

**ONTARIO
SUPERIOR COURT OF JUSTICE
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**

FACTUM

January 8, 2015

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Lawyers for the following Schedule C
Investors Stockton & Bush Holdings Inc.,
Stockton & Bush PMI Inc., Saul Spears, Ange
Boudle et. al.

TO: THE SERVICE LIST

PART I - OVERVIEW

1. This is a cross-motion made by the Schedule C investors, defined herein, in response to the manager's motion which seeks, *inter alia*, interim distribution of certain Schedule B proceeds to the DBDC Applicants. Said investors seek the direction of the Court in respect of the status of their claims relative to the Schedule B and Schedule C properties and/or proceeds therefrom and the obligation of Schonfeld Inc. in its capacity as inspector and/or manager relative to tracing the funds of the Schedule C investors into Schedule B properties.

PART II - SUMMARY OF FACTS

PARTIES AND PROPERTIES

2. The following persons/entities made investments with Norma Walton and Ronald Walton approximating \$12,350,000.00: Stockton & Bush Holdings Inc., Stockton & Bush PMI Inc., Saul Spears, Ange Boudle, Triane Boudle, 1607544 Ontario Inc., Harvey Naglie, Barbara Naglie, Michael DeJong, Christine DeJong, Howard Beck, Vane Plesse, Michelle Tessaro, Danny Servos, John Geikins, Dennis Condos, Peggy Condos, Ken Bugg, Grace Bugg, Duncan Coopland, John Korchynski, Sheila Korchynski, John Rawlings, Myrne Rawlings, Dian Cohen, Paul Duffy, Carmen Duffy, Mark Goldberg, Phil Aber, Joe Memme, Teresa Memme, Jill Penny, John Rocha, Michele Peng, Carlos Carreiro, Cary Silber, and Rosebud Holdings (the "**Schedule C Investors**").

3. Norma Walton and Ronald Walton (the "**Waltons**") are the co-founders of The Rose & Thistle Group Ltd. (the "**Rose & Thistle**"). They are both lawyers.

4. Dr. Bernstein is the founder of a number of diet clinics and, like the Schedule C Investors, invested with the Waltons/Rose & Thistle obtaining equity interests or mortgages against various properties.

5. The Schedule C Investors purchased shares in various corporations incorporated for the purpose of holding real property projects. The investments and shareholders are set out below:

Name of Shareholder	Amount
Phil Aber	\$ 100,000.00
John & Myrne Rawlings	\$ 395,000.00
John & Myrne Rawlings	\$ 165,500.00
Maria & Joseph Memme	\$ 281,000.00
Maria & Joseph Memme	\$ 100,000.00
Saul Spears	\$ 67,648.00
Peggy Condos	\$ 10,000.00
Dennis Condos	\$ 350,000.00
Ange Boudle	\$ 400,960.00
Mark Goldberg	\$ 150,000.00
John Geikins	\$ 50,000.00
Vane Plesse	\$ 117,675.00
Michelle Tessaro	\$ 154,864.00
Carlos Carreiro	\$ 285,000.00
Howard Beck	\$ 101,472.00
Danny Servos	\$ 356,907.00
Ken & Grace Bugg	\$ 650,000.00
Michele Peng	\$ 62,800.00
Sheila Korchynski	\$ 52,525.00
John & Sheila Korchynski	\$ 105,000.00
Cary Silber	\$ 16,912.00
Duncan Coopland	\$ 721,500.00
Barbara Naglie	\$ 117,778.00
Harvey Naglie	\$ 225,788.00
Carmen & Paul Duffy	\$ 409,599.00
Dian Cohen	\$ 100,000.00
Jill Penny	\$ 165,000.00
Stockton & Bush Holdings	\$ 172,639.00
Stockton & Bush PMI Inc	\$ 87,074.00
Triane Boudle	\$ 125,000.00
1607544 Ontario Inc.	\$ 1,940,500.00

Rosebud Holdings	\$ 351,822.00
Dejongs	\$ 3,967,026.00
	<u>\$ 12,356,989.00</u>

Affidavit of Gerry Gotfrit, sworn December 15, 2014 at para. 30

6. DBDC Spadina Ltd. et al ("**DBDC Spadina**") commenced proceedings in late 2013 against the Waltons, Rose & Thistle and Eglinton Castle Inc. A variety of relief was sought including constructive trust, equitable tracing, blanket charges, and interim certificates of pending litigation. The matter was heard over three days on July 16 – 18, 2014 and resulted in the Judgment and Orders of Justice Brown of August 12, 2014.

Affidavit of Gerry Gotfrit, sworn December 15, 2014 at para. 5

7. SimpsonWigle LAW LLP was retained to act for Dr. Christine and Michael DeJong and their corporations in May of 2014, and the other Schedule C Investors referenced herein in November of 2014.

Affidavit of Tanisha Hinds, sworn January 8th, 2015, paras. 3 and 4

8. The Schedule C Investors were neither made parties nor served with the proceedings advanced by DBDC Spadina. Hence they had no notice of proceedings to appoint the manager, the inspector or establish the claims processes. Any information relative to same was received through Norma Walton. On her representation that she would do so, the Schedule C Investors relied upon Norma Walton to protect their interests. She did not or could not do so.

Affidavit of Gerry Gotfrit, sworn December 15, 2014 at para. 6

9. The Schedule C Investors with respect to their investments were subjected by the Waltons to the same or similar misappropriation of funds, registration of unauthorized encumbrances and failure of the Waltons to contribute equity as per their representations which is the subject of the grounds for and the orders obtained in the proceedings that were advanced by DBDC Spadina.

Affidavit of Gerry Gotfrit, sworn December 15, 2014 at para. 11

10. Investments by Christine DeJong Medical Professional Corporation ("CDJ") and Stockton & Bush, Schedule C Investors, into United Empire Lands Ltd. ("UEL") and Front Church Properties Ltd. ("Front Church") provide examples of the foregoing. The Waltons misappropriated Stockton & Bush and CDJ investments with respect to UEL and Front Church, allowed unauthorized encumbrances to be registered and failed to contribute equity as per representations contained in the Investment Agreement entered into with said Investors.

UEL – 3270 AMERICAN DRIVE

11. In February of 2013, CDJ entered into an agreement with the Waltons relative to the purchase of shares in UEL. The agreement provided that each of CDJ and the Waltons would hold 716,906 shares, injecting equal cash for the purchase of the equity. The Capital Required documents which accompanied the referenced Investment Agreement specified an investment from CDJ and the Waltons of \$992,750.00 each which was in accordance with the fact that CDJ was rolling over an existing investment

in 165 Ontario Ltd. of \$275,844.00 in addition to the \$769,006.00 for a total of \$992,790.00. This structure mirrored that of Dr. Bernstein and the DBDC Applicants business arrangements with the Waltons as found by Justice Newbould on October 4, 2013.

Affidavit of Gerry Gotfrit, sworn December 15, 2014 at paras. 17 – 18

12. UEL's bank statement for the relevant period and specifically ending January 31, 2013 shows CDJ's investment of \$716,906.00 on January 28, 2013 further to those funds totalling \$706,850.00 being transferred out of the UEL account the Rose & thistle account over the four day period of January 28 – January 31, 2013, however the bank records of UEL do not show a similar equity contribution by the Waltons and specifically the \$992,790.00 referenced in the Capital Required document or in fact any amount. The Waltons never actually purchased shares in UEL. Moreover there is a second position vendor take back mortgage in the amount of \$670,000.00 which is not contemplated by the Investment Agreement and was not authorized by CDJ.

**Affidavit of Gerry Gotfrit, sworn December 15, 2014 at
paras. 21 and 22**

13. The records clearly indicate misappropriation of funds by the Waltons, breach of the Investment Agreement in respect of both the unauthorized encumbrances, and the failure to contribute the required equity. The Rose & Thistle account at Meridian Credit Union ("7311954 Wellesly Cheq") evidences the Waltons' pattern of utilizing funds of Schedule C Investors which were delivered by said Investors for the acquisition of a

distinct investment property but utilized by the Waltons to fund another to, in the words of Norma Walton, "smooth out cash flow".

Affidavit of Norma Walton, sworn June 26, 2014 at para. 8

Affidavit of Gerry Gotfrit, sworn December 15, 2014 at para. 24

65 FRONT STREET EAST

14. 65 Front Street East, owned by Front Church, is another example of investors' monies being utilized contrary to agreements made with investors and the equity in the property being diluted by unauthorized mortgages. The Schedule C Investors represented herein all subscribed for preferred shares in Front Church. Additionally, 1607544 Ontario Inc. subscribed for common shares.

15. Page three of the Investment Agreement represents that the preferred shares were "fully secured as a mortgage against the property". The only other mortgage authorized by the Investment Agreement was the first in the amount of \$3,870,000.00. Neither representation was honoured.

Affidavit of Gerry Gotfrit, sworn December 15, 2014 at paras. 26, 29 and 30

16. On March 5, 2012 a further mortgage securing the sum of \$2,500,000.00 was registered against the property in favour of 368230 Ontario Limited. There is no evidence of an advance to Front Church in that amount, or any other amount, in consideration for the aforesaid mortgage. By Order of Justice Brown dated May 20,

2014, \$2,720,000.00 for principal and interest plus \$85,000.00 in HST was paid to 368230 Ontario Limited. Dr. Bernstein is the principal of the aforesaid company.

Affidavit of Gerry Gotfrit, sworn December 15, 2014 at paras. 31 – 32

SCHEDULE C FUNDS APPROPRIATED TO SCHEDULE B USES

17. There is evidence that Schedule C Investor monies were misappropriated from the designated investment corporation then deposited to The Rose & Thistle and thereafter transferred out to Schedule B Corporations. The Froese Forensic Partners Ltd. report of May 23, 2014 concludes that approximately \$515,000.00 of the CDJ funds initially deposited to UEL were transferred to The Rose & Thistle and ultimately to Schedule B Corporations. The report states further that the balance of the CDJ funds went to Walton related companies. The foregoing is not addressed in the Inspector's tracing which only focuses on the funds of the DBDC Applicants transferred to Rose & Thistle and thereafter to Schedule C Companies.

Affidavit of Gerry Gotfrit, sworn December 15, 2014 at paras. 33 - 34

18. The Froese report was accepted into evidence pursuant to Rule 53.03 of the *Rules of Civil Procedure*.

**Reasons of Brown J. August 12th, 2014, Twenty Second Report of the Manager,
Appendix 5, para. 22, page 12**

19. Clearly both Schedule B and Schedule C monies were misappropriated by the Waltons.

Affidavit of Gerry Gotfrit, sworn December 15, 2014 at para. 37

THE WEST MALL

20. On the basis that DBDC Spadina monies that were invested in West Mall Ltd. but subsequently transferred to The Rose & Thistle and thereafter to a Schedule C Corporation, a constructive trust and tracing was ordered by Justice Brown in respect of that Schedule C company (UEL) and specifically 3270 American Drive. The finding was based on the fourth interim report of the Inspector which notes that \$1,032,000.00 was transferred out of West Mall Ltd. to Rose & Thistle on March 8, 2013 and thereafter to UEL. 3270 American Drive was purchased on March 11, 2013.

Affidavit of Gerry Gotfrit, sworn December 15, 2014 at paras. 39 and 42

21. Although not referenced in the aforesaid Inspector's report, West Mall Ltd. was in receipt of a further \$1,100,000.00 on March 13, 2013 and a combined deposit of \$1,937,500.00 on March 13, 2013. Both deposits were made in advance of the purchase of 291-295 The West Mall and after the purchase of American Drive. Neither the source of those funds nor the fact of the deposits is noted in the Inspector's materials. Under the circumstances, it is reasonable to conclude that the source of the funds are from either Schedule B or Schedule C Investors. Follow up requests made to the Inspector to determine the source of the deposits received no response.

Affidavit of Gerry Gotfrit, sworn December 15, 2014 at paras. 44-46 and Exhibit N

ROLE OF THE INSPECTOR AND ITS FAILURE TO DISCHARGE ITS OBLIGATIONS

22. The October 4th Order appointing the Inspector provides that the Inspector is to engage in "tracing of any amounts *to and from* the bank accounts of the Schedule B Corporations and those of Rose & Thistle or other accounts under the control of the 'Walton' respondents." Since July 2014, the Schedule C Inspectors have, primarily through its counsel, made requests to the Inspector for information, documentation, and the Inspector's position relative to the obligations to perform a full tracing to ensure that all investors are treated fairly. Notwithstanding the foregoing, the bank statements have not been delivered by the Inspector to the Schedule C Investors and it appears that the Inspector has not attempted to trace the funds of the Schedule C Investors to the Rose & Thistle account and other Walton accounts and then from such bank accounts to the Schedule B Corporations.

**Affidavit of Gerry Gotfrit, sworn December 15, 2014 at paras 47 – 51, and
Exhibit P thereto**

Affidavit of Tanisha Hinds, sworn January 8th, 2015, Exhibit "F"

23. In addition to there being a failure to recognise that there is a reasonable probability that the Schedule C Investors have tracing claims into the Schedule B properties and that there is an obligation to make the investigation, the Schedule C Investors have been shut out of the claims process. The Manager's position in respect of same is that none of the Schedule C Investors are entitled to file proofs of claim on the basis that they are not creditors as defined in the relevant orders. None of the Schedule C Investors were served with motion materials relative to the claims process

orders, the appointment of the Inspector, or the appointment of the Manager. While the Manger took the position on Oct. 30th, 2014 that it had no obligation to complete a tracing for the benefit of the Schedule C Investors, the Inspector refrained from stating a position.

Affidavit of Gerry Gotfrit, sworn December 15, 2014 at paras. 53 – 55

Affidavit of Tanisha Hinds, sworn January 8th, 2015, para. 8 and 10

EXCLUSION OF SCHEDULE C INVESTORS

24. The Schedule C Investors were not contacted by the Inspector or Manager. . In a September 23rd email exchange with Norma Walton, Inspector's counsel directed her to refrain from communication with the Schedule C Investors beyond simply referring them to the website of Schonfeld Inc. The only letter to the Investors to be found on the Schonfeld Inc. website is dated September 23rd, 2014, well after many crucial Orders had been issued. The Schedule C Investors received no contact from the Manager or the Inspector.

Affidavit of Tanisha Hinds, sworn January 8th, 2015, paras. 5-7

25. The aforesaid open letter references the fact that the Manager was appointed by the Court to ensure that all interested parties are treated fairly and to establish and execute a fair process for dealing with the Properties. The letter references as well that Court approval of the sale of any properties would be done on notice to all parties and that accurate and timely information would be provided to all parties with an interest in a particular Property. However, the letter was generated many months after the claims

process had been established and when no tracing of the Schedule C Investor funds had taken place.

Affidavit of Tanisha Hinds, sworn January 8th, 2015, para. 5

26. The Schedule C Investors were not contacted by Schonfeld Inc. or counsel to Schonfeld Inc. and most were unaware of the letter.

Affidavit of Tanisha Hinds, sworn January 8th, 2015, para. 6

27. The claims submitted by 1607544 Ontario Inc. and Michael DeJong, Schedule C Investors herein, relative to 65 Front Street East were rejected by the Manager on the basis that the July 18, 2014 Front Street Claims Order did not include investors/shareholders as permitted claimants; however, no notice of disallowance has been issued by the Manager.

Affidavit of Tanisha Hinds, sworn January 8th, 2015, para. 8

28. Correspondence from counsel to the Schedule C Investors herein on December 19, 2014 summarizes the efforts to obtain from the Inspector both information and as well the Inspector's position in respect of the obligation to complete a full tracing which would include monies received by Schedule B Corporations from the Schedule C Corporations. Correspondence of May 9th, May 14th, July 25th, August 12th, and September 8th of 2014 focused on requests for tracing of Schedule C monies into Schedule B Properties and for copies of bank statements relative to West Mall Holdings. There was no response from Schonfeld Inc. until September 11, 2014 whereupon the

Inspector's counsel stated by email that the Inspector had been asked to review the issue and provide a response. Subsequent correspondence in October followed up to no avail and the December correspondence addressed the Manager's motion herein

Affidavit of Tanisha Hinds, sworn January 8th, 2015, paras. 9-10 & Exhibit E

29. While the Manager has indicated on October 30th that there is no mandate to assist the Schedule C Investors relative to a tracing, no position has been received from the Inspector and it appears no efforts have been made by the Inspector to trace Schedule C Investor funds to Schedule B Properties notwithstanding that the Inspector had the means to do so and the Inspector had information such that it was reasonable to conclude that such funds had been used by the Waltons with respect to the acquisition of Schedule B Properties.

Affidavit of Tanisha Hinds, sworn January 8th, 2015, para. 11

30. As there is equity in some of the Schedule C Properties and equity in some of the Schedule B Properties, fairness would dictate that that equity is properly subject to the claims of both Schedule B and Schedule C Investors after a full tracing is completed.

Affidavit of Tanisha Hinds, sworn January 8th, 2015, paras. 9, 10 & 12

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

The proper interpretation and parameters of the Order of October 4, 2013 appointing Schonfeld Inc. as Inspector herein.

31. Section 161 of the Ontario *Business Corporations Act* (“**OBCA**”) provides for the appointment of an inspector. There are four grounds in that section on which the court may determine there is good reason to investigate the conduct. The inspector's role is inquisitional and to assist the court.

Ontario Business Corporations Act R.S.O. 1990, CHAPTER B.16

Holden v. Infolink Technologies Ltd., 2005 CarswellOnt 5027, [2005] OJ No. 4393

32. As noted herein the Order appointing the Inspector references a tracing of monies to and from the bank accounts of the Schedule B Corporations and to and from the bank accounts of The Rose & Thistle and the Walton accounts, which, it is respectfully submitted, means that the Inspector has to look at funds flowing into those Corporations and wherefrom. It is further respectfully submitted that to interpret the clause otherwise would result in an injustice wherein DBDC Spadina et. al. are allowed to follow their funds into the assets of other investors but the other, similarly affected, investors are not. Moreover, DBDC Spadina et. al. can trace without accounting for monies received into Schedule B Corporations from Schedule C Investors. This is manifestly unfair because it completely disregards the interests of the Schedule C Investors and privileges only the interests of DBDC Spadina.

33. It is respectfully submitted that there ought to be a full tracing and that the findings be considered in the Claims Process, if that proves to be the best mechanism to deal with Schedule C Investor claims. It is further submitted that it must be

remembered that these were distinct investments in distinct entities and that a “netting” exercise As between Schedule B and Schedule C monies is in appropriate.

Schedule C Investors are s.248 OBCA Claimants

34. It is respectfully submitted that we are beyond the point in time where the threshold issue of whether the Schedule C Investors have to prove that the conduct of Walton and The Rose & Thistle amounts to “oppression” within the oppression provisions of section 248 of the OBCA. Such proof is amply supported by paras. 263 and 273 of the Reasons of Justice D. M. Brown made on August 12, 2014.

**Reasons of Brown J. August 12th, 2014, Twenty Second Report of the Manager;
Appendix 5, pps. 87 and 90**

35. Proof of oppression within the meaning of s. 248 of the OBCA has already been established in respect of DBDC Spadina and such oppression is not limited only to DBDC Spadina; the oppressive conduct has extended to, and affected, other stakeholders such as the Schedule C Investors.

The Claims Process.

36. It is respectfully submitted that the Order appointing Schonfeld Inc. as manager must be amended in order to address, and respond to, the interests of the Schedule C Investors. In this regard, reliance can be placed upon para. 32 of the Order appointing Schonfeld Inc. as manager made by Justice Newbould on November 5, 2013.

37. In accordance with same, the Schedule C Investors are “interested parties” because they injected capital, in various amounts and at various times, into the Schedule B Corporations.

38. Because reliance can be placed on existing judicial endorsements in this case on the subject of “oppressive” conduct on the part of the Waltons and The Rose & Thistle, it has been sufficiently established that the Schedule C Investors have also been oppressed within the meaning of section 248 of the OBCA. Therefore, the fact that the Schedule C Investors are excluded from filing a Proof of Claim pursuant to the various Claims Procedure Orders presents an anomaly and injustice that, respectfully, ought to be rectified.

Setting aside or varying orders.

39. It is respectfully submitted that in circumstances where an order is made in the absence of affected parties having been served with the proceedings leading to same, said Order is open to variation or being set aside under rules 37.14 and 59.06(2) of the *Rules of Civil Procedure* and by case law interpreting those two rules.

Rule 37.14 (1) states that a party or other person who,

(a) is affected by an order obtained on a motion without notice;

(b) fails to appear on a motion through accident, mistake or insufficient notice; or

(c) is affected by an order of a Registrar,

may move to set aside or vary the order by a Notice of Motion that is served forthwith after the order comes to the person’s attention and names the first available hearing date that is at least three days after service of the Notice of Motion. (2) on a motion under (1) the court may set aside or vary the order on such terms as are just.

Rule 59.06(2) provides that a party who seeks to have an order set aside on the basis of facts arising or discovered after it was made may bring a motion to set aside or vary the Order.

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

40. In the present circumstances, various orders were obtained without notice to the Schedule C Investors. In the first instance, the Schedule C Investors relied upon Norma Walton to protect their interests. Ms. Walton did submit an Affidavit of Shareholder for each of the Schedule C Investors but took no other steps to apprise or inform the Schedule C Investors of the import and consequences of the appointment of an Inspector, the appointment of a Manager or the claims process orders. The proceedings rolled along with no solicitation of the Schedule C Investors relative to the claims process, no response relative to the Inspector's intentions relative to tracing and no response to document requests. Ultimately the majority of the Schedule C Investors retained counsel in November 2014.

41. It is respectfully submitted that basic fairness dictates that the Schedule C Investors be included in the purview of the Claims Process Orders.

4 The well known principles to be considered by the court in the exercise of its discretion to re-open a motion once an order has been made are as follows:

- i) Would the evidence, if presented to the court at first instance, probably have changed the result?; and
- ii) Could the evidence have been obtained before the hearing and disposition of the motion by the exercise of reasonable diligence?

(671122 Ontario Ltd. v. Sagaz Industries Canada Inc. (2001), 204 D.L.R.

(4th) 542, [2001] 2 S.C.R. 983 (S.C.C.), at paras. 20 and 59) ...

6 Notwithstanding that the plaintiffs' new evidence and arguments could have been placed before the court at the hearing of the Air France defendants' motion, the court still has discretion to re-open a motion to prevent a miscarriage of justice, which includes, but is not limited to, a fraud on or the deliberate misleading of the court, or to prevent an abuse of the court's process: *1307347 Ontario Inc. v. 1243058 Ontario Inc.*, 4 C.P.C. (5th) 153, [2001] O.J. No. 257 (Ont. S.C.J.), at paras. 6 to 8.

7 I do not accept the narrow interpretation suggested by the Air France defendants that the special circumstance or miscarriage of justice contemplated must be tantamount to a fraud on the court or its equivalent. The court has a wider discretion to re-open a matter where the integrity of the process is at risk or a principle of justice is at stake that requires the reconsideration of the matter: *DeGroot v. Canadian Imperial Bank of Commerce*, [1998] O.J. No. 1696 (Ont. Gen. Div.), at para. 9; *aff'd*, [1999] O.J. No. 2313 (Ont. C.A.). While a court should re-open a motion or other matter sparingly and with the greatest of care, it may re-open it when it is just to do so in exceptional circumstances.

Strugarova v. Air France 2009 CarswellOnt 4575, [2009] O.J. No. 3267, paras.4,6 & 7

42. In respect of the requirement of rule 37.14(1) for the Schedule C Investors to forthwith move with their motion to set aside the various orders pertaining to the OBCA Inspector appointment and the Claims Process, *Ahmed v. Stefaniu*, 2004 CarswellOnt 3802 at para. 20 *per* Cullity J. is authority for the proposition that the Court has the discretion to relieve against the requirement to forthwith move to set aside court orders that were made, with such discretion predicated upon rules 2.03 and 3.02.

***Ahmed v. Stefaniu*, 2004 CarswellOnt 3802 at para. 20**

43. The Schedule C Investors rely on *Ahmed* to relieve against the fact that they did not move forthwith after discovering the various orders appointing the OBCA Inspector and detailing the Claims Process.

44. In addition, the Schedule C Investors submit that the various orders appointing the OBCA Inspector and detailing the Claims Process did not come to their attention until they retained counsel in November 2014.

45. The law with respect to rule 59.06(2) was summarized by Thornburn J. in *Romspen Investment Corp. v. Edgeworth Properties*, 2014 ONSC 4340 at paras. 38-39

38 New facts will only justify setting aside an order where the evidence might well have altered the judgment and could not with reasonable diligence have been discovered sooner. (*Hall v. Powers* (2005), 80 O.R. (3d) 462 (Ont. S.C.J.), at para 12.) If that hurdle is cleared, the court will then consider whether there is prejudice to other parties who may have relied on the order.³⁹ The onus is on the party who seeks to vary the order to establish that another creditor will not be adversely affected. (*Ashley v. Marlow Group Private Portfolio Management Inc.*, 2006 CarswellOnt 3449, 270 D.L.R. (4th) 744 (Ont. S.C.J. [Commercial List]), at para 78.)

Romspen Investment Corp. v. Edgeworth Properties, 2014 ONSC 4340 at paras. 38-39

Fees

46. In respect of officers appointed by the court in a supervisory role, the court has inherent jurisdiction to review said officer's request for payment.

Re: *Bake Mates International Inc.* (2002), 164 O.A.C. 84 (C.A.) leave to appeal refused (also referred to as *Confectionately Yours Inc.*) para. 36

Kevin P. McElcheran, *Commercial Insolvency in Canada*, 2nd Ed. (Markham: LexisNexis, 2011) at p. 185 – 186 as cited in *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851, at para. 30

In *Bake Mates*, the court describes the purpose of the passing of a receiver's accounts and also discusses the applicable procedure. Borins JA stated, at para. 31, that there is an onus on the receiver to prove that the compensation for which it seeks approval is fair and reasonable. This includes the compensation claim on behalf of its counsel. At para. 37, he observed the accounts must disclose the total charges for each of the categories of services rendered. In addition:

The accounts should be in a form that can be easily understood by those affected by the receivership (or where the judicial officer is required to assess the accounts) so that such person can determine the amount of time spent by the receiver's employees (and others that the receiver may have hired) in respect of the various discreet aspects of the receivership.

The court endorsed the factors applicable to receivers compensation described by the New Brunswick Court of Appeal in *Belyea: Bake Mates*, at para. 51. In *Belyea*, at para. 9, Stratin JA listed the following factors: the nature, extent and value of the assets; the complications and difficulties encountered; the degree of assistance provided by the debtors; the time spent; the receiver's knowledge, experience and skills; the diligence and thoroughness displayed; the responsibilities assumed; the results of the receiver's efforts; and the cost of comparable services when performed in a prudent and economical manner.

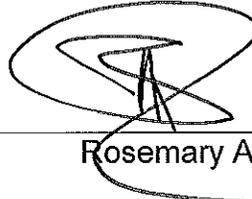
***Bank of Nova Scotia v. Diemer*, 2014 ONCA 851, paras. 32 - 33**

47. Both the Inspector and Manager seek to apportion their fees amongst the properties, including Schedule C Properties, which works to dilute the equity in the latter and where no work was done for the investors in those properties.

PART IV - ORDER REQUESTED

48. The Applicants on the Cross Motion request an Order directing the Inspector to complete a full tracing of the Schedule C Investor funds , amendment of the Order appointing the Manager and the Claims Process Orders and a stay of distributions to Schedule B Corporations pending same.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of January, 2015.



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Lawyers for the following Schedule C
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Stockton & Bush PMI Inc., Saul Spears, Ange
Boudle et. al.

SCHEDULE "A"

LIST OF AUTHORITIES

1. ***Holden v. Infolink Technologies Ltd.***, 2005 CarswellOnt 5027, [2005] OJ No. 4393
2. ***Strugarova v. Air France***, 2009 CarswellOnt 4575, [2009] O.J. No. 3267, paras.4, 6 & 7
3. ***Ahmed v. Stefaniu***, 2004 CarswellOnt 3802 at para. 20
4. ***Romspen Investment Corp. v. Edgeworth Properties***, 2014 ONSC 4340 at paras. 38-39
5. ***Re: Bake Mates International Inc. (2002)***, 164 O.A.C. 84 (C.A.) leave to appeal refused (also referred to as Confectionately Yours Inc.) para. 36
6. **Kevin P. McElcheran**, *Commercial Insolvency in Canada*, 2nd Ed. (Markham: LexisNexis, 2011) at p. 185 – 186 as cited in ***Bank of Nova Scotia v. Diemer***, 2014 ONCA 851, at para. 30
7. ***Bank of Nova Scotia v. Diemer***, 2014 ONCA 851, paras. 32 – 33

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY – LAWS

Ontario Business Corporations Act, R.S.O. 1990, Chapter B.16

Investigation

161. (1) A registered holder or a beneficial owner of a security or, in the case of an offering corporation, the Commission may apply, without notice or on such notice as the court may require, to the court for an order directing an investigation to be made of the corporation or any of its affiliates. 2006, c. 34, Sched. B, s. 33 (1).

Idem

- (2) Where, upon an application under subsection (1), it appears to the court that,
- (a) the business of the corporation or any of its affiliates is or has been carried on with intent to defraud any person;
 - (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted, or the powers of the directors are or have been exercised, in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards, the interests of a security holder;
 - (c) the corporation or any of its affiliates was formed for a fraudulent or unlawful purpose or is to be dissolved for a fraudulent or unlawful purpose; or
 - (d) persons concerned with the formation, business or affairs of the corporation or any of its affiliates have in connection therewith acted fraudulently or dishonestly,

the court may order an investigation to be made of the corporation and any of its affiliates. R.S.O. 1990, c. B.16, s. 161 (2).

Notice

(3) If a registered holder or a beneficial owner of a security makes an application under subsection (1) and the corporation is an offering corporation, the applicant shall give the Commission reasonable notice of the application and the Commission is entitled to appear and be heard in person or by counsel. 2006, c. 34, Sched. B, s. 33 (2).

Security for costs not required

(4) An applicant under this section is not required to give security for costs. R.S.O. 1990, c. B.16, s. 161 (4).

Closed hearing

(5) The hearing of an application made without notice under this section shall be closed to the public. R.S.O. 1990, c. B.16, s. 161 (5).

No publication without consent

(6) No person may publish anything relating to an application under this section except with the authorization of the court or the written consent of the corporation being investigated. R.S.O. 1990, c. B.16, s. 161 (6).

Oppression remedy

248. (1) A complainant and, in the case of an offering corporation, the Commission may apply to the court for an order under this section. 1994, c. 27, s. 71 (33).

Idem

(2) Where, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates,

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

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation, the court may make an order to rectify the matters complained of. R.S.O. 1990, c. B.16, s. 248 (2).

Court order

(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,

- (a) an order restraining the conduct complained of;
- (b) an order appointing a receiver or receiver-manager;
- (c) an order to regulate a corporation's affairs by amending the articles or by-laws or creating or amending a unanimous shareholder agreement;
- (d) an order directing an issue or exchange of securities;
- (e) an order appointing directors in place of or in addition to all or any of the directors then in office;
- (f) an order directing a corporation, subject to subsection (6), or any other person, to purchase securities of a security holder;
- (g) an order directing a corporation, subject to subsection (6), or any other person, to pay to a security holder any part of the money paid by the security holder for securities;
- (h) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;

- (i) an order requiring a corporation, within a time specified by the court, to produce to the court or an interested person financial statements in the form required by section 154 or an accounting in such other form as the court may determine;
- (j) an order compensating an aggrieved person;
- (k) an order directing rectification of the registers or other records of a corporation under section 250;
- (l) an order winding up the corporation under section 207;
- (m) an order directing an investigation under Part XIII be made; and
- (n) an order requiring the trial of any issue. R.S.O. 1990, c. B.16, s. 248 (3).

Idem

(4) Where an order made under this section directs amendment of the articles or by-laws of a corporation,

- (a) the directors shall forthwith comply with subsection 186 (4); and
- (b) no other amendment to the articles or by-laws shall be made without the consent of the court, until the court otherwise orders. R.S.O. 1990, c. B.16, s. 248 (4).

Shareholder may not dissent

(5) A shareholder is not entitled to dissent under section 185 if an amendment to the articles is effected under this section. R.S.O. 1990, c. B.16, s. 248 (5).

Where corporation prohibited from paying shareholder

(6) A corporation shall not make a payment to a shareholder under clause (3) (f) or (g) if there are reasonable grounds for believing that,

- (a) the corporation is or, after the payment, would be unable to pay its liabilities as they become due; or
- (b) the realizable value of the corporation's assets would thereby be less than the aggregate of its liabilities. R.S.O. 1990, c. B.16, s. 248 (6).

Rules of Civil Procedure, R.R.O. 1990 Reg. 194

Motion to Set Aside or Vary

37.14 (1) A party or other person who,

- (a) is affected by an order obtained on motion without notice;
- (b) fails to appear on a motion through accident, mistake or insufficient notice; or
- (c) is affected by an order of a registrar,

may move to set aside or vary the order, by a notice of motion that is served forthwith after the order comes to the person's attention and names the first available hearing date that is at least three days after service of the notice of motion.

Setting Aside or Varying

59.06 (2) A party who seeks to,

- (a) have an order set aside or varied on the ground of fraud or of facts arising or discovered after it was made;
- (b) suspend the operation of an order;
- (c) carry an order into operation; or
- (d) obtain other relief than that originally awarded,

may make a motion in the proceeding for the relief claimed.

DBDC SPADINA LTD. et al
Applicants

-and-

NORMA WALTON et al
Respondents

-and-

THOSE CORPORATIONS LISTED ON SCHEDULE C

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

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

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