

**COURT OF APPEAL FOR ONTARIO**

B E T W E E N:

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

Applicants

and

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

Respondents

and

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

**FACTUM OF THE RESPONDENT, 368230 ONTARIO LTD.**

October 9, 2015

**LENCZNER SLAGHT ROYCE  
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**FACTUM OF THE RESPONDENT, 368230 ONTARIO LTD.**

**PART I - OVERVIEW - NATURE OF CASE AND ISSUES**

1. Junior Academy Inc. ("Junior Academy") appeals part of an order from a motion it brought to hold its current landlord, 368230 Ontario Ltd. ("368 Ontario"), liable for \$136,319.87 in realty tax pre-payments paid to its previous landlord, Academy Lands Inc. ("Academy Lands").
2. While the motion judge granted Junior Academy's relief, he also found that:
  - (a) 368 Ontario bought the property "subject to the equities", such that 368 Ontario as successor landlord was bound by the state of accounts between Junior Academy and its previous landlord. That state of accounts included both the tax credit due to

Junior Academy and \$188,845.40 in rent arrears admittedly owed by Junior Academy to its previous landlord; and

(b) the \$136,319.87 tax credit should be reduced to \$49,181.84.

3. The Appellants' grounds of appeal set out below cannot succeed:

(a) the motion judge erred in finding that 368 Ontario should not have been able to obtain the benefit of rent arrears admittedly owed by Junior Academy to Academy Lands. This argument is meritless. By the terms of the Agreement of Purchase and Sale, 368 Ontario took over the previous landlord's position under the existing lease. The motions judge correctly applied the law in *TDL Group* and found that 368 Ontario took over the lease "subject to the equities";

(b) the motion judge erred in reducing Junior Academy's tax credit by \$25,000. The motion judge correctly found that the \$25,000 was not paid by Junior Academy and was not paid pursuant to the lease agreement. His Honour correctly concluded that 368 Ontario was not responsible for obligations that arose under a contract that was not assigned to 368 Ontario; and

(c) even if the motions judge was correct in ordering (a) and (b) the motion judge erred in ordering a set-off of the mutual debts owing between the parties. Justice Newbould properly exercised his discretion and set-off the amounts owing by all the parties to arrive at a result that was practical and just.

4. Justice Newbould's decision rests on both a sound legal foundation and factual findings rooted in the record. The Appellants fail to point to an identifiable error in Justice Newbould's

apprehension of the evidence (let alone a palpable and overriding error) or Justice Newbould's application of the law.

5. This appeal should be dismissed.

## **PART II - SUMMARY OF FACTS**

### The Parties

6. 368 Ontario is a company owned and controlled by Dr. Stanley Bernstein.<sup>1</sup> On January 8, 2015, the Court authorized the sale of 2454 Bayview Ave. ("2454 Bayview") to 368 Ontario.<sup>2</sup>

7. 2454 Bayview was sold to 368 Ontario by msi Spergel Inc. ("Spergel" or the "Receiver") pursuant to a power of sale that arose as a result of the oppressive conduct of the principals of Academy Lands, Norma and Ronauld Walton (collectively, the "Waltons"). The receiver retained from the sale proceeds the amount in dispute on this motion, being \$188,845.40 (the "Disputed Funds").

8. Junior Academy is the tenant at 2454 Bayview and occupies the property pursuant to the terms of a lease dated December 5, 2011 (the "Lease").<sup>3</sup> 368 Ontario is Junior Academy's current landlord.

9. Junior Academy is owned by Brian Johnson and Diane Johnson (collectively the "Johnsons").<sup>4</sup> The Johnsons are also principals of DiBri, the former owner of 2454 Bayview and the holder of a previously unregistered vendor take-back mortgage ("VTB mortgage").<sup>5</sup>

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<sup>1</sup> Contrary to paragraph 5 of the Appellants' Factum, DBDC Spadina Ltd. does not own or control 368 Ontario.

<sup>2</sup> Order of Justice Newbould, dated January 8, 2015, Exhibit "N" to the Affidavit of Talea Coghlin, sworn April 1, 2015 (the "Coghlin Affidavit"), Responding Motion Record of the Applicants, dated May 15, 2015 ("Responding Motion Record"), Exhibit Book, Vol. II, Tab 1N, pp 373-383, Respondent's Compendium ("RC"), Tab 1, pp 1-7

<sup>3</sup> Lease for 2454 Bayview Avenue, expiring July 31, 2021, Exhibit "D" to the Coghlin Affidavit, Responding Motion Record, Exhibit Book, vol. II, Tab 1D, pp 48-89, RC, Tab 2, pp 8-48.

Academy Lands/the Waltons Purchase 2454 Bayview from DiBri

10. DiBri purchased the property at 2454 Bayview in May 2005. On December 22, 2011, DiBri sold 2454 Bayview to Academy Lands for \$8 million.<sup>6</sup>

11. The Waltons, arranged \$6.2 million in financing for the purchase of 2454 Bayview, in the form of a first mortgage with the Business Development Bank of Canada ("BDBC"), which was registered on title.<sup>7</sup>

12. Unbeknownst to BDBC, and as part of the Sale Agreement between the Waltons and DiBri, DiBri took an unregistered and undisclosed vendor-take back mortgage (the "VBT mortgage") on the property at the time of sale in the amount of \$1,750,000.<sup>8</sup>

13. It appears that the VTB Mortgage was not registered on title in order to conceal that no down payment was made on the property from the first mortgagee, BDBC.<sup>9</sup>

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<sup>4</sup> Corporate profile report for Junior Academy, Exhibit "E" to the Coghlin Affidavit, Responding Motion Record, Exhibit Book, vol. II, Tab 1E, pp 91-94

<sup>5</sup> Corporate profile report for DiBri Inc., Exhibit "F" to the Coghlin Affidavit, Responding Motion Record, Exhibit Book, vol. II, Tab 1F, pp 96-100

<sup>6</sup> Affidavit of Jim Reitan, sworn May 15, 2015 ("Reitan Affidavit") at para 6, Responding Motion Record, Exhibit Book, vol. II, Tab 2, p 429, RC, Tab 3, p 50; Agreement of Purchase and Sale between DiBri Inc. and the Rose and Thistle Group, dated December 22, 2011, Exhibit "B" to the Affidavit of Brian Johnson, sworn May 11, 2015 ("Johnson Affidavit"), Motion Record of the Junior Academy Inc. and DiBri Inc. ("Applicant Motion Record"), Exhibit Book, vol. I, Tab 2B, pp 78-82, RC, Tab 4, pp 52-56.

<sup>7</sup> Copy of the parcel register from title search on 2454 Bayview Avenue, dated December 3, 2013, Exhibit "A" to the Reitan Affidavit, Responding Motion Record, Exhibit Book, vol. II, Tab 2A, pp 438-442

<sup>8</sup> Sale Agreement between the Junior Academy and DiBri Inc. and The Rose and Thistle Group, Exhibit "B" to the Johnson Affidavit, Applicant Motion Record, Exhibit Book, vol. I, Tab 2B, pp 75-77, RC, Tab 5, pp 57-59

<sup>9</sup> Reitan Affidavit at para 8, Responding Motion Record, Exhibit Book, vol. II, Tab 2, p 430, RC, Tab 3, p 51

Appointment of a Receiver Over 2454 Bayview

14. The property at 2454 Bayview Ave. came within the ambit of the this Application as Academy Lands was a net beneficiary of the Applicants' monies, which were improperly diverted by the Waltons.

15. On August 12, 2014, Justice Brown appointed Schonfeld Inc. as manager/receiver of the Schedule "C" Properties, including 2454 Bayview.<sup>10</sup>

16. On September 23, 2014, Spergel was appointed as receiver and manager, without security, of all of the assets, undertakings and properties of Academy Lands at the request of BDBC.<sup>11</sup>

Junior Academy Stops Paying Rent, HST and Property Taxes to Spergel

17. Following the appointment of Spergel, Junior Academy stopped paying rent, HST and property taxes on the basis of the tax-credit that it eventually claimed as against 368 Ontario.

18. Pursuant to the terms of the Lease, Junior Academy's financial obligations to the landlord include, *inter alia*:

**Minimum Rent:**

The Tenant shall pay to the Landlord annual Minimum Rent as follows:  
During the period December 20, 2011 – July 31, 2017 \$651,000.00 per annum...

HST shall be payable by the Tenant as it relates to the above noted Minimum Rent

**Taxes and Operating:**

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<sup>10</sup> Order of Justice D.M. Brown, dated August 12, 2014, Exhibit "A" to the Coghlin Affidavit, Responding Motion Record, Exhibit Book, vol. II, Tab 1A, pp 7-23, RC, Tab 6, pp 60-67: Contrary to paragraphs 7 and 20 of the Appellants' Factum, Schonfeld was not appointed as receiver of Academy Lands until August 12, 2014.

<sup>11</sup> Order of Justice McEwen, dated September 23, 2014, Exhibit "C" to the Coghlin Affidavit, Responding Motion Record, Exhibit Book, vol. II, Tab 1C, pp 30-46, RC, Tab 7, pp 68-69

Throughout the Term of this Lease, Tenant shall pay to the Landlord any and all Taxes and Operating Costs as they relate to the Building and the Premises as further outlined herein. Taxes and Operating Costs are subject to annual calculation as further outlined herein.

The Tenant shall pay \$5,000 per month to the Landlord on account of estimated property taxes as they relate to the building until such time the actual property tax obligation for the Building has been determined by the Landlord. Upon the Landlord receiving the actual assessment the Landlord shall make the required adjustment accordingly and the Tenant shall pay any shortfall to the Landlord upon receiving its invoice. In the event the property taxes are less than the amount paid by the Tenant the Landlord shall credit the difference on account of the taxes due for the following year going forward.<sup>12</sup>

19. In November 2014, Spergel brought a motion for an order requiring Junior Academy to pay rent and other arrears, including payments for property taxes to Spergel in the total amount of \$304,524.31.<sup>13</sup>

20. The motion was heard on December 18, 2014. At the motion Junior Academy acknowledged that it owed \$188,845.40 to Spergel on account of unpaid rent. Justice Newbould ordered that Junior Academy pay \$188,845.40 to Spergel.<sup>14</sup>

21. Junior Academy failed to pay the \$188,845.40 to Spergel.<sup>15</sup>

#### 368 Ontario Purchases 2454 Bayview

22. On January 8, 2015, Justice Newbould authorized the sale of 2454 Bayview to 368 Ontario.<sup>16</sup> The sale was completed on or around January 22, 2015.<sup>17</sup>

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<sup>12</sup> Lease for 2454 Bayview Avenue, expiring July 31, 2021, *supra* note 3, RC, Tab 2, pp 8-48

<sup>13</sup> Notice of Motion of msi Spergel inc., returnable on a date to be scheduled on November 25, 2014, Exhibit "I" to the Coghlin Affidavit, Responding Motion Record, Exhibit Book, vol. II, Tab 1I, pp 172-177, RC, Tab 8, pp 70-75

<sup>14</sup> Order of Justice Newbould, dated December 18, 2014, Exhibit "L" to the Coghlin Affidavit, Responding Motion Record, Exhibit Book, vol. II, Tab 1L, pp 356-358, RC, Tab 9, pp 76-78

<sup>15</sup> Notice of Motion of Junior Academy Inc. and DiBri Inc., returnable of May 25, 2014, at paras 23 and 24, Applicant Motion Record, Exhibit Book, vol. I, Tab 1, p 7, RC, Tab 10, p 85



23. The Agreement of Purchase and Sale stated that 368 Ontario would assume all existing leases and occupancy agreements affecting 2454 Bayview.<sup>18</sup>

24. The Vesting Order had the effect of transferring 2454 Bayview from Spergel to 368 Ontario free and clear of any mortgages and security interests by discharging the registered encumbrances, including DiBri's second mortgage. The Lease was assigned to 368 Ontario by way of "Permitted Encumbrance" under the agreement.<sup>19</sup>

#### Distribution of the Sale Proceeds

25. Following the sale of 2454 Bayview to 368 Ontario, the Manager netted \$1,303,199 in surplus funds after paying out the first mortgage in favour of BDBC.<sup>20</sup>

26. On April 21, 2015, the Manager brought a motion to determine the distribution of sale proceeds from 2454 Bayview.<sup>21</sup>

27. On consent of Junior Academy, DiBri and 368 Ontario, Justice Newbould ordered that:

- (a) TCE Capital (an assignee of the DiBri second mortgage) be paid \$424,655 in full satisfaction of its claim;

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<sup>16</sup> Order of Justice Newbould, dated January 8, 2015, *supra* note 2, RC, Tab 1, pp 1-7

<sup>17</sup> Agreement of Purchase and Sale (2454 Bayview Avenue, Toronto, Ontario), dated December 1, 2014, Exhibit "O" to the Coghlin Affidavit, Responding Motion Record, Exhibit Book, vol. II, Tab 10, pp 384-422, RC, Tab 11, pp 87-125

<sup>18</sup> Agreement of Purchase and Sale (2454 Bayview Avenue, Toronto, Ontario), dated December 1, 2014, at cl. 5(c), *ibid*, RC, Tab 11, p 91

<sup>19</sup> Order of Justice Newbould, dated January 8, 2015, at Schedules C and D, *supra* note 2, RC, Tab 1, pp 6-7

<sup>20</sup> Spergel Interim Statement of Receipts and Disbursements, dated January 27, 2015, Exhibit "K" to the Johnson Affidavit, Applicant Motion Record, Exhibit Book, vol. 1, Tab 2K, p 327, RC, Tab 12, p 126

<sup>21</sup> Order of Justice Newbould, dated April 21, 2015, Exhibit "L" to the Johnson Affidavit, Applicant Motion Record, Exhibit Book, vol. I, Tab 2L, pp 328-335, RC, Tab 13, pp 127-133

- (b) the Manager hold \$188,845.40 in trust pending further order of the court (again, the “Disputed Funds”); and
- (c) DiBri, as second mortgagee, be paid the balance of \$613,500.<sup>22</sup>

### The Order Under Appeal

28. On May 25, 2015, Junior Academy moved for a declaration that Junior Academy was entitled to a tax credit of \$136,319.87 from 368 Ontario for pre-paid taxes.

29. Junior Academy claimed that it had paid \$185,000 to Academy Lands (the Waltons) comprised of:

- (a) thirty-two (32) \$5,000 payments pursuant to the Lease (32 x \$5,000 = \$160,000); and
- (b) \$10,000 and \$15,000 payments paid by DiBri to the Waltons pursuant to s. 5(d) of the Sale Agreement between Dibri, Junior Academy and the Waltons.<sup>23</sup>

30. Section 5(d) of the Sale Agreement states:

The Company [Academy Lands] will pay to DiBri the sum of \$6.25 million, subject to adjustments, as follows:

...d. The sum of \$100,000 will be held back by the Company on account of property taxes expected to be owing from the period 2008 through to Closing...<sup>24</sup>

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<sup>22</sup> Order of Justice Newbould, dated April 21, 2015, *ibid*, RC, Tab 13, pp 127-133

<sup>23</sup> Notice of Motion, of Junior Academy Inc. and DiBri Inc., returnable May 25, 2015, *supra* note 15, RC, Tab 10, pp 79-86

<sup>24</sup> Agreement between the Junior Academy and DiBri Inc. and The Rose and Thistle Group at para 5(d), Exhibit “B” to the Johnson Affidavit, *supra* note 8, RC, Tab 5, p 58

31. A further oral agreement reduced the \$100,000 hold-back to \$25,000. There is no evidence explaining why this change was made.<sup>25</sup>

32. Junior Academy sought \$136,319.87 on the motion below, which it calculated as the remainder of its pre-payment of \$185,000, following the payment of property taxes of \$10,681.09 in 2012, \$11,999.36 in 2013 and \$25,999.68 in 2014.<sup>26</sup>

33. DiBri (operating with the same principals as Junior Academy) took the position that it was entitled to receipt of the Disputed Funds in respect of its second mortgage.

34. 368 Ontario took the position that:

(a) the obligations and the benefits of the prior landlord flowed together. If Junior Academy was entitled to the benefit of the prepayment of taxes to Academy Lands, 368 Ontario was entitled to \$188,845.40 in rent arrears Junior Academy was ordered to pay in December, 2014; and

(b) the amount claimed by Junior Academy for prepayment ought be reduced by \$88,138.03 because:

(1) \$62,138.03 was paid by Spergel from the closing funds in satisfaction of the 2014 outstanding tax arrears (in addition to the \$25,999.68 Junior Academy said was paid in 2014); and

(2) \$25,000 of the set-off claimed by Junior Academy was paid to Academy Lands by DiBri further to the Sale Agreement between

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<sup>25</sup> Johnson Affidavit at para 12, Applicant Motion Record, Exhibit Book, vol. I, Tab 2, pp 13-36, RC, Tab 14, p 134

<sup>26</sup> Johnson Affidavit, *ibid* at para 13, RC, Tab 14, p 135

DiBri Inc., Junior Academy and Academy Lands, not the Lease Agreement. That amount could not be an obligation of a successor landlord who did not assume the agreement.

35. Justice Newbould correctly held that:

- (a) 368 Ontario was entitled to the \$188,845.40 in rent arrears that Junior Academy had not paid to the former landlord; and
- (b) Junior Academy's claim was reduced to \$49,181.84 for over payment of taxes.

36. In the result:

- (a) 368 Ontario received \$136,319.56 from the Disputed Funds (being \$188,845.40 in rent arrears - \$49,181.84 tax credit); and
- (b) DiBri received the balance of the Disputed Funds, being \$49,181.84 in partial satisfaction of their second mortgage.<sup>27</sup>

### **PART III - POSITION ON ISSUES AND STANDARD OF REVIEW**

37. The Respondent takes the following position with respect to the issues raised by the Appellants:

- (a) Justice Newbould correctly held that 368 Ontario, as the current landlord, took the assignment of the Lease "subject to the equities" and was entitled to the rent arrears owed by Junior Academy to Spergel/Academy Lands;

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<sup>27</sup> Endorsement of Justice Newbould, dated May 25, 2015, Appeal Book and Compendium, Tab 3, RC, Tab 15, pp 136-142

- (b) Justice Newbould correctly held that Junior Academy was not entitled to credit from 368 Ontario for the \$25,000 paid by DiBri to Academy Lands under the Sale Agreement. 368 Ontario not having assumed the Sale Agreement. 368 Ontario is not responsible for obligations that arose under a contract that was not assigned to 368 Ontario; and
- (c) Justice Newbould properly applied equitable set-off in order to satisfy the debts owed among the parties. On the facts before the motion judge, set-off was the most efficient and practical resolution for the debts between the parties and was within Justice Newbould's discretion.

38. The standard of review for this appeal is palpable and overriding error. Justice Newbould's interpretation of the Lease is a matter of mixed fact and law requiring the application of legal principles to the words of the written contract.<sup>28</sup>

#### **PART IV - LAW AND ARGUMENT**

##### **A. 368 ONTARIO IS ENTITLED TO \$188,845.40 IN RENT ARREARS FROM JUNIOR ACADEMY**

39. Justice Newbould correctly found that 368 Ontario assumed the Lease subject to all equities and the full state of accounts between the landlord and tenant.

40. There is no dispute that:

- (a) Junior Academy failed to pay \$188,845.40 in rent arrears to Spergel/Academy Lands, as ordered by the court in December, 2014;<sup>29</sup> and

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<sup>28</sup> *Creston Moly Corp v Sattva Capital Corp*, 2014 SCC 53 at para 50, Respondent's Book of Authorities ("Respondent's BOA"), Tab 1

- (b) as part of the Agreement of Purchase and Sale, dated December 1, 2014, 368 Ontario agreed to assume the Lease. There were no exclusions.

41. In the circumstances, Justice Newbould correctly relied on the decision of the Court of Appeal in *TDL Group*.<sup>30</sup> In *TDL Group*, the Court of Appeal held that the law of assignment was relevant:

An assignment substitutes a new party – creditor or debtor – for one of the original parties to the contract. [...] Here, the Mortgagee stepped into the Landlord’s shoes or substituted for the Landlord under the Lease.<sup>31</sup>

42. In fact, Junior Academy relied on exactly this authority for its argument on the motion below. It seeks, however, to limit its application to obligations of the prior landlord, with no attendant obligations of the tenant to the benefit of the landlord.

43. The Court went on to hold that “an assignee takes subject to all equities that have accrued at the time the debtor has notice of the assignment”<sup>32</sup> and that the Mortgagee took over the Landlord’s position, including “the state of accounts then existing between the Landlord and tenant.”<sup>33</sup>

44. The Court of Appeal applied contractual principles, including commercial practice, to reach its conclusions.<sup>34</sup>

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<sup>29</sup> Factum of the Appellants at paras 23 and 49

<sup>30</sup> *473807 Ontario Ltd v TDL Group Ltd*, [2006] OJ No 3050 (CA) at para 53 (“*TDL Group*”), Respondent’s BOA, Tab 2

<sup>31</sup> *TDL Group* at para 53, *supra* note 30, Respondent’s BOA, Tab 2

<sup>32</sup> *TDL Group* at para 54, *supra* note 30, Respondent’s BOA, Tab 2

<sup>33</sup> *TDL Group* at para 56, *supra* note 30, Respondent’s BOA, Tab 2; See also *Arlesford Trading Co Ltd v Servansingh*, [1971] 3 All ER 113 at 115, Respondent’s BOA, Tab 3

<sup>34</sup> The Court of Appeal also relied, in part, on section 53(1) of the *Conveyancing and Law of Property Act*, which codifies the rule that an absolute assignment in writing, with notice to the debtor, “is effectual in law...to pass and

45. DiBri, as second mortgagee, is not entitled to rent arrears under the terms of the Lease. None of the Lease, the Agreement of Purchase and Sale, or the mortgage registration documents provide for an assignment of rents to DiBri under any circumstances.

46. As Justice Laskin said in *TDL Group*:

TDL's action against the Landlord arose from a landlord-tenant dispute between them. I do not see why, as a matter of law or policy, a mortgagee should be encouraged to intervene in a landlord-tenant dispute.<sup>35</sup>

47. In any event, DiBri, as guarantor for Junior Academy under the Lease, is jointly and severally liable to 368 Ontario for the \$188,845.40 in rent arrears.<sup>36</sup>

**B. JUSTICE NEWBOULD PROPERLY REDUCED JUNIOR ACADEMY'S CREDIT BY \$25,000**

48. Justice Newbould correctly reduced Junior Academy's tax credit by \$25,000. The \$25,000 was not paid by Junior Academy and was not paid pursuant to the Lease. The \$25,000 was advanced by DiBri under the Sale Agreement with Academy Lands.<sup>37</sup>

49. Justice Newbould correctly held that there was no privity of contract between Academy Lands and 368 Ontario with respect to the Sale Agreement between the Appellants and Academy Lands.<sup>38</sup>

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transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same". *Conveyancing and Law of Property Act*, RSO 1990 c. C-34 at s 53(1). The right of a successor landlord to stand in the shoes of its predecessor is also codified in section 4 of the *Commercial Tenancies Act*.

<sup>35</sup> *TDL Group* at para 71, *supra* note 30, Respondent's BOA, Tab 2

<sup>36</sup> Lease for 2454 Bayview Avenue, expiring July 31, 2021 at cl. 14.1, *supra* note 3, RC, Tab 2, pp 34-35

<sup>37</sup> The Appellants mistakenly state at paragraph 40 of their Factum that Junior Academy was the payor of the \$25,000 to Academy Lands. In fact, the Appellants' evidence clearly demonstrates that these monies were paid by DiBri, as required under the Sale Agreement: See Copies of cheques from DiBri and Junior Academy to Academy Lands, Exhibit "E" to the Johnson Affidavit, Applicant Motion Record, Exhibit Book, vol. I, Tab 2E, pp 223-256, Respondent's Compendium, Tab 16, pp 143-144

<sup>38</sup> Endorsement of Justice Newbould, dated May 25, 2015, *supra* note 27, RC, Tab 15, pp 136-142

50. 368 Ontario is a stranger to the Sale Agreement.<sup>39</sup>

51. Unlike the Lease, the Sale Agreement between the Appellants and Academy Lands was not assigned to 368 Ontario when it purchased 2454 Bayview, nor was it permitted as an encumbrance under Justice Newbould's Vesting Order.<sup>40</sup>

**C. THE MOTIONS JUDGE'S DECISION TO APPLY EQUITABLE SET-OFF WAS EFFICIENT AND PRACTICAL**

52. Justice Newbould properly applied equitable set-off principles to arrive at a final judgment that was practical and efficient in the circumstances.

53. The Supreme Court in *Telford v Holt* established that equitable set-off is available in circumstances where there are mutual debts that arise out of the same contract or closely interrelated contracts. It is especially useful where there has been an assignment of interests.<sup>41</sup> Set-off was also applied in *TDL Group* to permit the tenant to set-off a court judgment against a predecessor landlord as against future rents to the successor landlord.<sup>42</sup>

54. Justice Newbould appropriately applied the principle of set-off to order Junior Academy to set-off its tax credits against rent arrears.

55. Set-off in this case was the most efficient way of dealing with the mutual debts between the parties. It permitted the Court to finally dispose of all the issues with respect to 2454 Bayview and

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<sup>39</sup> *Coast-to-Coast Industrial Development Co v 1657483 Ontario Inc*, 2010 ONSC 2011 at paras 43 and 44, Respondent's BOA, Tab 4

<sup>40</sup> Order of Justice Newbould, dated January 8, 2015, *supra* note 2, Respondent's Compendium, Tab 1, pp 1-7

<sup>41</sup> *Telford v Holt*, [1987] 2 SCR 193 at para 26, Respondent's BOA, Tab 5

<sup>42</sup> *TDL Group* at para 55, *supra* note 30, Respondent's BOA, Tab 2



permitted the discharge of the Receiver and Manager from their duties with respect to the property.<sup>43</sup>

56. In the result, 368 Ontario ends up with a net award of \$139,663. As canvassed above, DiBri and Junior Academy are both wholly owned and controlled by the Johnsons. Even if Justice Newbould made an error in assigning the \$49,181.84 award to DiBri instead of to Junior Academy, this ground of appeal is a waste of court resources.

57. Justice Newbould had the discretion to set-off the amounts owing by all the parties to arrive at a result that was both just and efficient.

#### **PART V - ORDER REQUESTED**

58. The Appellant respectfully requests that this appeal be dismissed.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 9<sup>th</sup> day of October, 2015.

FOR:

Peter H. Griffin

Danielle Glatt

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<sup>43</sup> Order of Justice Newbould, dated May 26, 2015, at paras 3 and 4, Appeal Book and Compendium, Tab 2, RC, Tab 17, pp 145-147

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LTD. and EGLINTON CASTLE INC.

Respondents

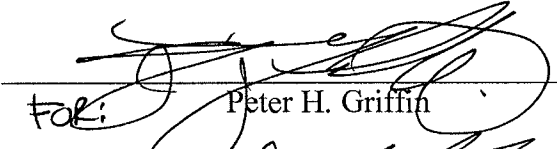

and

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

**CERTIFICATE**

I estimate that 30 minutes will be needed for my oral argument of the appeal, not including  
reply. An order under 61.09(2) (original record and exhibits) is not required.

DATED AT Toronto, Ontario this 9<sup>th</sup> day of October, 2015.

  
for: Peter H. Griffin  
  
Danielle Clatt

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## **SCHEDULE “A”**

### **LIST OF AUTHORITIES**

1. *Creston Moly Corp. v Sattva Capital Corp.*, 2014 SCC 53
2. *473807 Ontario Ltd. v TDL Group Ltd.*, [2006] OJ No 3050 (CA)
3. *Arlesford Trading Co Ltd. v Servansingh*, [1971] 3 All ER 113
4. *Coast-to-Coast Industrial Development Co. v 1657483 Ontario Inc.*, 2010 ONSC 2011
5. *Telford v Holt*, [1987] 2 SCR 193

## **SCHEDULE "B"**

### **TEXT OF STATUTES, REGULATIONS & BY - LAWS**

1. *Conveyancing and Law of Property Act*, RSO 1990 c. C-34 at s 53(1):

Any absolute assignment made on or after the 31st day of December, 1897, by writing under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action is effectual in law, subject to all equities that would have been entitled to priority over the right of the assignee if this section had not been enacted, to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor.

2. *Commercial Tenancies Act*, RSO 1990 c L.7 at s 4:

All persons being grantees or assignees of the Queen, or of any person other than the Queen, and the heirs, executors, successors and assigns of every of them, shall have and enjoy like advantage against the lessees, their executors, administrators, and assigns, by entry for non-payment of the rent, or for doing of waste, or other forfeiture, and also shall have and enjoy all and every such like and the same advantage, benefit, and remedies, by action only, for the non-performance of other conditions, covenants, or agreements, contained and expressed in the indentures of their said leases, demises or grants against all and every of the said lessees and grantees, their executors, administrators, and assigns as the said lessors or grantors themselves, or their heirs or successors, might have had and enjoyed at any time or times.

DBDC SPADINA LTD., et al.  
Applicants

-and- NORMA WALTON et al.  
Respondents

Court File No.: C60593  
Court File No. CV-13-10280-00CL

**COURT OF APPEAL FOR ONTARIO**

PROCEEDING COMMENCED AT TORONTO

**FACTUM OF THE RESPONDENT, 368230 ONTARIO  
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