Court File No. CV-18-00611214-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

SEARS CANADA INC., by its Court-appointed Litigation Trustee,
J. DOUGLAS CUNNINGHAM, Q.C.

Plaintiff

- and -

ESL INVESTMENTS INC., ESL PARTNERS, LP, SPE I PARTNERS, LP,
SPE MASTER I, LP, ESL INSTITUTIONAL PARTNERS, LP,
EDWARD S. LAMPERT, EPHRAIM J. BIRD, DOUGLAS CAMPBELL,
WILLIAM CROWLEY, WILLIAM HARKER, R. RAJA KHANNA, JAMES
MCBURNEY, DEBROAH ROSATI and DONALD ROSS

Defendants

RESPONDING BOOK OF AUTHORITIES OF THE DEFENDANT FORMER DIRECTORS, R. RAJA KHANNA AND DEBORAH ROSATI

(Documentary Production Motions, Returnable March 20, 2019)

March 11, 2019

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Litigation Service List
Last Updated Mar. 8, 2019 at 3:21 PM

Court File No. CV-18-611219-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

FTI CONSULTING CANADA INC.,
in its capacity as Court-appointed monitor in proceedings
pursuant to the *Companies' Creditors Arrangement Act*, RSC 1985, c. c-36

Plaintiff

and

ESL INVESTMENTS INC., ESL PARTNERS, LP, SPE I PARTNERS, LP, SPE MASTER I, LP, ESL INSTITUTIONAL PARTNERS, L.P., EDWARD S. LAMPERT, WILLIAM HARKER and WILLIAM CROWLEY

Defendants

Court File No. CV-18-611214-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

SEARS CANADA INC., by its Court-appointed Litigation Trustee,
J. DOUGLAS CUNNINGHAM, Q.C.

Plaintiff

and

ESL INVESTMENTS INC., ESL PARTNERS LP, SPE I PARTNERS, LP,
SPE MASTER I, LP, ESL INSTITUTIONAL PARTNERS, L.P.,
EDWARD LAMPERT, EPHRAIM J. BIRD, DOUGLAS CAMPBELL, WILLIAM CROWLEY,
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and DONALD ROSS

Defendants

Litigation Service List
Last Updated Mar. 8, 2019 at 3:21 PM

Court File No. CV-18-611217-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

MORNEAU SHEPELL LTD., in its capacity as administrator of the Sears Canada Inc. Registered Pension Plan

Plaintiff

and

ESL INVESTMENTS INC., ESL PARTNERS, LP, SPE I PARTNERS, LP, SPE MASTER I, LP, ESL INSTITUTIONAL PARTNERS, LP, EDWARD S. LAMPERT, WILLIAM HARKER, WILLIAM CROWLEY, DONALD CAMPBELL ROSS, EPHRAIM J. BIRD, DEBORAH E. ROSATI, R. RAJA KHANNA, JAMES MCBURNEY and DOUGLAS CAMPBELL

Defendants

Court File No. 4114/15 (Milton)

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

1291079 ONTARIO LIMITED

Plaintiff

and

ESL INVESTMENTS INC., SEARS CANADA INC., WILLIAM C. CROWLEY, WILLIAM R. HAWKER, DONALD CAMPBELL ROSS, EPHRAIM J. BIRD, DEBORAH E. ROSATI, R. RAJA KHANNA, JAMES MCBURNEY and DOUGLAS CAMPBELL

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Proceeding under the Class Proceedings Act, 1992

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TAB 1

2014 ONSC 5515
Ontario Superior Court of Justice

De Iuliis v. Zilli

2014 CarswellOnt 13547, 2014 ONSC 5515, 245 A.C.W.S. (3d) 47

Danilo de Iuliis also known as Danny de Iuliis, Emilia de Iuliis, Sebastian de Iuliis, by his litigation guardian, Emilia de Iuliis, Andrea de Iuliis, by her litigation guardian, Emilia de Iuliis, and Dominic de Iuliis, by his litigation guardian, Emilia de Iuliis v. Luigia Grazia Zilli, personally, and carrying on business as Kerr Village Art Gallery, and Corporation of the Town of Oakville operating as "Town of Oakville"

Emery J.

Heard: August 21, 2014
Judgment: September 25, 2014
Docket: Milton 1864/14

Counsel: Douglas J. Simpson, for Plaintiffs
Robert W. Wilson, for Defendant, Luigia Grazia Zilli
Scott Hamilton, for Defendant, Corporation of the Town of Oakville

***Emery J.*:**

1 Danilo De Iuliis is convinced that Luigia Grazia Zilli laid a complaint against him on May 16, 2012 to his employer, the Town of Oakville because he had broken off an affair with her two months before. Mr. De Iuliis had been employed as a Parking Control Officer by the Town and Ms. Zilli's business was located on his patrol route. Mr. De Iuliis is equally convinced that the Town relied upon the complaint laid by Ms. Zilli and subsequent statements made by her in the course of its investigation when it terminated his employment two months later.

2 Mr. De Iuliis and his family commenced this action against Ms. Zilli and the Town of Oakville seeking damages they have allegedly suffered as a result of the defendants tortious conduct. Mr. De Iuliis seeks general, special and punitive or exemplary damages against Ms. Zilli for defamation, intentional infliction of emotional suffering, extortion, intimidation, uttering death threats and intentional interference with contractual relations between himself and the Town. He seeks general, special and punitive or exemplary damages against the Town for defamation and for negligent investigation.

3 Mr. De Iuliis has deposed that the plaintiffs commenced this action before they could obtain the complaint and statements of Ms. Zilli or the documentary record of the investigation conducted by the Town to preserve their claims within the relevant limitation period. Mr. De Iuliis deposes that it has always been the intention of the plaintiffs to amend the Statement of Claim once those documents were produced.

4 The plaintiffs bring this motion under Rule 30.04(5) to compel the defendant Zilli and the defendant Town to produce the required documents. Before submissions, counsel for Ms. Zilli advised the court that the plaintiffs had settled the motion with Ms. Zilli. Therefore, the motion proceeded as against the Town only for production of the following documents:

1. The complaint received by the Town from the defendant Luigia Grazia Zilli on May 16, 2012;

2. All documents received by the Town from the defendant Luigia Grazia Zilli on or after May 16, 2012;

3. The record of any oral statements, to the extent that they were reduced to writing by employees of the Town, made by Ms. Zilli on or about May 16, 2012 either preceding or following the complaint; and,

4. Transcripts or notes taken by employees of the Town of any interviews of Ms. Zilli conducted by the Town between May 16, 2012 and July 25, 2012.

Background

5 Counsel for the Town of Oakville served a Notice of Intent to Defend on or about April 23, 2014. The Town of Oakville then served a Demand for Particulars dated May 2, 2014. The Demand included a request for particulars of the allegations contained in paragraph 27, various sub-paragraphs of paragraph 31, and paragraphs 32 and 35 of the Statement of Claim.

6 On or about May 30, 2014, Mr. De Iuliis served particulars in response to the Demand for Particulars of the Town. In response to the Demand for Particulars to the allegations contained in paragraphs 27 and 31 of the Statement of Claim, Mr. De Iuliis stated that the plaintiffs will bring a motion under Rule 30.04(5) to obtain them from the defendants.

7 The plaintiffs had already applied to the Town of Oakville for access to the documents required to provide these particulars to the allegations contained in the Statement of Claim, under the *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56. The Town of Oakville has provided Mr. De Iuliis his employment file. However, the Town refused to provide the complaint(s) and statement(s) of Ms. Zilli to the Town on the basis that the *Act* does not apply to "records collected, prepared, maintained or used by or on behalf of an institution in relation to meetings, consultations, discussions or communications about labour relations or employment related matters" pursuant to section 52(3).

8 The plaintiffs have also served a request to inspect documents on each of the defendants. Both defendants have refused to produce the documents requested. I note that the request to inspect documents does not make reference to any pleading, affidavit or other document, as required by Rule 30.04(1) or (2).

9 Neither of the defendants have filed a Statement of Defence. Mr. De Iuliis states in his affidavit that the defendants have indicated their intention to bring a Motion under Rule 21 to strike out all or part of the Statement of Claim. Although materials for those motions have not been served, October 21, 2014 has been reserved as a date for the court to hear those motions.

10 There is evidence before me that Mr. De Iuliis has good reason to conclude that Ms. Zilli had made complaints or statements about him to the Town of Oakville that lead to the investigation. He attaches to his affidavit an email sent by Ms. Zilli to himself in which she threatened to inform the Town about a personal relationship between them that implied her intention to procure the termination of his employment.

11 Mr. De Iuliis has given evidence that he inferred from the events that followed Ms. Zilli's threat on May 16, 2012 that her complaint or statements to the Town on or after May 16, 2012 were of a serious and damaging nature to him.

12 On May 16 2012, the Town issued a letter to Mr. De Iuliis stating that he had been placed on administrative suspension because it had received a complaint from a member of the public. Mr. De Iuliis deposes that although the complainant was not identified in the letter, he is certain that the complaint was made by Ms. Zilli. In her email, Ms. Zilli declared to Mr. De Iuliis that when someone betrays her, she goes into "destroyer mode".

13 The Town subsequently terminated Mr. De Iuliis from his position as a parking control officer in July 2012. In the Statement of Claim, Mr. De Iuliis pleads that he accepted a severance package from the Town to mitigate his damages.

Analysis

14 Rule 30.04(5) provides the court with the discretion to order the production of documents at any time, provided those documents are not privileged and are in the possession, control or power of the other party. However, there are limits on the exercise of this discretion. Generally, the power to order documentary disclosure before the close of pleadings is used sparingly. Where it is in the interest of justice to order production before the close of pleadings, using that power merits greater consideration.

15 In *Hong Kong (Official Receiver) v. Wing*, [1986] O.J. No. 1104 (Ont. H.C.) the court held that production of a documents should not be ordered prior to the close of pleadings unless the court is satisfied that the documents at issue were essential or necessary for the purpose of allowing the requesting party to plead. It would appear this statement was based on Rule 30.03(1) as it read before the amendments to the *Rules of Civil Procedure* came into effect on January 1, 2010. There is no reason for present purposes why that principle should not be considered the general rule today even with introduction of the Discovery Plan under Rule 29.1.03.

16 The affidavit sworn by Melanie Fullerton in response to the motion contains a helpful chronology of most events in the litigation to date. However, the affidavit does not give a reason why the Town is refusing the request for documents at this stage, or makes any claims for privilege over the documents.

17 There is no denial that those documents are in the possession, power or control of the Town. Indeed, the letter from the Town to Mr. De Iuliis dated May 16, 2012 and attached to as Exhibit "B" to his affidavit refers specifically to a complaint and the start of an investigation. And attached at Exhibit "A" to Ms. Fullerton's affidavit is the letter from the Town to Mr. De Iuliis dated July 25, 2012 confirming the conclusion of the investigation resulting in his dismissal.

18 Where a party makes a claim for defamation, the law contains technical requirements for pleading defamation as a cause of action. Those requirements do not require the Statement of Claim to set out the exact words used, but the words that are substantially the words allegedly spoken or published to make it sufficiently clear to enable the defendant(s) to plead: *Lysko v. Braley* (2006), 79 O.R. (3d) 721 (Ont. C.A.). Mere speculation is not enough: *Promatek Industries Ltd. v. Creative Micro Designs Inc.*, [1989] O.J. No. 159 (Ont. Master).

19 Likewise, the requirements of making a claim for negligent investigation informed by defamatory statements raises the requirement that the plaintiffs know the basis for the investigation in order to plead. The tort of negligent investigation has been recognized in Ontario as a cause of action at least since *Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board* [2005 CarswellOnt 4589 (Ont. C.A.)], [2005] CanLII 34230, affirmed at 2007 SCC 41 (S.C.C.). The Court of Appeal in *Hill* described the appropriate standard of care for the investigating officers as being what would be expected of reasonable officers in like circumstances, subject to the qualification that the standard of care is tied to reasonable and probable grounds at the point of arrest.

20 I would think that the question of "like circumstances" makes the documents relevant to allow the parties to plead for the purpose of eventual disclosure and production. The question is, however, whether the court should order production of those documents before the defendants have pleaded.

21 I conclude that the Town must produce those documents now as those documents are essential to the plaintiffs' case. The documents are not only essential because of the evidence of Mr. De Iuliis that the plaintiffs always intended to amend the Statement of Claim when those documents were obtained and the strict rules for pleading defamation claims, they were made essential when the Town gave notice of its intention to bring a motion under Rule 21 to strike the Statement of Claim.

22 In *Freedom International Brokerage Co. v. Tullett Prebon Canada Ltd.* [2009 CarswellOnt 6113 (Ont. S.C.J.)], 2009 CanLII 54766, the plaintiff by counterclaim alleging libel and slander moved for the production of a letter in the possession of the defendant to the counterclaim. The defendant to the counterclaim had served a Demand for Particulars

of the allegations of the libel and slander. The defendant to the counterclaim did not deny the existence of the letter but took issue with the lack of specifics and particularity in the pleading. Although the plaintiff by counterclaim responded to the Demand for Particulars and stated it would provide a more fulsome response once the letter was produced, the defendant to the counterclaim served its motion to strike pleadings.

23 Master Brott expressed the view that on a motion under Rule 30.04(5), when the court finds a valid reason to order one party to an action to produce a document to another party, then the one party should be ordered to produce those documents.

24 The Court in the *Freedom International Brokerage* case found that it was the pending motion of the defendant to the counterclaim to strike pleadings that rendered the production of the subject letter essential. The Master also indicated that she relied heavily on Rule 1.04 that requires that all *Rules of Civil Procedure* shall be construed liberally to secure the just, most expeditious and least expensive determination of every civil proceeding on the merits. She expressed the view that the motion to strike might be averted once the letter was produced.

25 The decision in *Freedom International Brokerage* is on all fours with the motion before me. I do not accept the argument made by the Town that the reasoning of the Master in *Freedom International Brokerage* can be distinguished on the facts. The reality is that a defendant bringing a motion to strike and the threat of bringing a motion to strike coupled with booking a long motion date is a distinction without a difference. In each instance, the pleading of the plaintiff is under attack and the life of the action is placed in imminent danger of being dismissed.

26 Production of the documents at issue by the Town will enable the plaintiffs to amend the Statement of Claim to meet the technical requirements for pleading defamation and negligent investigation claims. Production of those documents will allow the plaintiffs to provide a more fulsome response to the Demand for Particulars served by the Town. When those amendments are made and particulars given, the Rule 21 motion may be adverted if it is brought at all. If the defendant Town brings the motion, each of the parties will at least have the subject documents to use as they may. It will level the playing field and give each of the litigants the same advantage with respect to those documents. There is something fundamentally unfair about a defendant who not only demands particulars it already possesses, but also seeks to strike pleadings or dismiss the action of a plaintiff because of documents it alone controls and is holding back.

27 In my view, the plaintiffs' motion is not a fishing expedition. It is a legitimate request for documents in the hands of the Town that in the interests of justice should be produced under the prevailing circumstances. Those documents are relevant and would likely be disclosed after pleadings were closed in the normal course of events. The plaintiffs are at an unfair disadvantage by not having access to those documents now.

28 I therefore order the Town of Oakville to produce the documents at issue by October 3, 2014.

29 If any party seeks costs of this motion, written submissions may be made consisting of no more than three typewritten pages not including a costs outline, and sent by fax to my Judicial Assistant Sherry McHady at (905) 456-4834 by October 10, 2014.

Motion granted.

TAB 2

2008 CarswellOnt 7495
Ontario Superior Court of Justice

Durling v. Sunrise Propane Energy Group Inc.

2008 CarswellOnt 7495, [2008] O.J. No. 5031, 173 A.C.W.S. (3d) 408

JAMES DURLING, JAN ANTHONY THOMAS, JOHN SANTORO, GIUSEPPINA SANTORO, ANNA MANCO, FRANCESCO MANCO and CESARE MANCO v. SUNRISE PROPANE ENERGY GROUP INC., 1367229 ONTARIO INC., 1186728 ONTARIO LIMITED, 1452049 ONRAIO INC., VALERY BELAHOV, SHAY (SEAN) BEN-MOSHE, LEONID BELAHOV, ARIE BELAHOV, 2094528 ONTARIO INC., HGT HOLDINGS LTD., TESKEY CONSTRUCTION CO. LTD. and TESKEY CONCRETE CO. LTD.

Master R. Dash

Judgment: December 11, 2008
Docket: CV-08-363271-00CP

Counsel: Ted Charney, Harvin Pitch for Plaintiffs
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Daniel Murdoch for Teskey Defendants
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Lisa LaHorey, Laurie Murphy for Non-party, Technical Standards & Safety Authority
George Cowley for Non-parties Toronto Police Services, William Blair

***Master R. Dash*:**

1 On August 10, 2008 an explosion and fire occurred at the Sunrise Propane facility in Toronto, resulting in an evacuation of the surrounding area and damage to a large number of properties. [1] The plaintiffs herein claim losses arising from physical damage to and contamination of their properties, diminution in value and emotional distress. The Fire Marshall [2] and Office of the Chief Coroner [3] closed off and took custody of the site and, together with the Ministry of the Environment ("MOE") [4], the Ministry of Labour ("MOL") [5] and the Technical Standards & Safety Association ("TSSA") [6] (collectively the "Regulatory Agencies") have been conducting various investigations into the causes of the explosion and compliance or possible breaches of various statutes or regulations. The Toronto Police Services ("police") have also conducted an investigation. The site has been altered as a result of the investigations. It has been further altered as a result of clean-up efforts. Five intended class actions were commenced on August 13, 2008. [7] No motion for certification is pending. The plaintiffs move herein for an order compelling the Regulatory Agencies and the police to produce the fruits of their investigations so that their expert can prepare a report as to the cause of the explosion. Other relief claimed has been resolved by the parties.

The Documents and the Position of the Parties and Non-Parties

2 Although the different agencies have gathered or prepared different documentation as a result of their investigations, and at the risk of over-simplification, the fruits of these investigations include the following:

(a) photographs, aerial photos and videos taken at different times, including those depicting the condition of the site after the explosion but prior to alteration of the site for purposes of investigation and clean-up;

(b) sketches;

(c) witness statements and interview notes;

(d) investigation notes from investigators, provincial officers, inspectors and police officers;

(e) field reports, incident reports, activity reports and provincial officer's reports;

(f) internal memos and referral requests;

(g) research reports;

(h) Ontario Propane Association training records;

(i) internal documents from and provided by the defendants to investigators;

(j) pre-incident records from TSSA Fuel Safety Division including Sunrise propane licences and inspection documentation;

(k) TSSA documents respecting post-accident suspension to operate a propane filling plant and proposal to revoke licence;

(l) environmental assessments and clean-up documentation;

(m) correspondence and emails.

3 The Fire Marshall, the MOE and the MOL have prepared charts identifying items or sets of items including the creator of the items, a short description and whether the agency is prepared to release the items or whether they resist production as prejudicial to the ongoing investigations and contrary to the public interest. The Fire Marshall has identified 50 items or sets of items and the MOE 197 items or sets of items, the MOL approximately 51 items or sets of items plus an additional 197 that appear to duplicate the MOE list. The TSSA has not prepared charts but has identified approximately eight documents related to licensing of the site and the provisional suspension and proposal to revoke the licence, all of which have also been provided to the Sunrise defendants. It has also identified eight documents or categories of documents relating to its investigation. The police have not provided responding material or identified what documents are or were in their possession. Several of the Regulatory Agencies however have listed as documents in their possession photographs taken or documents obtained or prepared by the police. They will be treated as documents in the possession of the Regulatory Agencies for purposes of this motion and it is unnecessary to consider a separate production order against the police. The police were represented by counsel at the hearing of this motion but did not make independent submissions, relying on the position of the Crown.

4 The plaintiffs have produced a number of reports from their expert detailing information required from the Regulatory Agencies in order to opine as to the cause of the explosion. They have stated that "it is important to document the explosions/fire site such that all fuel sources and potential ignition sources are identified and properly examined." The expert would need to see "documentation relating to the layout of the facility including the location of bulk propane tanks, propane trucks..." They would need to examine the damage, location and displacement of objects of interest caused by the explosion. The expert (together with the experts for various defendants) had access to the site in early October 2008. They observed that the scene had been altered resulting from the investigation by the Regulatory Agencies, some objects had been removed from the site, many objects left on site were not returned to the location they were in immediately after the explosion and some were stacked in a large pile of debris. [8]

5 The plaintiffs' expert states that "the origin of the explosion and fires involves the coordination of information that is derived from witness information, fire patterns, arc mapping and fire dynamics." Witness information would include observations of people "who witnessed the explosion/fire or who are aware of conditions present at the time..." He adds that a "fire pattern analysis requires that all artifacts be placed in their pre-explosion/fire locations" but the expert has not been provided with the photographs, drawings and sketches that would depict the condition of the site and the location of the artifacts "in their pre-explosion/fire locations." He claims that observations of witnesses and the initial site assessment can "provide evidence that is necessary in determining the origin" of the fire/explosion. In particular, such evidence could narrow his focus to a more localized area of the site and may reduce the number of artifacts to be examined. Photographs taken during the initial site inspection "will depict burn patterns on artifacts that had not been moved or altered" and could lead to further investigation at the site. The expert therefore outlines four categories of documents taken from the Crown and TSSA motion records that he must review in order to help him recreate the site pre-disturbance and to enable him to "complete a scientific evaluation of the cause and origin of the explosions and fire", namely "witness statements, photographs/videos, exhibits (physical evidence)[9], and investigator's notes, sketches, drawings, aerial maps." The expert opines that he needs the information at this early stage for reasons that will be set out later in these reasons.

6 The Regulatory Agencies resist the motion, supported by the operators of the propane facility, on three grounds. Firstly they argue that the plaintiffs have not met the test for non-party production under the rules. Secondly they argue that the motion is premature as it attempts to obtain "pre-discovery discovery" prior to certification of the class proceeding and before the close of pleadings. Finally the Regulatory Agencies argue that they are entitled to screen the documents prior to production pursuant to the principles enunciated in *P. (D.) v. Wagg*[10]. They assert public interest grounds for refusing production at this time since their investigations are ongoing and since regulatory and possibly criminal charges may be laid. They are of the view that production at this stage may prejudice the ability of the Crown to properly conduct any prosecutions arising out of the investigation and may prejudice the right of the accused to a fair trial. They also assert that the time to be spent by the Regulatory Agencies in making production will take away from their investigation of this incident and other sites operated by Sunrise.

7 The plaintiffs, in support of their motion to compel the non-party Regulatory Agencies to provide copies of the documents created or received by them during the course of their investigations rely on section 12 of the *Class Proceedings Act*[11] ("CPA"), rule 30.10 and rule 32.01.

Inspection of Property: Rule 32.01

8 Rule 32.01(1) and (2) provide as follows:

> **32.01** (1) The court may make an order for the inspection of real or personal property where it appears to be necessary for the proper determination of an issue in a proceeding.
>
> (2) For the purpose of the inspection, the court may,
>
> (a) authorize entry on or into and the taking of temporary possession of any property in the possession of a party or of a person not a party;
>
> (b) permit the measuring, surveying or photographing of the property in question, or of any particular object or operation on the property; and
>
> (c) permit the taking of samples, the making of observations or the conducting of tests or experiments.

In my view rule 32.01 is of no assistance to the plaintiffs. The rule is concerned with physical evidence, and the inspection and testing thereof, not with documentary production. The rule would have been of assistance to the plaintiff in gaining access to the lands and objects remaining thereon and to objects removed from the site for the purposes of inspection

and testing, but the parties have agreed to a protocol with respect thereto and any remaining issues will be dealt with at a later date. It does not apply to the issues to be decided on the motion currently before me.

Section 12 of the Class Proceedings Act

9 The plaintiffs argue that Section 12 of the CPA can be utilized to provide enhanced early discovery rights in class actions. Section 12 provides as follows:

> 12. The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.

10 Section 35 of the CPA must also be considered:

> 35. The rules of court apply to class proceedings.

11 Although there is a broad discretion to make any order it deems appropriate, "the discretion conferred by s. 12 of the CPA is intended to supplement the Rules by accommodating the special nature of class proceedings. However, s. 12 is not designed to circumvent the normative Rules." [12] It would take extraordinary circumstances to allow pre-discovery discovery because of the nature of class proceedings:

> It is not normal under the Rules to provide pre-discovery disclosure of information and documentation... Section 12 confers a broad discretion upon the court to depart from the Rules. This would require extraordinary circumstances due to the specific "class" nature of the proceedings. Otherwise, the usual rules of court apply. [13]

Unless there is evidence "to suggest that the alleged 'class' nature of the claim calls for any departure from the discovery procedures set out in the Rules...the plaintiff is not entitled to additional or accelerated rights of discovery under s. 12 of the CPA." [14]

12 In my view the plaintiffs do not require the information from the Regulatory Agencies to plead. They have already delivered a fresh comprehensive statement of claim. Do they require the information in order to certify the action as a class proceeding? The Supreme Court of Canada has determined as follows:

> [T]he certification stage is decidedly not meant to be a test of the merits of the action...[A]ny inquiry into the merits of the action will not be relevant on a motion for certification...Rather the certification stage focuses on the form of the action. The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action.

[15]

13 Section 5 of the CPA sets out requirements for certification, one of which (section 5(1)(a)) is that "the pleadings or the notice of application discloses a cause of action." [16] Although "the representative of the asserted class must show some basis in fact to support the certification order" the evidentiary requirement applies only to the appropriateness of the action proceeding as a class proceeding and not to the merits of the claim itself, so long as the pleadings disclose a cause of action. The "test for certification contained in s. 5(1)(a) is to be determined solely by reference to the pleadings, by analogy to a Rule 21 motion to strike. No evidence is admissible in support of such determination." [17]

14 Since at the certification stage the plaintiffs do not require the information from the Regulatory Agencies in order to provide an evidentiary basis for liability, can it be said that they require the information in order to formulate a theory as to the cause of the explosion and the liability of the defendants so that they could prepare a pleading that "discloses a cause of action"? The plaintiffs have pleaded in paragraphs 31 to 37 of their statement of claim facts relating to unsafe truck-

to-truck transfer of propane and smoking in the vicinity of propane. They have pled four causes of action. In paragraphs 76 to 85 they plead material facts and a legal theory respecting causes of action in strict liability, nuisance and trespass, all relating to the escape of dangerous gases and of contaminants. In paragraphs 86 to 90 they plead material facts in support of a cause of action in negligence respecting the unsafe storage and supply of propane and unsafe operation of the facility. In paragraph 90 they plead 20 particulars of breach of a duty of care. Other pleadings relate to the liability of related companies and officers and directors. Although it is not my function to determine and I do not determine whether the statement of claim discloses a reasonable cause of action in law, I am of the view that the plaintiffs have articulated a cause of action in their statement of claim and have been able to do so without the information sought from the Regulatory Agencies. Although the information sought may help the plaintiffs better particularize the cause of action and perhaps result in an amendment to their statement of claim and will undoubtedly provide evidence that will ultimately help the plaintiffs prove the material facts as to the cause of the explosion, I cannot say that at this stage the information is necessary to enable the plaintiffs to plead or to obtain certification.

15 Although the cases cited refer to situations where early production may or may not be necessary to plead or obtain certification, in my view the court's "broad discretion" to depart from that rule in "exceptional" circumstances as enunciated in *Stern v. Imasco Ltd.* do not appear to be limited to those situations. As is typical in many class proceedings, the production and discovery stage in this action will not take place until after determination of the motion for certification (which can be lengthy and can involve extensive cross-examinations). A motion for certification has yet to be delivered. It is only after a determination is made on certification that defences are typically delivered, followed by formal production and discovery. I do not wish to imply that pre-discovery discovery is appropriate simply because of the nature of a class proceeding and the delay in getting to the discovery stage. In fact early production is an exception to the general rule that production, including non-party production, is not appropriate until after certification and pleadings are complete. However in my view early production can also be considered where the delay can work to the prejudice of one or more parties as part of the court's "broad discretion" to depart from the Rules based on extraordinary circumstances.

16 It is however first necessary to consider whether the plaintiffs are entitled to the relief under the ordinary rules that apply to all actions, including class proceedings.

Non-Party Production under Rule 30.10

17 The plaintiffs must meet a two-part test under Rule 30.10 in order to compel documentary productions from non-parties to the action provides. The rule provides as follows:

> 30.10 (1) The court may, on motion by a party, order production for inspection of a document that is in the possession, control or power of a person not a party and is not privileged where the court is satisfied that,
>
> (a) the document is relevant to a material issue in the action; and
>
> (b) it would be unfair to require the moving party to proceed to trial without having discovery of the document.

18 I have no hesitation in concluding that the first part of the test is met. Even though I have not considered individually each of the many documents outlined by the Regulatory Agencies, I am satisfied based on the report of the plaintiffs' experts, that any documents received or prepared by the Regulatory Agencies that would tend to show the condition of the site prior to the explosion and the condition of the site immediately after the explosion but prior to disturbance of the site during investigation and clean-up are relevant to enabling the expert to determine the cause and origin of the explosions and fire. I agree with the plaintiffs that such evidence would include "witness statements, photographs/videos, and investigator's notes, sketches, drawings, aerial maps." In my view it would also include any documents provided to the investigators from the operators or owners of the site that would indicate the location of ignition sources, such as propane tanks. They would clearly be relevant to the issues of causation of the fire and negligence. There may be some documents listed by the Regulatory Agencies that are not responsive to the plaintiffs' requests but without more detailed information I am not in a position to make that determination.

19 With respect to the second part of the test, the Court of Appeal in *Ontario (Attorney General) v. Ballard Estate* [18] has indicated the policy behind requiring a fairness analysis before burdening a non-party with a production order:

> In making the fairness assessment required by rule 30.10(1)(b), the motion judge must be guided by the policy underlying the discovery regime presently operating in Ontario. That regime provides for full discovery of, and production from parties to the litigation. It also imposes ongoing disclosure obligations on those parties. Save in the circumstances specifically addressed by the Rules, non-parties are immune from the potentially intrusive, costly and time-consuming process of discovery and production. By its terms, rule 30.10 assumes that requiring a party to go to trial without the forced production of relevant documents in the hands of non-parties is not per se unfair.

20 *Stavro* set out a number of factors the court must consider in deciding whether to order non-party production in the circumstances of a particular case [19]:

- the importance of the documents in the litigation;
- whether production at the discovery stage of the process as opposed to production at trial is necessary to avoid unfairness to the appellant;
- whether the discovery of the defendants with respect to the issues to which the documents are relevant is adequate and if not, whether responsibility for that inadequacy rests with the defendants;
- the position of the non-parties with respect to production;
- the availability of the documents or their informational equivalent from some other source which is accessible to the moving parties;
- the relationship of the non-parties from whom production is sought, to the litigation and the parties to the litigation.

21 Four of these six factors strongly favour production. The documents are important, if not critical, to this litigation. The Fire Marshall closed off the site and only the Regulatory Agencies had access to investigate immediately after the explosion. The site was then altered and some artifacts were removed. Without the information from the Regulatory Agencies the plaintiffs would be unable to engage their expert to report on the cause of the explosion and the possible liability of the defendants. The plaintiffs must have this information well in advance of trial. They would be unable to pass even a summary judgment motion without the information, they would be unable to provide an expert report 90 days in advance of trial as required by rule 53.03(1) and they would be unable to make an informed decision as to the viability of their action. The information would be equally important to the defendants. An early determination of the cause of the fire and explosion would promote settlement. Discovery of the defendants would not be adequate. While the defendants may be able to provide information and documents about the location of propane on the site and the condition of the site generally before the explosion, they would be unable to provide any information about the condition of the site and the location of artifacts after the explosion given the restricted access by the Fire Marshall and the alteration of the site. Only the Regulatory Agencies have the necessary information. It does not appear that the informational equivalent is available from any other source accessible to the plaintiffs.

22 The non-parties have no relationship with any of the parties to the litigation. The non-parties have a taken a position in opposition to the request, at least at this time. This will be explored more thoroughly further in these reasons, but in my view the opposition relates mainly to the timing of the production, and less with production per se.

23 In considering all of the circumstances, I conclude that it would be unfair to require the plaintiffs to proceed to trial without production of the non-party documents. Although non-parties should be saved from "potentially intrusive and time consuming" production, production is favoured when, as here, the non-parties themselves have by active measures

ensured that only they had access to that information to the exclusion of all others. Of course, I do not suggest that the Fire Marshall was wrong to take possession of the site and exclude all but the Regulatory Agencies from access. That was part of their statutory duty to secure the site and investigate. It does not however make them immune from producing the fruits of that investigation when required by the parties in litigation involving the same matters.

Pre-Discovery Discovery: Is the Motion Premature?

24 This leads us to the issue of timing. In *Hedley v. Air Canada* [20], the court noted that, "ordinarily, production and disclosure do not take place in a civil action until after the pleadings have been completed"; however there is a discretion in the court to order production as between the parties "at any time", but "this discretion is usually exercised at the pleading stage only where the documents are essential to enable the party to plead." The court then noted that when dealing with productions not from a party, but from a non-party, the same considerations apply:

> Although Rule 30.10 does not impose any time parameters for such a motion, its language clearly indicates that its provisions are directed towards the "production and discovery" part of the civil litigation process — it speaks of unfairness in requiring a party "to proceed to trial" without "discovery" — and not to the production of documents for the purpose of pleading. It may be that the Court, in the exercise of its discretion, could import by analogy the same principle that it has implied into the application of subrule 30.04(5), namely, that production may be ordered prior to pleading if it is shown to be essential for that purpose. [21]

The court held that documents to be produced under rule 30.10 "can best be assessed after statements of defence have been delivered, pleadings completed, and the issues suitably defined." [22]

25 I have already determined that production of the documents in the possession of the non-parties, while necessary before trial, are not necessary in order to permit the plaintiffs to plead. On the other hand, barring an admission of liability by the defendants, the issues are already "suitably defined" in the statement of claim. The issue (or at least one of the issues) is the cause of the fire and explosion. Notwithstanding that pre-discovery production is "usually exercised" in order to enable a party to plead, the court's discretion to order production "at any time" could in my view be exercised on other compelling grounds.

26 It is also worth repeating the statement from *Stern v. Imasco Ltd.* in relation to class actions: "It is not normal under the Rules to provide pre-discovery disclosure of information and documentation... Section 12 confers a broad discretion upon the court to depart from the Rules. This would require extraordinary circumstances due to the specific "class" nature of the proceedings. Otherwise, the usual rules of court apply." [23]

27 The plaintiffs' expert opines that he needs the information at this early stage for a variety of reasons. He wishes to obtain witness information before memories fade and witnesses die or disappear. Photographs, videos, aerial maps and sketches would help determine site conditions and location of artifacts immediately after the explosions and fires before site conditions were altered by the Regulatory Agencies and may indicate burn patterns on artifacts. The expert is of the view that this information will lead him to conduct further investigations based on his preliminary findings. It would focus the scope of his investigation of the site and reduce the number of artifacts to be examined. He says that the site has already been altered and if he has to wait until all investigations by the Regulatory Agencies and any resulting charges are completed there "is a significant risk" that the site will be further altered and evidence that he may have examined had he known of its significance "may be lost or destroyed." He understands that "the site evidence may not be available 6 months to one year from now."

28 Counsel for the Regulatory Agencies points out that the "ship has already sailed" in that the site has already been altered and that the plaintiffs' expert is free to photograph and examine the site to ascertain its current condition before it is altered further. The solicitor for the site owners confirmed that there will be further clean up of the site. This will result in further site disturbance. Therefore, although the ship may have sailed, it is not yet out of sight. I am

satisfied from the expert's report that early access to the documents, before further alteration to the site and possible loss of evidence, is of great importance to the expert being able to prepare a meaningful opinion as to the cause of the explosion. It appears that without knowing where artifacts were situated prior to the site alteration, the expert may not know what further investigations are necessary prior to the evidence being lost. For example, he would not know which of the many articles in the huge pile of debris are significant, requiring further investigation before the debris is removed. In my view the plaintiffs would be prejudiced in these exceptional facts if production of the documents necessary to enable the expert to conduct a meaningful, narrowed and cost efficient investigation were delayed until the production and discovery stage of this action. Even though this motion involves production of documents, the concerns are similar to those involving interim preservation or inspection of property where early inspection is necessary before physical property is destroyed. [24]

29 I am satisfied, based on the reports from the plaintiffs' experts, that the delay in getting to the discovery stage of this class proceeding and in obtaining documents which depict the condition of the site following the explosion and fire constitutes extraordinary circumstances. In my view this is an appropriate case for early non-party production, but such productions should be as narrow as possible to minimize interruptions to the ongoing investigations being conducted by the Regulatory Agencies and should be restricted to those required at this early stage to prevent prejudice to the plaintiffs. The plaintiffs can always apply for more fulsome non-party production at the appropriate time. This determination is of course subject to the Crown first screening the documents, as they have done, for public interest privilege and allowing the court to determine production based upon a *Wagg* analysis.

The Wagg Analysis

30 Investigations being done by the Regulatory Agencies are analogous to a police investigation. The Regulatory Agencies are considering, but have not yet determined, to initiate a prosecution for regulatory or criminal offences. If charges are laid, the documents may form part of the Crown Brief. In these circumstances the Crown has the right to screen the requested documents for purposes of determining whether to oppose or delay production based on public interest grounds pursuant to the principles enunciated in *P. (D.) v. Wagg*. Therefore before ordering non-party productions the court must take into account the public interest asserted by the Crown on behalf of the Regulatory Agencies and by the TSSA. The public interest asserted by the Crown often includes protection of privacy and security of victims and witnesses as well as the integrity of the investigative and criminal process itself.

31 The parties to a civil proceeding do not have a "right" to production of documents which may form part of the Crown Brief just because the documents may be relevant to that action. The Crown in its screening process however is to bear in mind that the fruits of the investigation in its possession are "not the property of the Crown for use in securing a conviction, but the property of the public to ensure that justice is done" and that "society has an interest in seeing that justice is done in civil cases as well as criminal cases, and generally speaking that will occur when the parties have the opportunity to put all relevant evidence before the court". [25] There may be circumstances where "the public interest in protecting...the integrity of the criminal investigation process itself outweighs the value we attribute to full production in a civil proceeding." [26]

32 A court may refuse production where a police investigation is ongoing in order to "preserve the confidentiality of information where real need arises." [27] The "integrity of the criminal prosecution...is a serious policy and public interest consideration" which "must not be jeopardized" and may "take priority over the public interest of having disclosure of all relevant information..." although concerns may no longer exist after the evidence has been given in a preliminary enquiry. [28]

33 Limits on production of documents when matters are still under investigation or in the criminal process are determined through the aforementioned screening process and by the court resolving any disputes about production. In doing so, the court balances the public interests asserted by the Crown with the interests of the parties to the litigation

in securing all relevant evidence in order to obtain a correct disposition of the civil proceeding. The Court of Appeal in *P. (D.) v. Wagg* adopted the following summary of the court's role in balancing these considerations:

> The judge hearing the motion for production will consider whether some of the documents are subject to privilege or public interest immunity and generally whether there is a prevailing social value that overrides the public interest in promoting the administration of justice through full access of litigants to relevant information. [29]

34 The fairness test and balancing process has been restated by the Court of Appeal in *G. (N.) v. Upper Canada College*: [30]

> [I]n the context of a request for production of material from a Crown brief, the fairness test under rule 30.10 encompasses balancing consideration of the needs of the moving party for access to the particular material against the interests of a third party, the interests of the public in protecting the material from disclosure, and any other relevant interests.

35 Such balancing "is determined on a case-by-case basis in the context of specific facts." [31]

36 In a case where a plaintiff sought production of the Crown Brief before the statement of claim was served and no evidence was adduced other than a wish of counsel to advise their clients whether to proceed with the litigation and retain an expert, the court held that the motion was premature and that the "balancing of interest cannot occur at this stage of this proceeding with the materials filed on this motion" [32] and on the evidence before the court it was too early to assess fairness. In this case however an expert has already been retained and he has opined on the need for early production.

37 For reasons already stated I do not believe that it is premature to consider production of the documents in the possession of the Regulatory Agencies subject to balancing the public interest in protecting the materials from disclosure against the need of the plaintiffs for access to the documents at this time. That is the key question I must resolve.

38 Where public interest concerns are legitimately raised, courts may in an appropriate case satisfy the balancing of interests with strict terms to provide safeguards against the misuse of information such as limiting access to or use of the documents to counsel in the civil actions, preventing copying, imposing confidentiality terms and ensuring witnesses are not exposed to the documents or to influence as to their testimony. [33]

39 The Regulatory Agencies state that the investigation into the fire is incomplete and decisions have not been made with respect to the laying of charges. I have been provided with no timeline as to when the investigation will be complete or when a determination will be made with respect to charges. Depending on the investigating agency, the limitation for instituting provincial offences ranges from 6 months to two years. They also assert generally that taking time from their investigative duties both in relation to this matter as well as other unrelated matters would unduly interfere with the investigative process. They suggest that further relevant documents may be generated further into the investigation. The Regulatory Agencies should generally be allowed to complete their work without unwarranted interruption. That cannot however be absolute or for an indefinite period given the need for production of the documents in this civil proceeding to ascertain the cause of the explosion and liability of the parties and given the fact that the documents are exclusively in the possession of the Regulatory Agencies who closed the site to all other interested persons. I have however taken their concerns into account by restricting any productions at this stage to those that the expert requires in a timely manner prior to further site alteration, leaving the production of other relevant documents to the discovery phase of this action either by agreement or by a subsequent motion.

40 A number of other specific public interest concerns have been raised, although these interests differ somewhat among the different Regulatory Agencies and the category of the productions sought. I will consider these concerns and the balancing process by category of document.

Balancing of Interests by Category of Document

41 The Regulatory Agencies assert that witness statements may be used to determine if an offence has been committed and that production would disclose names of witnesses that may be called upon to testify in provincial or criminal charges that may be instituted. They raise a fear that this could lead to a contamination of their evidence and allow pressure to be asserted on witnesses by parties who have an interest in their testimony. They state that if this were to happen it could interfere with the Crown's ability to conduct a fair trial and with the rights of potential, but as yet unnamed, accused persons to their constitutional right to a fair trial. The also state there could be a chilling effect generally on witnesses coming forward to assist in police (or regulatory) investigations.

42 As stated by the Court of Appeal, a risk of "tainting" witnesses may be met by strict confidentiality conditions. [34] It must also be remembered that a risk of tainting comes not from production of the documents, but from the fact that the witness may testify. [35] The witnesses may have evidence that would assist the plaintiffs' expert identify the location and cause of the explosion and fire and lead him to further investigate particular evidence. The plaintiffs' solicitors have agreed that the names of the witnesses be withheld (to the extent they have not already been revealed in the lists of documents provided by the Regulatory Agencies). To further reduce concerns of tainting, they are also prepared to accept a term that would prevent the parties, or their solicitors or investigators or other persons retained by them from contacting the witnesses before they have had an opportunity to give their evidence in the criminal or quasi-criminal proceedings, for example at a trial or preliminary hearing or the Crown has determined that no charges will be laid. Once the witnesses have given and committed themselves to their evidence by testimony under oath, the risk of tainting is minimal. Further once they are called as witnesses, their identity will have been revealed. Further safeguards would also be necessary restricting the use of the statements to the plaintiffs' counsel and experts retained by them. With respect to the chilling effect, there is no evidence that any of the specific witnesses who have given a statement to the police or a regulatory official to assist in the investigation into the cause of the fire would be concerned if their statements were also to be used to assist the victims of that same fire recover their losses in a civil action. The chilling effect in this case is no more than speculation.

43 Photographs, aerial photos and videos have been taken of and depict the condition of the site prior to its alteration as a result of the investigation and clean-up. As noted, these are particularly critical and time-sensitive documents for the plaintiffs' experts. In my view sketches prepared by witnesses and investigators to the extent that they depict the condition of the site before or during the explosion or the movement of articles thereon fall into the same category and should be produced (subject to the safeguards with respect to exposing witness names). The Regulatory Agencies assert that viewing these photographs could lead viewers to draw incorrect conclusions that may not be supported by further testing. They assert that the photos could prematurely depict something incriminating or exculpatory respecting parties to be charged and could lead to tampering with the evidence. In my view the photographic depictions of the site "are what they are". They depict the site at a critical moment in time — after the explosion and fire and prior to site disturbance, as well as articles removed from the site. The plaintiffs' expert should be able to rely on his own expertise to draw his own conclusions, whether they turn out to be correct or incorrect. The plaintiffs run the risk that the expert opinions may have to be revised as a result of later productions and evidence, but they should have the right at this time to see the site in the same condition as the fire marshal and other investigators saw it, in order to conduct their own further investigations before the site is further altered. These productions will be further protected by restricting access to counsel and experts retained by them, and out of the public domain.

44 The Regulatory Agencies also assert that some of the photos or videos document the investigative process. Investigative privilege is a recognized category of public interest privilege. It is designed to "protect a genuine police interest in maintaining secrecy in respect of ongoing investigations, ongoing investigative techniques..." [36] The reference to investigative process has not been adequately explained in the material before me. To the extent that the photos and videos depict *how* the site was altered for purposes of the investigation, then in my view that forms part of the depiction of the site as it was after the explosion and how it was altered and should be produced. If there is a method to segregate the photos or videos or parts thereof that demonstrate "investigative techniques" they need not be produced, but it if they cannot be segregated from demonstrating how the site was altered then they will have to be produced at this time.

45 Investigators' or inspectors' notes are said to contain theories and other information which may or may not be relevant to a final determination of the cause of the explosion and fire and the laying of charges. It is said they are preliminary in nature and could lead to further examinations and in their current incomplete form could lead to incorrect assumptions that may be unsupported with further investigation. They are protected by investigative privilege. They need not be produced at this time, without prejudice to a subsequent motion at a more advanced stage, such as after a criminal trial or preliminary hearing or after a decision is made not to initiate charges. The only exception I would make is this: to the extent that the notes are merely descriptive of the location of the area of the site depicted in the photographs or the location from which they were taken, then they are really an adjunct to the photos and should be produced.

46 Investigators' research reports and preliminary reports as to theories respecting the cause of the fire may or may not be relevant, but they are not required for the limited purpose for which I am ordering pre-discovery discovery. In any event they are covered by investigative privilege. Notification documents, field reports, incident reports, activity reports, provincial officer's reports and orders, police notes, internal memos, records from the Ontario Propane Association, documents from the TSSA respecting pre-explosion licences and compliance directives, referrals for investigation, post-explosion documents from the TSSA respecting suspension and revocation proposal, emails and correspondence may all be relevant and ultimately producible, but are unnecessary for the limited purposes of this order and need not be produced at this time. Further many of the TSSA documents are also in the possession of the defendants and may ultimately be compellable from them as part of the regular discovery process. Publically available documents such as corporation profile reports need not be produced. Documents from the School Board do not appear to be responsive to this motion and need not be produced. Documents respecting environmental assessments and clean-up, while they may be relevant to the issues in the action, are not necessary for the limited purposes for which I am allowing pre-certification production and need not be produced at this time.

47 There are a number of documents over which the non-parties do not claim a public interest privilege. I understand the Regulatory Agencies do not object to producing some of those documents. I do not make nor have I been asked to make any order with respect to those documents. I may be contacted if there is an outstanding issue with respect to such documents.

48 Documents that were the property of the defendants and that have been provided by or seized from them are more problematic. If such documents provide evidence of what was on the site, particularly propane tanks or incendiary devices and where they were stored or otherwise located, this would be important evidence of the site conditions *before* the explosion and may be even more helpful to the plaintiffs than site conditions *after* the explosion (but before site alteration). These documents however would be in the possession of the defendants (assuming they kept originals or copies) and therefore producible during the discovery process by them as parties to the action. The plaintiffs have no right to require production from the non-parties pursuant to rule 30.10 until they have first attempted to obtain them from the defendants. Production of documents from the defendants is not before me on this motion. If the non-parties have the only copies of the documents, then I would have considered ordering their production at this time, however I do not have evidence whether the defendants have retained copies.

49 In my view the needs of the moving parties for production at this time of those documents that would provide information and depictions of the condition of the site after the explosion and fire but before disturbance of the site resulting from the investigation and clean-up, with proper safeguards, outweigh the public interests as advanced by the Regulatory Agencies. The order will be subject to the Crown further vetting the documents for privacy and other concerns not specifically addressed on this motion and is without prejudice to the plaintiffs moving for further production during the discovery stage of the action, or such other time as may be appropriate.

50 Given the ongoing investigation and work involved I will allow the Regulatory Agencies 60 days to deliver the productions. Also, given the volume of the productions and likely duplications in the photographs I would suggest, but not direct, that the plaintiffs' expert attend at a location designated by the Regulatory Agencies to review all of

the documents governed by this order and then request reproduction of only those documents required at this time. Of course, the plaintiffs will pay the costs of the Regulatory Agencies in complying with this production order.

Production to Defendants

51 The Teskey group of defendants took no position on the motion but seek a copy of any productions to be given to the plaintiffs. The Sunrise group of defendants supported the position of the Regulatory Agencies and opposed the plaintiffs' motion. They did not request copies of the documents that may be given to the plaintiffs. I make no specific order with respect to production to the defendants, although it appears that if they are they produced to the plaintiffs it would be fair to also provide copies to the defendants if requested and provided they pay their pro-rata share of the costs of the Regulatory Agencies. If there is objection by the Crown I may be contacted to resolve the issue. I will however order that if the defendants obtain production, the same safeguards that were imposed upon the plaintiffs will apply to them.

Order

52 I hereby order as follows:

1. The non-parties Fire Marshall, Ministry of the Environment, Ministry of Labour and Technical Standards & Safety Association shall within 60 days produce to the plaintiffs:

    (a) Copies of all photographs, aerial photos, videos or sketches that depict (i) the condition of the site after the explosion and fire but prior to disturbance of the site, (ii) any movement of items during or following the explosion and (iii) any items removed from the site, together with any documents or portion of documents that serve to identify the photos.

    (b) Copies of witness statements, will-say statements or interview notes with witnesses if no statement or will-say statement exists. All contact information of witnesses may be redacted. Names of witnesses, unless already identified in the list of documents, may be redacted.

2. The plaintiffs may not contact any witnesses whose identities have been made known as a result of this motion until the earlier of the testimony of that witness in a proceeding related to the events described in this action, the determination by the Crown that no charges will be laid or the passage of 18 months from the date of this order unless the Crown consents or the court orders otherwise.

3. The plaintiffs shall reimburse the Regulatory Agencies for all reasonable costs of providing copies of the productions to them.

4. The plaintiffs shall not make any further copies of the documents without the consent of the non-parties or order of the court. The plaintiffs shall not allow any person, including the parties, to view the documents except the solicitors for the plaintiffs and any experts retained by them. The documents shall not be used for any purposes not related to the conduct of this action.

5. If the defendants are provided with copies of the documents from the Regulatory Agencies they shall pay their pro-rata share of the costs of production and shall be bound to the same terms as imposed upon the plaintiffs.

6. The non-parties may make additional redactions to protect genuine privacy concerns or other public interests not determined in these reasons. In the event of any dispute, a hearing will be arranged and the controverted documents produced for the court's inspection.

7. The request to produce the remaining non-party productions is refused without prejudice to any of the parties moving for further productions from the non-parties after determination of certification and close of pleadings or earlier with leave of the court.

8. Any party may move to obtain the redacted portions of documents or to vary or remove any of the restrictions on use of the documents or other terms of this order either after evidence is given in a proceeding related to the events described in this action or the determination by the Crown that no charges will be laid or earlier with leave of the court.

Costs

53 It appears that there has been mixed success. Although the plaintiffs were successful in obtaining an order for production of many of the items requested, many others were refused. I also note that the Crown was performing a necessary role as mandated by our jurisprudence of vetting the documents for the purpose of ascertaining and asserting a public interest privilege in relation to an ongoing investigation. They acted reasonably in so doing. Prima facie it does not appear that there should be costs of this motion to any party or non-party, however I am prepared to receive any submissions to the contrary.

54 Any party or non-party seeking costs of this motion shall forward brief written submissions supported by a Costs Outline (Form 57B) and dockets within 14 days of release of these reasons. Any responding submissions shall be forwarded within 7 days thereafter.

Footnotes

1 There was also a casualty, but claims arising from that casualty are not part of this class action at this time.

2 The Fire Marshall has a duty under section 9(2) of the *Fire Protection and Prevention Act, 1997*, S.O. 1997, c. 4 to "investigate the cause, origin and circumstances of any fire or of any explosion." Pursuant to section 14(2) of that Act, the Fire Marshall may close and prevent entry to lands or premises during the completion of an investigation, take photographs and videos, remove articles and take samples. Provincial or criminal offences could be initiated by the police.

3 The coroner's involvement concerns the death of what turned out to be a Sunrise employee on site. It is common ground that the Chief Coroner has no relevant documentation respecting the plaintiffs' request.

4 The MOE involvement concerns possible violations of the *Environmental Protection Act* ("EPA"). The MOE has power to regulate the discharge of contaminants into the environment. A provincial officer conducts an inspection, prepares an incident report and if he believes there has been a contravention of the EPA makes a referral to the Investigation and Enforcement Branch ("IEB"). If the IEB decides to lay charges in accordance with the *Provincial Offences Act*, it forwards a Crown Brief to the MOE's Legal Services Branch, which is reviewed by a Crown prosecutor to determine whether to initiate or continue a prosecution.

5 The MOL involvement concerns possible violations of the *Occupational Health and Safety Act*. This could result in charges under the Act.

6 The TSSA is an independent administrative authority under the *Technical Standards and Safety Act, 2000*, S.O. 2000, c. 16. Through its Fuel Safety Division the TSSA may grant, suspend and revoke licences to operate propane filling plants. It also has the power to prosecute for an offence under that Act or regulations thereunder. It initially assisted the Fire Marshall and is co-operating with the other Regulatory Agencies.

7 After the motion was launched a new class action was commenced and all counsel agree that as this will be the action that moves forward to encompass all class plaintiffs, I should make this endorsement in the context and style of cause of the new action.

8 The plaintiffs argue that the Fire Marshall has not complied with NFPA 921 (The Guide for Fire and Explosion Investigation) which provides that every attempt should be made to "preserve the fire scene as intact and undisturbed as possible" with contents "remaining in their pre-fire locations". Evidence to be preserved is to include material or items "related to the fire ignition, development or spread." The Crown argues that the statutory duties of the Fire Marshall trump NFPA 921 and that

in any event the scene pre-disturbance has been preserved by photographs and sketches and can be re-created. It matters not for purposes of this motion whether the Fire Marshall breached NFPA 921. It is evidence of the pre-disturbance state which is available and which is the subject matter of this motion.

9 Counsel have agreed on a protocol for examining physical evidence and that is not sought as part of this motion.

10 *P. (D.) v. Wagg*, [2002] O.J. No. 3808, 222 D.L.R. (4th) 97 (Ont. Div. Ct.), affirmed [2004] O.J. No. 2053, 239 D.L.R. (4th) 501 (Ont. C.A.)

11 *Class Proceedings Act*, 1992, S.O. 1992, c. 6.

12 *Stern v. Imasco Ltd.*, [1999] O.J. No. 4235, 38 C.P.C. (4th) 347 (Ont. S.C.J.) at paragraph 27.

13 *Stern v. Imasco Ltd.*, supra at paragraph 28.

14 *Stern v. Imasco Ltd.*, supra at paragraph 29.

15 *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158, 2001 SCC 68 (S.C.C.) at paragraph 16.

16 *Class Proceedings Act*, paragraph 5(1)(a).

17 *Caputo v. Imperial Tobacco Ltd.* (1997), 34 O.R. (3d) 314 (Ont. Gen. Div.) at paragraph 24.

18 *Ontario (Attorney General) v. Ballard Estate*, [1995] O.J. No. 3136, 26 O.R. (3d) 39 (Ont. C.A.) [hereinafter Stavro] at paragraph 12

19 *Ontario (Attorney General) v. Ballard Estate* , supra at paragraph 15

20 *Hedley v. Air Canada*, [1994] O.J. No. 287, 23 C.P.C. (3d) 352 (Ont. Gen. Div.) at paragraph 46.

21 *Hedley v. Air Canada*, supra at paragraph 48.

22 *Hedley v. Air Canada*, supra at paragraph 49.

23 *Stern v. Imasco Ltd.* , supra at paragraph 28.

24 For example, an order may be made prior to the completion of pleadings to inspect a car involved in a motor vehicle accident before it is repaired or sold for scrap.

25 *P. (D.) v. Wagg*, supra at paragraph 53.

26 *P. (D.) v. Wagg* at paragraph 14.

27 *Gelbard v. A. (G.)*, [1996] O.J. No. 4633 (Ont. Gen. Div.) at paragraphs 5 and 6.

28 *Dixon v. Gibbs*, [2003] O.J. No. 75 (Ont. S.C.J.) at paragraphs 27-29.

29 *P. (D.) v. Wagg*, supra at paragraph 51.

30 *G. (N.) v. Upper Canada College*, [2004] O.J. No. 1202, 70 O.R. (3d) 312 (Ont. C.A. [In Chambers]) at paragraph 12.

31 Hubbard, Magotiaux and Duncan, *The Law of Privilege in Canada*, Canada Law Book, May 2008 page 3-45.

32 *Publicover v. Ontario (Minister of Transportation)*, [2005] O.J. No. 713 (Ont. S.C.J.) at paragraph 26.

33 *G. (N.) v. Upper Canada College*, supra, Divisional Court at paragraph 17, Court of Appeal at paragraphs 4 and 16.

34 *G. (N.) v. Upper Canada College*, supra, Court of Appeal paragraph 16

35 *G. (N.) v. Upper Canada College*, supra, Court of Appeal paragraph 16.

36 *The Law of Privilege in Canada*, at page 3-45.

TAB 3

2011 ONSC 665
Ontario Superior Court of Justice

Popov v. Jones

2011 CarswellOnt 643, 2011 ONSC 665, 15 C.P.C. (7th) 120, 197 A.C.W.S. (3d) 368

Popov et al v. Jones et al

Master Benjamin Glustein

Heard: January 26, 2011
Judgment: February 3, 2011 *
Docket: 10-CV-398179

Counsel: Keith Landy, for Plaintiffs
Stephen Turk, for Defendant, Shawn Jones
John Ormston, for Defendant, Marcel Jones
Robert J. van Kessel, for Defendant, Blake Jones

***Master Benjamin Glustein*:**

Nature of the motions and overview

1 The plaintiffs bring a motion pursuant to Rule 30.10 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the "*Rules*") requiring the non-party Canadian Imperial Bank of Commerce ("CIBC") to produce and deliver to the plaintiffs the following documents (collectively, the "CIBC Documents"):

> (i) complete transaction history on all accounts belonging to the defendant 1754338 Ontario Inc. carrying on business as Edvac Capital Investment ("Edvac"), including transaction date and transaction amount for the period from September 2008 to present,
>
> (ii) monthly bank statements in respect of all accounts belonging to Edvac for the period from September 2008 to present,
>
> (iii) bank accounts, applications and signature cards in respect of all accounts belonging to Edvac, and
>
> (iv) copies of all original deposit slips, withdrawal slips and cancelled cheques in respect of accounts belonging to Edvac from September 2008 to present.

2 CIBC does not oppose the relief sought. CIBC did not attend at the hearing.

3 The defendants Marcel Jones ("Marcel") and his sons Shawn Jones ("Shawn") and Blake Jones ("Blake") (collectively, the "Jones Defendants") oppose the motion. Each of the Jones Defendants is represented by separate counsel. Shawn's counsel made the principal submissions on behalf of the Jones Defendants. Marcel's counsel and Blake's counsel made brief submissions in support of Shawn's position.

4 Edvac has been noted in default.

5 By endorsement at the hearing, I granted the additional relief sought by the plaintiffs on this motion (on consent of the Jones Defendants) and dispensed with service of the amended statement of claim and the motion record for the

present motion on the defendant Sudeesh Shivarattan ("Shivarattan"). The plaintiffs have made numerous attempts to locate and serve Shivarattan at different addresses and he cannot be located.

6 For the reasons discussed below, I grant the Rule 30.10 motion and order production of the CIBC Documents to the plaintiffs.

7 I reject the Jones Defendants' preliminary objections that the court should not consider the merits of the Rule 30.10 motion. I find that:

(i) The motion is not premature, since the Jones Defendants have filed pleadings and Edvac is deemed to admit the truth of the pleadings under Rule 19.02(1)(a);

(ii) The relevance of the CIBC Documents both (a) to the motions by Marcel and Blake to discharge certificates of pending litigation against their properties (the "CPL Discharge Motions"), and (b) to the action, is not a bar to the motion;

(iii) The plaintiffs were not required to lead evidence as to relevance since relevance can be determined on the pleadings. Evidence is required to establish why it would be unfair for the plaintiffs to proceed to trial without the documents. However, in any event, there is sufficient evidence before me on both issues to make the order sought;

(iv) The decisions of the plaintiffs (a) to not lead evidence about the merits of the action and (b) to refuse to answer questions at their cross-examinations about the merits of the action, were both well-founded and cannot be treated adversely by the court; and

(v) The plaintiffs' cross-examination of Blake [1] on his CPL Discharge Motion does not constitute a basis to refuse to consider the merits of the motion. Production of the CIBC Documents is without prejudice to the positions of the parties as to whether the plaintiffs can file additional evidence for the CPL Discharge Motions under Rule 39.02(2).

8 Having decided that I can consider the merits of the Rule 30.10 motion, I find that the CIBC Documents are relevant to the issues in the action and to the CPL Discharge Motions. I reject the submission of the Jones Defendants that the CIBC Documents are relevant only to tracing and as such cannot be produced until after judgment. To the contrary, the CIBC Documents are necessary to establish the liability of the Jones Defendants in the action and are relevant to substantive issues on the CPL Discharge Motions such as the use of funds by the Jones Defendants.

9 Further, I find that it would be unfair to require the plaintiffs to proceed to trial without the CIBC Documents. I rely on the relevant factors set out in *Ontario (Attorney General) v. Ballard Estate* (1995), 26 O.R. (3d) 39 (Ont. C.A.) ("*Stavro*"). In particular:

(i) The CIBC Documents are important documents that address central issues in the action and on the CPL Discharge Motions: (a) whether Blake, Marcel, or Shawn had any involvement in Edvac and in the alleged fraud perpetrated on the plaintiffs and (b) whether Marcel or Blake used Edvac funds to purchase or renovate the properties that are the subject of the CPL Discharge Motions;

(ii) Production ought to be made at the discovery stage as opposed to production at trial to avoid unfairness at the CPL Discharge Motions and at trial; and

(iii) CIBC is "involved in the events" as a non-party in the litigation in that funds may have been transferred out of the bank (although there is no suggestion of wrongdoing on the part of CIBC).

10 Consequently, I grant the motion and order production of the CIBC Documents.

Nature of the action and the positions of the parties

(i) Nature of the action

11 This action arises out of allegations of breach of contract and fraud perpetrated by the defendants. The plaintiffs allege that they deposited a total of $765,000 with Edvac between September 2008 and February 2009, on the basis of representations that the plaintiffs would (i) receive a rate of return of 2% per month if they provided a loan to Edvac for 6 to 12 months, and (ii) be repaid the full amount of the principal of the loan depending on their individual agreed period.

(ii) Position of the plaintiffs

12 The plaintiffs allege that promissory notes were signed in favour of the plaintiffs on behalf of Edvac, in which Edvac promised to repay the plaintiffs the loan amount within 12 months plus interest.

13 The plaintiffs allege that the Jones Defendants falsely represented that the principal sum advanced to Edvac would be invested in various projects and loaned to third parties with a mortgage security.

14 The plaintiffs plead that the Jones Defendants were the controlling minds of Edvac, and "were personally engaged outside their roles as officers and directors" of Edvac by their fraudulent conduct and as such "are personally liable to the Plaintiffs for damages caused by their fraudulent conduct" (paragraph 30 of the amended statement of claim).

15 The plaintiffs allege that the Jones Defendants transferred the plaintiffs' funds in Edvac to the Jones Defendants personally through fraudulent means, either directly or through a series of transactions. The plaintiffs allege that Marcel used the Edvac investment funds for renovations on his property and that Blake used the Edvac investment funds to purchase and/or renovate his property.

16 The plaintiffs obtained certificates of pending litigation on Marcel and Blakes' properties (the "CPLs").

(iii) Position of the defendants

17 The Jones Defendants deny any involvement with Edvac.

18 Marcel pleads that he is a shareholder of Edvac, along with Blake and Shawn, but that Marcel "does not control and is not the controlling mind of Edvac". Marcel pleads that "Shawn Jones has excluded Marcel and Blake Jones from the operation of the business and is acting on behalf of Edvac without the authority of the other shareholders". Marcel pleads that the "amounts claimed in the statement of claim ... are amounts that Shawn Jones borrowed in his personal capacity without the knowledge of Marcel" and that "any funds loaned by the plaintiffs as alleged in the statement of claim were appropriated by Shawn Jones for his personal use" (paragraphs 2, 4, 7, 8 and 10 of Marcel's statement of defence and crossclaim).

19 Shawn denies that he was the operating or controlling mind of Edvac at all material times. Shawn pleads that his father Marcel "was the operating mind of [Edvac] and the individual that dealt with the matters set out in the Statement of Claim". Shawn denies that he was a director or officer of Edvac (paragraphs 2 and 4 of Shawn's statement of defence and crossclaim).

20 Blake pleads that he is not an officer or director of Edvac and that he resigned those positions shortly after Edvac was incorporated. Blake denies that he is the operating or controlling mind of Edvac. Blake further pleads that the funds he used to purchase his house were advanced principally "from, as he understands it, Marcel's line of credit with CIBC" (paragraphs 2, 4, and 10 of Blake's statement of defence and crossclaim).

21 Marcel crossclaims against Shawn and Shivarattan for contribution and indemnity. Shawn crossclaims against all co-defendants, including Blake and Marcel. Blake crossclaims against all co-defendants.

22 Edvac has been noted in default and as such is deemed to admit the allegations of fact in the amended statement of claim (Rule 19.02(1)(a)).

Evidence on the present motion

23 The plaintiffs' evidence on the present motion can be summarized as follows:

(i) A Corporation Profile Report for Edvac dated February 22, 2010 provides that Marcel, Blake, and Shawn are the directors of Edvac;

(ii) The CIBC account at a branch at Dundas Street & Ossington Avenues in Toronto was the bank account to which all of the plaintiffs' cheques payable to Edvac were deposited;

(iii) The CIBC branch stamp is on one of the plaintiffs' cancelled cheques;

(iv) All of the plaintiffs' cheques were payable to Edvac;

(v) Edvac has not repaid the full amount of the principal and the interest due under each loan;

(vi) In his affidavit sworn on behalf of his CPL Discharge Motion, Marcel deposes that "I believe that these loan agreements were entered into by Shawn Jones and that he has appropriated the plaintiffs' funds for his personal use";

(vii) The use of funds for the property renovations and/or purchase by Blake and Marcel took place in February and May 2009, at approximately the same time or shortly after the plaintiffs completed their investments;

(viii) Marcel swore in his affidavit on his CPL Discharge Motion that "I did not use any funds from the plaintiffs to renovate my property" and "The source of bulk [sic] of the funds for the renovation of my home was through my CIBC line of credit";

(ix) Blake swore in his affidavit on his CPL Discharge Motion that "I did not use, or knowingly use, any of the Plaintiffs' funds to buy or renovate" his home and that Blake "received $85,000 from Marcel to help me close the purchase" of his home and that "I understood from Marcel that these funds originated from his line of credit with CIBC"; and

(x) The plaintiffs requested the CIBC Documents from the Jones Defendants by letters dated September 23 and 27, 2010 but to date, the Jones Defendants have not provided the requested documents.

Analysis

24 The Jones Defendants raise five preliminary objections to the court considering the merits of the Rule 30.10 motion:

(i) The motion is premature because pleadings have not closed;

(ii) Rule 30.10 cannot be used to obtain non-party documents relevant to a motion;

(iii) The plaintiffs require evidence to establish a right to the documents (both as to relevance of the documents and unfairness to proceed to trial without the documents), and they failed to lead such evidence;

(iv) The plaintiffs' decisions (a) not to lead evidence as to the merits of the action and (b) to refuse to answer cross-examination questions as to the merits of the action generates an adverse inference disentitling the plaintiffs to the relief sought; and

(v) Even if production could be ordered under Rule 30.10, it ought not to be ordered since it is an abuse of process for the Rule 30.10 production to be made after the plaintiffs conducted a cross-examination of Blake on his affidavit for his CPL Discharge Motion.

25 The Jones Defendants further submit that if the court considers the merits of the Rule 30.10 motion, it should not be granted because the plaintiffs do not meet the requirements under Rule 30.10. The Jones Defendants submit that (i) the CIBC documents are not relevant as they only address the issue of tracing and as such documents relating to the use of the Edvac funds by the Jones Defendants are irrelevant until after judgment; and (ii) it would not be unfair for the plaintiffs to proceed to trial without the documents, considering the relevant factors under *Stavro*.

26 I address each of these issues below.

(a) Preliminary objections

(i) State of the pleadings

27 The Jones Defendants submit that because pleadings are not closed, the motion is premature. The Jones Defendants rely on the decision of Master Dash in *Durling v. Sunrise Propane Energy Group Inc.*, [2008] O.J. No. 5031 (Ont. Master) ("*Durling*").

28 In *Durling*, Master Dash cited *Hedley v. Air Canada*, [1994] O.J. No. 287 (Ont. Gen. Div.) for the general principle that "ordinarily, production and disclosure do not take place in a civil action until after the pleadings have been completed" (*Durling*, at para. 24). Master Dash held that exceptions to the principle are limited to when (i) documents are essential to enable the party to plead and (ii) there are "other compelling grounds" justifying early production [2] (*Durling*, at paras. 24-25).

29 However, in *Durling*, the defendants had not filed a statement of defence, as all parties were awaiting a certification motion. [3] In the present case, all of the Jones Defendants filed statements of defence with a full defence on the merits. Edvac has been noted in default, and as such is deemed to admit the truth of all allegations of fact made in the statement of claim (Rule 19.02(1)(a)).

30 With the order dispensing with service of the amended statement of claim and the motion record in the present motion on Shivarattan (consented to by the Jones Defendants), the plaintiffs will be able to note him in default. In fact, the plaintiffs sought to obtain the order dispensing with service the first time this motion was to be heard on November 3, 2010 but the issue was adjourned, even though Shawn's counsel acknowledged at the present hearing that it would have been appropriate to consent to that order at the earlier time.

31 It would be inappropriate to delay Rule 30.10 production on an issue because one defendant cannot be located despite diligent efforts of plaintiff's counsel. Even if Shivarattan were to become aware of the litigation and either file a statement of defence or seek to be relieved from a potential noting in default, the issues between the plaintiffs and the Jones Defendants are well-defined by the pleadings.

32 In particular, the issues of control over Edvac, the involvement of the Jones Defendants in the alleged fraudulent scheme, the use of Edvac funds to purchase or renovate personal properties, and the crossclaims between the Jones Defendants in which they blame each other, all combine to define the issues between the plaintiffs, Edvac, and the Jones Defendants such that it is not premature to bring a Rule 30.10 motion.

(ii) Use of Rule 30.10 to obtain documents relevant to a motion

33 The Jones Defendants submit that Rule 30.10 cannot be used to obtain documents relevant to a motion. Since the plaintiffs acknowledge that the CIBC Documents would be relevant to the CPL Discharge Motions, the Jones Defendants submit that the plaintiffs cannot bring the motion under Rule 30.10.

34 The Jones Defendants rely on two authorities. In *550551 Ontario Ltd. v. Framingham* (1991), 2 O.R. (3d) 284 (Ont. Div. Ct.) ("*Framingham*"), McKeown J. held that Rule 30.10 could not apply to an "application", since the text of Rule 30.10(1) requires that the court be satisfied that (i) "the document is relevant to a material issue in the *action*" (Rule 30.10(1)(a)) and (ii) "it would be unfair to require the moving party to proceed to *trial* without having discovery of the document" (Rule 30.10(1)(b)) [emphasis added]. McKeown J. also relied on Rule 39 which limits evidence on applications to affidavits and cross-examinations of witnesses (*Framingham*, at 285-86).

35 However, *Framingham* does not apply in the present case. The plaintiffs have brought an action (not an application) and will have a trial of the issues. As I discuss below, the CIBC Documents are relevant both to the action and to the CPL Discharge Motions.

36 Further, to the extent the plaintiffs seek to introduce any affidavit evidence derived from the CIBC Documents in support of the CPL Discharge Motions, they would need leave of the court under Rule 39.02(2). As I discuss below, this order is without prejudice to the positions of both parties as to whether leave is appropriate.

37 The Jones Defendants also rely on *Pastway v. Pastway* (2000), 2 C.P.C. (5th) 18 (Ont. S.C.J.) ("*Pastway*"). In *Pastway*, Reilly J. held that the petitioner had not satisfied the court of the relevance of the documents to the action or any unfairness in proceeding to trial without production of the documents, as required under Rule 30.10. Reilly J. held (*Pastway*, at para. 18, pp. 25-26):

> *I am not satisfied that the production sought is relevant to a material issue in the action* ... Neither am I satisfied that it would be unfair to require the petitioner to proceed to trial without having discovery of the documents requested. [emphasis added]

38 In *obiter*, Reilly J. also commented that "To the extent that the petitioner seeks production of documents from non-parties for purposes of the pending motion, I conclude that Rule 30.10 has no application" (*Pastway*, at para. 11, p. 23). Reilly J. relied on the reasoning of McKeown J. in *Framingham*.

39 Given Reilly J.'s findings that the documents sought were not relevant to the action, *Pastway* has no application to a situation in which (such as I find below in the present motion) the documents are relevant to both the motion and the action.

40 Two courts have considered the situation in which documents are relevant to both the motion and the action, and have ordered production on a Rule 30.10 motion.

41 In the recent decision of *Fairview Donut Inc. v. TDL Group Corp.*, [2011] O.J. No. 108 (Ont. S.C.J.) ("*Fairview Donut*"), Strathy J. ordered production of documents under Rule 30.10 from non-party franchisees who swore affidavits in support of the defendant's motion for summary judgment. Strathy J. held that the documents were relevant to both the motion and the action (*Fairview Donut*, at paras. 3-5):

> *The one particularly contentious issue on the motion concerned the production of documents by one of the franchisees, Mr. Cardella. The documents at issue are described as "throw sheets".* At the conclusion of counsel's submissions I indicated that I proposed to grant the motion with respect to Mr. Cardella's throw sheets, with reasons to follow. These are my reasons.
>
> *One of the important issues in this action is the effect of Tim Hortons' conversion from the old-fashioned "bake from scratch" method, employing professional bakers in each store, to a par baking system called "Always Fresh", where baked goods were prepared at a central facility, frozen and shipped to the retail stores where they were baked in a*

convection oven. The plaintiff says that this system, although touted by Tim Hortons as a cost-saving, really had the effect of increasing franchisees' expenses.

Mr. Cardella is one of the Affiant Franchisees. Among other things, he deposes that after the conversion to "Always Fresh" the wasted baking in one of his stores was reduced. He refers specifically to his store #1469 and says that by comparing the month of August 2001 (before the conversion) to August 2003 (after the conversion) the amount of waste or "throws" was cut in half. "Throws" refers to donuts or other baked goods that have to be discarded at the end of the day because more product was baked than was sold. *Tim Hortons' case will likely be that there were fewer "throws" after the conversion because baking was simpler and more efficient because it could be tailored to demand*. [emphasis added]

42 Strathy J. referred to the submission of franchisees' counsel that the court had jurisdiction to make the order under Rule 30.10. Strathy J. held that "I *also* have jurisdiction under the combined operation of Rule 34.10 (dealing with production of documents on examination) and section 12 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6" [emphasis added] (*Fairview Donut*, at paras. 7-8).

43 Strathy J. ordered production of the non-party documents (the throw sheets) since they were relevant to both the motion and the action. Strathy J. relied on *Stavro* (as summarized by Perell J. in *Tetefsky v. General Motors Corp.*, [2010] O.J. No. 1117 (Ont. S.C.J.) at paras. 41-42), and applied the factors under Rule 30.10. Strathy J. held (*Fairview Donut*, at para. 11):

(a) *The "throw sheets" are plainly relevant* - the affidavit filed by Mr. O'Rourke, one of Tim Hortons' directors, acknowledges that such records are relevant. Mr. Cardella's own affidavit indicates that they are relevant to the effect of the "Always Fresh" conversion. *The documents are also important to enable the plaintiffs to make out their case that the conversion did not reduce costs*. They are also important to challenge Mr. Cardella's credibility.

(b) *The plaintiffs are facing a summary judgment motion. It would be unfair to require them to proceed to that motion without production well in advance and without the opportunity to confront Mr. Cardella with the evidence on his examination*. [emphasis added]

44 In *Hilltop Group Ltd. v. Katana*, 1997 CarswellOnt 900 (Ont. Gen. Div.) ("*Hilltop*"), Greer J. allowed the appeal from the master's decision and ordered production from the non-party bank "relating to the loans to and/or the financing of certain businesses, joint ventures and/or trusts which the Bank may have in its possession in connection with" the land developments, businesses, and joint ventures at issue on the plaintiffs' motion for an interlocutory injunction (*Hilltop*, at para. 4). Greer J. held (*Hilltop*, at para. 4):

The Learned Master erred in not finding that the production of the requested documentation was relevant with the purpose of the plaintiffs' pending Motion for an interlocutory injunction.

45 In *Hilltop*, the plaintiffs sought an interlocutory and permanent injunction in their statement of claim, so by necessity, the documents sought were relevant to both the action and motion. Further, Greer J. referred to the defendants' argument based on *Framingham* that Rule 30.10 could not apply to the motion. Greer J. did not adopt the defendants' position, and held only that if the motion could not be brought under Rule 30.10 (which Greer J. did not decide), then she could still order production under Rule 34.10(2)(b) (*Hilltop*, at para. 6).

46 Consequently, none of the cases relied upon by the Jones Defendants support the conclusion that a Rule 30.10 motion cannot be brought when documents are relevant to both a motion and the action.

47 The interpretation proposed by the Jones Defendants would be contrary to Rule 1.04 which requires the court to construe the *Rules* to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits. If a document is relevant and important to both a motion and an action, particularly a critical motion such as an injunction, summary judgment, or a motion to discharge a certificate of pending litigation (as in this case), it would

not lead to a just or less expensive result to have the motion determined without important (as required under *Stavro*) documents relevant to the action, but then have the issue determined at trial with the important documents.

48 Permitting the use of Rule 30.10 to obtain production of documents relevant to both motions and the action is consistent with the approach adopted in *Hilltop* and *Fairview Donut*. I rely on the principles set out in those cases to dismiss the submission of the Jones Defendants on this issue.

49 Even if the approach of Reilly J. in *Pastway* could be said to be contrary to the approach of Greer J. in *Hilltop* and Strathy J. in *Fairview Donut*, I would follow the latter approach for the reasons set out above.

50 I do not address whether Rule 30.10 can be used to obtain documents relevant only to a motion (and not relevant to the action) as the issue does not arise on the facts of the present case.

(iii) The requirement for evidence on a Rule 30.10 motion

51 The Jones Defendants submit that evidence is required on a Rule 30.10 motion both (i) as to why the documents requested are relevant and (ii) how they would assist the moving party in avoiding unfairness at trial.

A. Evidence as to relevance

52 The Jones Defendants submit that the plaintiffs are required to lead evidence as to why the CIBC Documents are relevant.

53 The Jones Defendants rely on *Olendzki v. W.A. Baker Trucking Ltd.*, 27 C.P.C. (6th) 338 (Ont. S.C.J.) ("*Olendzki*"), in which the plaintiff brought an action for monies allegedly owed since the plaintiff transported goods for the defendant. The plaintiff sought "numerous business and financial" documents from "the defendant and a non-party financial institution" (*Olendzki*, at para. 1).

54 In *Olendzki*, there is no analysis as to whether the pleadings disclosed the relevance of the documents sought on the motion.

55 In *Olendzki*, the only evidence as to why the documents were sought from the defendant and the non-party financial institution was an opinion by an accountant that the additional documents were "necessary for her to perform an analysis" (*Olendzki*, at para. 12). J.W. Quinn J. held that the accountant had not explained how the documents would assist and that "Without evidence to support the opinion of the accountant, I am unable to determine the relevance of the additional documents" (*Olendzki*, at paras. 12-13).

56 Consequently, *Olendzki* does not stand for the proposition that a plaintiff must lead evidence to establish relevance under Rule 30.10, but only that if there is insufficient evidence in light of the pleadings, the court may not order production under Rule 30.10.

57 The Jones Defendants also rely on *Han v. Cho*, 2008 BCSC 1207 (B.C. S.C. [In Chambers]) ("*Han*"), which did not involve a motion for production from a non-party. Rather, the plaintiff sought production from the defendants. Griffin J. held that the pleadings were pivotal to relevance (*Han*, at para. 3):

> The first question is whether the documents sought are relevant. *In order to consider the relevance of the documents sought by the plaintiffs, it is important to consider the pleadings*. [emphasis added]

58 In *Han*, the plaintiffs filed evidence which established a *prima facie* case of fraud (*Han*, at para. 5). However, at no point does Griffin J. suggest that such evidence is necessary to establish relevance. To the contrary, Griffin J. considers the pleadings to determine relevance (*Han*, at paras. 3, 6-13).

59 In *Colville-Reeves v. Gray*, [2003] O.J. No. 1304 (Ont. Master) ("*Colville-Reeves*"), Master Dash considered the pleadings when determining relevance under Rule 30.10 (an approach consistent with that taken by Griffin J. in *Han*). Master Dash held (*Colville-Reeves*, at para. 8):

> The first part of the [Rule 30.10] test is relevance to a material issue in the action. *In my view relevance should be determined by the issues set out in the pleadings that are in effect as of the date that the rule 30.10 motion is heard.* [emphasis added]

60 Consequently, I do not accept the submission by the Jones Defendants that the court requires the plaintiffs to file evidence to establish relevance when the pleadings demonstrate such relevance.

61 In any event, there is evidence before the court to establish the relevance of the CIBC Documents, an issue I address below when I review the factors as to why the CIBC Documents should be produced.

B. Evidence that it would be unfair to require the plaintiff to proceed to trial without such production

62 It is settled law that the moving parties on a Rule 30.10 motion "bear the burden of showing that it would be unfair to make them proceed to trial without production of the documents" (*Stavro*, at 49). However, for the reasons I discuss below when I consider the factors set out in *Stavro* and other cases, I find that the plaintiffs have led sufficient evidence to satisfy this burden.

(iv) The decisions of the plaintiffs to not lead evidence about the merits of the action and to refuse to answer cross-examination questions about the merits of the action

63 The Jones Defendants submit that the decisions of the plaintiffs to not lead evidence about the merits of the action and refuse to answer cross-examination questions, about the merits of the action, is a ground on which "for this reason alone the motion herein should be dismissed".

64 The Jones Defendants rely on *Han*, in which Griffin J. held (*Han*, at para. 16):

> The problem with the submissions of counsel for the defendants on this motion is that they are unsupported by affidavit evidence of their clients. In a fraud case especially, it is not sufficient for the court to be advised by counsel as to what their clients have told them. If the defendants want the court to draw evidentiary conclusions, they must provide evidence under oath.

65 However, as noted above, the issue in *Han* did not involve production from non-parties. Instead, the issue was production from the alleged fraudster defendants. The issue addressed by the court with respect to the above-cited passage was whether production should not be ordered because "Counsel for the defendants Subi and Jioh Park says he does not know whether or not they have the power to obtain these documents" (*Han*, at para. 15).

66 In *Han*, defendants' counsel argued a potential lack of power of the clients to obtain documents based "as to what their clients have told them" (*Han*, at para. 16). In these circumstances, Griffin J. held that there was no affidavit evidence as to whether the clients had the power to control the documents.

67 However, the court in *Han* did not find that the defendants had to file evidence on the merits of the action in order to avoid production. Rather, Griffin J. held that the defendants had to file evidence on the issue before the court on the motion, *i.e.* their power to obtain the documents.

68 Consequently, the decision in *Han* does not stand for the proposition that unless the moving parties on a Rule 30.10 motion [4] lead evidence as to the merits of the action, or answer such questions on cross-examination, the motion should be dismissed.

69 As I discuss above, the courts have repeatedly held that a Rule 30.10 motion is properly brought after the close of pleadings and may be brought even earlier if there are compelling circumstances or the documents are necessary to plead. The merits of the action are not a factor to be considered under the *Stavro* test.

70 It would not be just to require evidentiary proof of fraud as a basis to order production from non-parties. The purpose of Rule 30.10 is to ensure a just result at trial (or at an impending motion as in *Hilltop* and *Fairview Donut*), through production of documents from non-parties. To defeat a motion seeking important documents to establish fraud at trial because a plaintiff cannot establish a *prima facie* case of fraud when (and perhaps because) it does not have those non-party documents, would be contrary to Rule 1.04, procedural fairness, and the principles set out in the leading cases on Rule 30.10 allowing production from non-parties before examinations for discovery.

71 For these reasons, I draw no adverse inferences from (i) the plaintiffs' refusal to answer any cross-examination questions as to the merits of the action, nor (ii) the plaintiffs' decision to file no evidence in support of the merits of their action.

(v) The effect of seeking Rule 30.10 relief after cross-examination

72 Blake submits in his factum and at the hearing that Rule 30.10 relief should be denied because the plaintiffs chose to cross-examine Blake on October 22, 2010 prior to serving their notice of motion under Rule 30.10.

73 Blake relies on Rule 39.02(2) which precludes the introduction of any evidence obtained after cross-examinations without consent or leave of the court. Blake submits that the plaintiffs cannot use any evidence obtained from the CIBC Documents in support of the CPL Discharge Motions.

74 However, the issue on this motion is not whether any evidence obtained through the CIBC Documents can be used at the CPL Discharge Motions. That issue requires evidence relevant to leave under Rule 39.02(2), and will be considered by the court taking into account the relevant factors under that Rule.

75 Consequently, I adopt Master Graham's approach in his earlier endorsement on scheduling in this matter and hold that the court's decision on this motion "in no way constitutes a finding that any material that may be ordered on the rule 30.10 motion may automatically be used for the CPL motion".

(b) Merits of the Rule 30.10 motion

76 The Jones Defendants raise two arguments on the merits of the Rule 30.10 motion. First, the Jones Defendants submit that the CIBC Documents are not relevant as they relate to tracing and as such are irrelevant until judgment and a tracing order.

77 Second, the Jones Defendants submit that on consideration of the factors set out by the Court of Appeal in *Stavro* (the "*Stavro* factors"), it would not be unfair to require the plaintiffs to proceed to trial without having discovery of the CIBC Documents.

78 I address each of these arguments below.

(i) Relevance of questions as to tracing

79 The Jones Defendants submit that the CIBC Documents relate to tracing their assets and as such are irrelevant until judgment and a tracing order.

80 The Jones Defendants rely on *Lafarge Canada Inc. v. McAdoo Auto Parts Ltd.* [2009 CarswellOnt 338 (Ont. Master)], 2009 CanLII 2035 ("*Lafarge Canada*") in which Master Dash held that certain questions directed only as to

tracing were irrelevant. Master Dash held that "Courts must be vigilant to ensure that just because a tracing remedy is claimed, defendants are not to be treated as judgment debtors" (*Lafarge Canada*, at paras. 14, 19, and 23).

81 Similarly, C. Campbell J. held in *Sun-Times Media Group Inc. v. Black*, [2007] O.J. No. 795 (Ont. S.C.J. [Commercial List]) ("*Black*") at para. 43, in relation to a Mareva injunction (adopted by Master Dash in relation to tracing at *Lafarge Canada* at paras. 17 and 18) that "examination in and [sic] [5] of tracing may be ordered once the basic foundation Order has been granted".

82 However, the CIBC Documents are relevant to the core issue of the liability of the Jones Defendants. They are not only relevant to tracing, unlike the situations in *Lafarge Canada* and *Black*.

83 In order for the plaintiffs to establish liability, they will have to establish that the Jones Defendants took funds from the plaintiffs' investments in Edvac and used the funds for their personal benefit. It is not a situation, as in *Lafarge Canada*, where the fraudulent liability would be established based on other evidence, and tracing of the funds would only take place after determination of whether the fraud took place. Master Dash makes this distinction (*Lafarge Canada*, at paras. 9 and 25):

> *On the other hand, question 884 p. 162* to provide copies of property tax records for the property sold to the plaintiff *and question 882 p. 157* to produce those portions of the McAdoo minute book that relate to the purchase and sale of that property *have a semblance of relevance to the knowledge of the defendants both at the time they purchased the property and at the time they sold it to Lafarge as to the use that had been made of the property and will be answered.*
>
> . . .
>
> *The threshold issues of liability and damages are clearly severable from the consequential issue of a tracing remedy.* Indeed the court cannot consider a tracing order until it has first determined that these defendants are liable for the plaintiff's damages. *In other words, the information sought becomes relevant only after liability and damages are first established.* Further, the actual tracing is severable from determination of the issue of whether the plaintiff can establish the right to a tracing remedy, including the establishment of a proprietary interest in the property to be traced. I have already determined that *the information sought to be withheld, with the exception of two questions as noted, is relevant only to tracing the funds*; it can have no bearing on whether the defendants have breached the contract or made a fraudulent or negligent misrepresentation as to buried waste on the property - *it is relevant only to tracing the purchase funds so far as is necessary to satisfy the plaintiff's damage claim.* [emphasis added]

84 The CIBC Documents are not relevant only to tracing assets after a cause of action is found to exist, but are necessary to establish the cause of action. Consequently, I reject this submission by the Jones Defendants.

(ii) The Stavro factors

85 In *Stavro*, the Court of Appeal set out the following factors to consider on a Rule 30.10 motion (*Stavro*, at 48-49):

> (i) the importance of the documents in the litigation,
>
> (ii) whether production at the discovery stage of the process as opposed to production at trial is necessary to avoid unfairness to the moving party,
>
> (iii) whether the discovery of the defendants with respect to the issues to which the documents are relevant is adequate and if not, whether responsibility for that inadequacy rests with the defendants,
>
> (iv) the position of the non-parties with respect to production,
>
> (v) the availability of the documents or their informational equivalent from some other source which is accessible to the moving parties, and

(vi) the relationship of the non-parties from whom production is sought, to the litigation and the parties to the litigation. Non-parties who have an interest in the subject-matter of the litigation and whose interests are allied with the party opposing production should be more susceptible to a production order than a true "stranger" to the litigation.

86 I review each of these factors below.

A. The importance of the documents in the litigation and in the CPL Discharge Motions

87 The plaintiffs' evidence establishes the high degree of importance of the CIBC Documents to both the action and the CPL Discharge Motions.

88 The issues of (i) whether the Jones Defendants appropriated Edvac funds and (ii) whether Blake and Marcel used Edvac funds to renovate or purchase their properties are seminal issues in both the action and the CPL Discharge Motions.

89 In their statements of defence, none of the Jones Defendants acknowledges any controlling role in Edvac. Marcel pleads that Shawn was the controlling mind of Edvac, while Shawn pleads that Marcel was the "operating" mind of Edvac. On the other hand, the Corporation Profile Report indicates that all of the Jones Defendants were directors of Edvac as at February 22, 2010. Evidence from the CIBC Documents will be important to assessing the involvement of the Jones Defendants in Edvac.

90 Both Marcel and Blake swear in their affidavits filed on the CPL Discharge Motions that the funds they used to purchase and renovate their properties did not come from Edvac. On the other hand, those renovations and the purchase took place shortly after the plaintiffs invested funds in Edvac. Evidence from the CIBC Documents will be important to determine whether the plaintiffs can claim an interest in the properties sufficient to maintain the CPLs.

91 Consequently, I find that the CIBC Documents are of pivotal importance in determining the liability of the Jones Defendants which depends, in significant part, on their involvement in Edvac and their use of funds invested in Edvac by the plaintiffs.

B. Production at the discovery stage rather than trial to avoid unfairness

92 Production of the CIBC Documents prior to trial is necessary to avoid unfairness.

93 The result of the CPL Discharge Motions may depend on the factual issue of whether the plaintiffs' funds which were deposited in the Edvac account were used (i) by Marcel to pay off his line of credit that he used to renovate his house and (ii) directly or indirectly by Marcel or Blake as a down payment on Blake's property.

94 Even if Blake did receive $85,000 as a gift from Marcel, the plaintiffs may be able to trace misappropriated funds to an innocent party if those funds were gratuitously given by the wrongdoer as a gift (*Waxman v. Waxman*, [2002] O.J. No. 3533 (Ont. S.C.J.) at paras. 14, 58-60).

95 If the plaintiffs' funds can be followed into Marcel and Blake's properties, the court could conclude that the plaintiffs have an interest in the properties sufficient to support the CPLs.

96 Waiting until after the CPL Discharge Motions to produce the CIBC Documents would be unfair to the plaintiffs. If the CIBC Documents were produced at trial, then the plaintiffs could lose their substantive right to the protection of the CPLs.

97 Further, this case may require expert forensic evidence to determine how and when the plaintiffs' funds were removed and to ascertain the whereabouts of the funds. The information in the CIBC Documents is required to properly prepare for examinations for discovery and trial.

98 Consequently, it would be unfair for the plaintiffs to proceed to trial or examinations for discovery without these documents.

C. Whether discovery of the defendants on the issues is adequate

99 There has been no production of the CIBC Documents by the Jones Defendants. Counsel for the Jones Defendants did not respond to two requests by plaintiffs' counsel in September 2010 to produce the CIBC Documents. Consequently, while examinations for discovery have not taken place, there is some likelihood that discovery would not produce adequate results.

100 In any event, as discussed above, it is settled law that examinations for discovery do not need to be conducted before the court may make an order under Rule 30.10. In *Hilltop*, Greer J. held that "the Master erred in finding that the Motion was premature because discovery of Katana had not yet taken place" (*Hilltop*, at para. 9). As I discuss above, courts have held that Rule 30.10 production is ordinarily made after the pleadings have been completed (*Durling*, at para. 24).

D. The position of the non-parties with respect to production

101 CIBC does not oppose the motion and did not appear at the hearing.

E. The availability of the documents or their informational equivalent from some other source which is accessible to the moving parties

102 The plaintiffs have no access to the CIBC Documents and the Jones Defendants have not produced the documents. Further, the Jones Defendants plead that they have no control over the affairs of Edvac. In these circumstances, this factor also favours production of the CIBC Documents.

F. The relationship of the non-parties from whom production is sought, to the litigation and the parties to the litigation

103 If a bank receives funds allegedly procured by fraud, or if funds may have been transferred out of that bank, the bank is "involved in the events" in the litigation and is not a "true stranger". Consequently, this is an additional factor supporting production from the bank, as its involvement makes it a proper non-party from whom to procure documents or information requested by the plaintiffs who are the alleged victims of the fraud (*Colville-Reeves*, at para. 11(f); *Valente v. Valente*, [2004] O.J. No. 5267 (Ont. S.C.J.) at para. 36).

G. Conclusion on the Stavro factors

104 The evidence and pleadings demonstrate that the *Stavro* factors support an order for production of the CIBC Documents under Rule 30.10. Consequently, I reject the Jones Defendants' submissions that even if the Rule 30.10 motion could be brought, it ought to be rejected on the *Stavro* test.

Order and costs

105 For the above reasons, I grant the motion and order production of the CIBC Documents. The motion was vigorously and ably argued by all counsel. The plaintiffs and Shawn filed lengthy motion records, factums, and briefs of authorities, and Blake filed a brief factum. Both of the principal counsel who argued the motion, *i.e.* counsel for Shawn and counsel for the plaintiffs, were senior counsel who submitted almost identical costs outlines seeking partial indemnity costs of approximately $11,000, inclusive of taxes and disbursements.

106 At the hearing, Shawn submitted that if the plaintiffs were successful, deductions should be made for costs thrown away as a result of an adjournment, and alleged duplication of time spent by a junior lawyer for both preparation and attendance.

107 However, the net result of the time and effort was similar for both parties. While the plaintiffs may have incurred slightly more hours than Shawn, many of those hours were at a lower hourly rate because of the work of junior counsel. The materials prepared by Shawn and the plaintiffs were both of superb quality and an unsuccessful party on a motion of this nature would reasonably expect to pay the similar amounts claimed by both parties, particularly based on the extent and quality of material.

108 Counsel for Blake submitted that since he had only filed a brief factum and made brief submissions, Blake should not be required to pay costs. However, each of the three Jones Defendants opposed the motion and a costs order in favour of the successful party should be paid by all defendants who oppose the motion, not on the basis of who made the principal argument.

109 Given the importance and complexity of the issues (which both the plaintiffs and Shawn acknowledge), the quality of the materials, and the amount an unsuccessful party would reasonably expect to pay, I fix costs at $11,000 inclusive of taxes and disbursements, to be paid by the Jones Defendants to the plaintiffs within 30 days of this order.

110 With respect to the plaintiffs' motion to strike his defence on the basis that Marcel failed to pay his prior costs award, [6] I order that Marcel pay separate costs of $600 inclusive of taxes and disbursements to the plaintiffs within 30 days of this order. While Marcel paid his costs award immediately prior to the hearing, his payment was made at the last minute. Consequently, the plaintiffs' motion was necessary and costs are appropriate.

111 I thank counsel for their thorough and reasoned oral and written submissions, which were of great assistance to the court.

Motion granted.

Footnotes

* Affirmed at *Popov v. Jones* (2011), 15 C.P.C. (7th) 143, 2011 CarswellOnt 5601, 2011 ONSC 3594 (Ont. S.C.J.).

1 There is no evidence before me that either Blake or Marcel was cross-examined on their affidavits on the CPL Discharge Motions but no objection was made to Blake's counsel's submission at the hearing and in his factum that Blake was cross-examined prior to this Rule 30.10 motion. Consequently, for the purposes of these Reasons for Decision, I accept that Blake was cross-examined on his affidavit on his CPL Discharge Motion. I would adopt the same analysis if Marcel was cross-examined on his affidavit.

2 (Such as the danger that the site condition would be altered, as in *Durling*)

3 Production from the non-parties was ordered in any event due to the compelling circumstances described at paragraphs 27-29 of *Durling*, and summarized at footnote 2 above.

4 (Or even on a motion for production from a party, as in *Han*)

5 The word "and" should likely be "aid", given the other references to "aid" at paragraphs 9, 25, 27, 29, 31, and 39 of the decision in *Black*.

6 This motion was not argued on the merits but only on costs since Marcel paid his outstanding costs award immediately prior to the hearing.

2011 ONSC 3594
Ontario Superior Court of Justice

Popov v. Jones

2011 CarswellOnt 5601, 2011 ONSC 3594, 15 C.P.C. (7th) 143, 203 A.C.W.S. (3d) 720

Sergiy Popov, Igor Golerkansky, Valeri Gourevitch, Liudmila Grishanov, Dzmitry Grishanov, Genady Kats, Michael Kharlab, Iouri Loukianov, Gennady Minskiy, Irina Obotnina, Larina Plankova, Sergei Tkach, Marina Vinogradov, Vladimir Vinogradov, Yuri Zabara and Vadim Zevlever, Plaintiffs and Marcel Jones, Shawn Jones, Blake Jones, 1754338 Ontario Inc., carrying on business as Edvac Capital Investment and Sudeesh Shivarattan, Defendants

Carole J. Brown J.

Heard: April 5, 2011
Judgment: June 22, 2011
Docket: CV-10-398179

Proceedings: affirming *Popov v. Jones* (2011), 2011 CarswellOnt 643, 2011 ONSC 665 (Ont. Master)

Counsel: V. Kats, C. Wyche, for Plaintiff
J. Ormston, for Defendant, Marcel Jones
S. Turk, for Defendant, Shawn Jones
R. Van Kessel, for Defendant, Blake Jones

***Carole J. Brown J.*:**

1 The Defendants, Marcel Jones ("Marcel"), Shawn Jones ("Shawn") and Blake Jones ("Blake") (collectively, the "Jones Defendants") seek to overturn the decision of Master Glustein dated January 26, 2011[2011 CarswellOnt 643 (Ont. Master)], which granted production of the corporate defendant's banking records from CIBC, a non-party, pursuant to Rule 30.10 of the *Rules of Civil Procedure* ("*Rules*").

2 This action arises out of allegations of breach of contract and fraud on the part of the Defendants. The Plaintiffs alleged that they deposited with Edvac Capital Investment ("Edvac") between September 2008 and February 2009, a total of $765,000, on the basis of representations that the Plaintiffs would receive a rate of return of 2% per month if they provided a loan to Edvac for six to twelve months and that they would be repaid the full amount of the principal of the loan depending on their individual agreed periods.

3 The Plaintiffs allege that the Jones Defendants falsely represented that the principal sum advanced to Edvac would be invested in various projects and loaned to third parties with a mortgage security. They allege in the Statement of Claim that the Jones Defendants were the controlling minds of Edvac, were personally engaged outside their roles as officers and directors of Edvac by their fraudulent conduct and, as such, are personally liable to the Plaintiffs for damages caused by their fraudulent conduct. They further allege that the Jones Defendants transferred the Plaintiffs' funds in Edvac to themselves personally, either directly or through a series of transactions, that Marcel used the investment funds for renovations on his property, and that Blake used the said funds to either purchase or renovate his property. The Plaintiffs obtained certificates of pending litigation ("CPL") on the properties of both Marcel and Blake, and the Jones Defendants have brought a motion to have the CPL removed from title.

4 The Jones Defendants deny all of the allegations and also deny involvement with Edvac. Marcel pleads in his Statement of Defence that he is a shareholder of Edvac along with Blake and Shawn, but is not the controlling mind of Edvac. He pleads that Shawn has excluded Blake and himself, and is acting on behalf of Edvac without authority of the other shareholders. He further claims that Shawn borrowed money from Edvac without his knowledge, which monies were appropriated for his own use. Shawn denies that he is the operating or controlling mind of Edvac and pleads that his father, Marcel, was the operating mind.

5 Blake pleads that he is not an officer or director and that the funds he used to purchase his home were borrowed from the line of credit of his father, Marcel. Each of the Jones Defendants crossclaims against the others. These denials regarding involvement with Edvac are not consistent with the Corporate Profile Report for Edvac produced by the Plaintiffs.

6 The Plaintiffs seek the documents of CIBC as they relate to the issues in this action and the issue of the CPL, and CIBC does not oppose the motion. The Plaintiffs requested production of the CIBC banking records from the Jones Defendants in September of 2010, but the Jones Defendants have not, to date, provided them.

7 Master Glustein ordered production of the said documentation pursuant to Rule 30.10 in his carefully analyzed decision dated January 26, 2011.

8 Marcel and Shawn appeal the decision of the Master. Blake appeals only the costs award against him. Edvac failed to defend the action and was noted in default.

Positions of the Parties

The Appellants'/Defendants' Submissions

9 Each of the Jones Defendants are represented by separate counsel.

10 It is the position of Shawn that the Master erred in holding as follows:

(i) that relief could be granted pursuant to Rule 30.10 in furtherance of the CPL motion;

(ii) that the motion was not premature given the stage of the proceeding;

(iii) that he failed to consider the alternate nature of the Claim;

(iv) that he did not consider or properly consider that the documents were being sought in furtherance of a tracing remedy;

(v) that he failed to consider that Rule 30.10, where tracing is involved, must be approached with an abundance of caution;

(vi) that he failed to properly distinguish the cases of *Lafarge Canada Inc. v. McAdoo Auto Parts Ltd.* [2009 CarswellOnt 338 (Ont. Master)], (2009) CanLII 2035 and *Sun-Times Media Group Inc. v. Black*, [2007] O.J. No. 795 (Ont. S.C.J. [Commercial List]) in view of the claims pleaded in the Amended Statement of Claim;

(vii) in his finding that the issue of tracing pertained to the issue of relevancy only;

(viii) in determining that the Plaintiffs were not required to lead evidence as to the relevance of the documents sought, given the tracing nature of the documents;

(ix) in not making an adverse finding against the Plaintiffs regarding their refusal to lead evidence about the merits of the action and to answer questions in cross-examination about the merits of the action; and

(x) in failing to determine that the Plaintiffs could not rely on their pleadings to seek the relief requested but rather had to establish the *prima facie* nature of their claim.

11 Marcel's grounds for the appeal are the same.

12 Blake appeals only on the issue of costs awarded against him on a joint and several basis in the amount of $11,000 and submits that the costs as against him individually should be reduced to $750 all inclusive.

The Respondents'/Plaintiffs' position

13 The Plaintiffs argue that the decision of Master Glustein is correct and that there are no grounds on which to overturn it.

14 The Plaintiffs emphasize the fact that the motion is not brought simply for purposes of tracing of the assets, but to assist in advancing its case, particularly given the fact that the Jones Defendants have denied any involvement in Edvac and have crossclaimed as against one another with respect to involvement in Edvac.

Standard of Review

15 On this Appeal, the Court must determine whether the Master made any error in law. Where an error in law has occurred, the standard of review is correctness. With respect to the Appeal of Blake regarding costs, leave to appeal a discretionary award of costs is required.

Disposition

16 The Master carefully and properly reviewed all of the evidence and caselaw. He analyzed the issues raised by all parties at pages 6 - 18 of his decision. I find that he correctly applied the facts, evidence and caselaw before him to the issues raised in arriving at his decision.

17 The documentation sought from CIBC is material to the issues and it would be unfair to have the Plaintiffs proceed without this documentation. The Master correctly found that "[t]he issues of (i) whether the Jones Defendants appropriated Edvac funds and (ii) whether Blake and Marcel used Edvac funds to renovate or purchase their properties are seminal issues in the action and the CPL Discharge Motions", and "that the CIBC Documents are of pivotal importance in determining the liability of the Jones Defendants which depends, in significant part, on their involvement in Edvac and their use of funds invested in Edvac by the Plaintiffs."

18 The Jones Defendants have not produced their banking documentation despite the Plaintiffs' requests and there is no other source for this documentation apart from the non-party CIBC.

19 With respect to the Order for production of documents pursuant to Rule 30.10, having reviewed all of the evidence, the applicable caselaw and the Master's decision, and having considered the submissions of the parties on appeal, I find that there are no grounds on which to overturn the Master's decision and am satisfied that the Master correctly found that:

(i) the motion for production of documents is not premature as the Jones Defendants have filed pleadings and Edvac is deemed to admit the truth of the pleadings pursuant to Rule 19.02(1)(a);

(ii) the documents are clearly relevant to the action, as well as the motion and Rule 30.10 is applicable;

(iii) there was sufficient evidence before the Court to establish the relationship of the CIBC documents to the action and the CPL motion, and the relevance of those documents to the issues;

(iv) no adverse inference was to be drawn from the Plaintiffs' decision not to lead evidence concerning the merits of the action or their refusal to answer cross-examination questions as to the merits of the action and the decision to file no evidence in support of the merits of the action, as both decisions were well-founded;

(v) compelling production after cross-examination on a CPL motion does not constitute a finding that the materials ordered produced may automatically be used for the CPL motion;

(vi) the CIBC documents are necessary to establish the cause of action and not, as the Jones Defendants argue, only to trace the assets after the cause of action is found to exist, *i.e.* after judgment;

(vii) the CIBC documents are of pivotal importance in determining the liability of the Jones Defendants, which depends in significant part on the involvement in Edvac and their use of the funds invested in Edvac by the Plaintiffs;

(viii) production at the discovery stage is necessary to avoid unfairness, and the documents cannot be obtained from other sources, as the Plaintiffs have no access to the CIBC documents and the Jones Defendants have not produced them;

(ix) the *Stavro* factors were carefully analyzed by the Master in the context of this action and the factors have been met;

(x) the Master properly considered, analyzed and distinguished *Lafarge* and *Sun-Times* in the costs paragraph.

20 Accordingly, the Appeal is dismissed and the Order of Master Glustein dated January 26, 2011 is upheld.

Costs Awarded by the Master

21 With respect to the motion brought by Blake, I find there to be no reason to overturn the decision of Master Glustein that the costs should be awarded against the Jones Defendants to the Plaintiffs in the amount of $11,000 on a joint and several basis.

22 While counsel for Blake submits that Blake did not actively participate in the motion and simply 'dipped his toe into the pool of water, while the other two Jones Defendants jumped in', I find the analysis of the Master to be correct. Master Glustein held as follows:

> Counsel for Blake submitted that since he had only filed a brief factum and made brief submissions, Blake should not be required to pay costs. However, each of the three Jones Defendants opposed the motion and a costs order in favour of the successful party should be paid by all defendants who opposed the motion, not on the basis of who made the principal argument.

23 I note as well that, whether Blake participated actively or passively, or to a greater or lesser extent than the others in the motion and this appeal, he will benefit in the event that a decision is rendered in favour of the Jones Defendants. I find there to be no error in the decision as rendered by Master Glustein with respect to the production of documents and the award of costs.

Costs of this Appeal

24 I would urge the parties to agree among themselves as to the costs of this motion. In the event that they are unable to do so, I would invite the parties to provide any costs submissions in writing, to be limited to three pages, including the costs outline. The submissions may be forwarded to my attention, care of Judges' Administration at 361 University Avenue, within five days of the release of this Endorsement.

Appeal dismissed.

SEARS CANADA INC., by its Court-appointed Litigation Trustee, J. DOUGLAS CUNNINGHAM, Q.C.
Plaintiff

-and-

ESL INVESTMENTS INC. et al

Defendants

Court File No. CV-18-00611214-00CL

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(Documentary Production Motions, Returnable March 20, 2019)

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