 2014 at para. 233, AR, Vol. IV, Tab 32, p. 151.

cc: Carlie Fox  
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