File No. CI 20-01-26627

THE QUEEN'S BENCH
WINNIPEG CENTRE

IN THE MATTER OF: **THE APPOINTMENT OF A RECEIVER PURSUANT TO SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985 c. B-3, AS AMENDED AND SECTION 55 OF *THE COURT OF QUEEN'S BENCH ACT*, C.C.S.M. c. C280**

BETWEEN:

WHITE OAK COMMERCIAL FINANCE, LLC,

Applicant,

- and -

NYGÅRD HOLDINGS (USA) LIMITED, NYGARD INC., FASHION VENTURES, INC., NYGARD NY RETAIL, LLC, NYGARD ENTERPRISES LTD., NYGARD PROPERTIES LTD., 4093879 CANADA LTD., 4093887 CANADA LTD., and NYGARD INTERNATIONAL PARTNERSHIP,

Respondents.

MOTION BRIEF OF THE RECEIVER – CALIFORNIA PROPERTIES

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MOTION BRIEF OF THE RECEIVER – CALIFORNIA PROPERTIES

I. LIST OF DOCUMENTS

1. The Affidavit of Robert L. Dean affirmed March 9, 2020;
2. The Affidavit of Debbie Mackie affirmed March 10, 2020;
3. The Affidavit of Greg Fenske affirmed April 8, 2020;
4. The First Report of the Receiver, dated April 20, 2020;
5. The Affidavit of Greg Fenske affirmed May 13, 2020;
6. The Second Report of the Receiver, dated May 27, 2020;
7. The Third Report of the Receiver, dated June 22, 2020;
8. The Fifth Report of the Receiver, dated July 6, 2020.

II. LIST OF AUTHORITIES

Tab

1. *Filkow v. D'arcy & Deacon LLP*, 2019 MBCA 61

2. Sections 1, 243 and 244 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended

III. POINTS TO BE ARGUED

Introduction

1. On March 18, 2020, Richter Advisory Group Inc. was appointed receiver (in such capacity, the "**Receiver**") over all assets, undertakings and properties of the Respondents, Nygård Holdings (USA) Limited, Nygard Inc., Fashion Ventures, Inc., Nygard NY Retail, LLC, Nygard Enterprises Ltd., Nygard Properties Ltd., 4093879 Canada Ltd., 4093887 Canada Ltd., and Nygard International Partnership (collectively, the "**Debtors**") pursuant to an Order (the "**Receivership Order**") of this Honourable Court on application of White Oak Commercial Finance, LLC.

2. The Receiver has now filed the Fifth Report of the Receiver, dated July 6, 2020 (the "**Fifth Report**"). The purpose of the Fifth Report is to provide this Honourable Court with background information and documentation relating to certain properties located in Gardena, California (collectively, the "**California Properties**") which are owned by Edson's Investments Inc. ("**Edson's**") and Brause Investments Inc. ("**Brause**", and together with Edson's, the "**California Landlords**"), and which are subject of a motion made on behalf of the California Landlords seeking the payment of occupation rent from the Receiver.

3. The California Properties that are the subject of the motion consist of the following:

(a) 312 & 332 East Rosecrans Avenue (owned by Brause);

(b) 14401 South San Pedro Street (owned by Edson's); and

(c) 14421 South San Pedro Street (owned by Edson's).

4. This Brief is being filed to outline and further explain the Receiver's position in respect of the California Properties and in particular in opposition of the California Landlords' motion seeking the payment of occupation rent.

Background Information – Receivership Order / Landlord Waivers

5. The following provisions of the Receivership Order are relevant in considering the position of the California Landlords:

> 3. THIS COURT ORDERS that, subject to further Order of this Court, and subject to the exercise of overriding powers pursuant to paragraph 6 hereof, the Debtors shall remain in possession and control of the Property, and the Receiver shall not be or be deemed to be in possession and control of the Property save and except as specifically provided for herein or pursuant to steps actually taken by the Receiver with respect to the Property under the permissive powers granted to the Receiver pursuant to paragraph 6 of this Order.
>
> …
>
> 6. THIS COURT ORDERS that the Receiver is hereby empowered and authorized, but not obligated, subject at all times to paragraph 5 above, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable (provided that any disbursements made in connection with this paragraph 6 are made in accordance with the terms of this Receivership Order and the Receiver Term Sheet):
>
> (a) to take possession of and exercise control over the Property;
>
> (b) to receive, preserve, protect and maintain control of the Property, or any part or parts thereof, including, but not

> limited to, the changing of locks and security codes, the relocating of Property to safeguard it, the engaging of independent security personnel, the taking of physical inventories and the placement of such insurance coverage as may be necessary or desirable;
>
> …

6. In addition, as referenced in the Fifth Report, a "Landlord Waiver" document was signed by each of the California Landlords in relation to each of the California Properties (collectively, the "**Landlord Waivers**"). The Landlord Waivers were granted by the California Landlords in connection with the loan transaction and revolving credit facility provided by the Applicant and Second Avenue Capital Partners, LLC to the Debtors. The relevant provisions from each of the Landlord Waivers are identical, and state the following:

> **TO**: **WHITE OAK COMMERCIAL FINANCE, LLC** (together with its successors and assigns, the "**Agent**") for and on behalf of the Lenders (as such term is defined below)
>
> **RE:** Credit agreement entered into or to be entered into among, *inter alios*, Nygard Holdings (USA) Limited, Nygard Inc., Fashion Ventures, Inc., Nygard NY Retail, LLC, as borrowers, Nygard Enterprises Ltd., 4093879 Canada Ltd., Nygard Properties Ltd., Nygard International Partnership, 4093887 Canada Ltd., as guarantors, the lenders from time to time party thereto (the "**Lenders**") and the Agent (as amended, modified, extended, renewed, restated, supplemented, replaced, or otherwise modified from time to time, the "**Credit Agreement**"). All capitalized terms used herein and not otherwise defined shall have the meanings assigned to such terms in the Credit Agreement.
>
> …
>
> **AND WHEREAS** the Tenant is granting, among other things, security interests, mortgages and/or hypothecs pursuant to one or more security agreements, deeds of hypothec or other similar agreements (collectively, the "**Security Agreements**") in favour of the Agent and the Lenders in all the Tenant's

present and after-acquired property, assets and undertaking, including inventory, equipment and all tangible property which is now or in the future may become located at, installed in or affixed to, the Premises, and the proceeds thereof (collectively, the "**Collateral**"), in order to secure the Tenant's indebtedness, obligations and liabilities to the Agent and the Lenders (collectively, the "**Obligations**");

NOW THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Landlord agrees in favour of the Agent as follows:

…

4. Until this Waiver is terminated in accordance with Section 14, the Landlord (i) disclaims any interest in the Collateral, (ii) confirms that it has no lien, security interest, claim, rights of levy or distraint, mortgage, general assignment, charge, privilege or hypothec in, of or on the Collateral, (iii) agrees not to levy or distrain upon any of the Collateral or to assert any claim or privilege against the Collateral or the Tenant with respect to the Collateral for any reason, and (iv) agrees to not terminate the Lease without the prior written approval of the Agent.

…

6. The Landlord acknowledges and agrees that the Tenant's granting of security interests and/or hypothecation to the Agent in the Collateral shall not constitute a default under the Lease, nor shall it permit the Landlord to terminate the Lease or re-enter or repossess the Premises or otherwise be the basis for the exercise of any remedy by the Landlord, and the Landlord hereby consents to the granting of the hypothecation, assignment and security interest in the Collateral pursuant to the Security Agreements, and any amendments, revisions or replacements thereof from time to time, to the extent that the consent thereto of the Landlord is required under the Lease.

7. The Agent, and its officers, employees, invitees, agents, and any receiver, receiver and manager or other representatives of the Agent, may, at its option, from time to time, enter the Premises for the purpose of inspecting, possessing, removing, selling (by way of public or private auction), advertising for sale or otherwise dealing with the Collateral or carrying on the business of the Tenant, a rent

> and royalty free license shall be irrevocable and shall continue from the date that any enforcement proceedings commence but not to exceed a period of one hundred and eighty (180) days after the receipt by the Agent of written notice by the Landlord directing removal of the Collateral. For greater certainty, no rent or other amounts whatsoever shall be payable by the Agent (for the 180-day period of its occupation) or the Borrower from and after the commencement of any insolvency or enforcement proceedings.
>
> …
>
> 14. This Waiver shall continue in full force and effect until all Obligations have been fully paid and performed and the Agent has no further obligation to extent credit accommodations to the Tenant.
>
> 16. This Waiver shall be governed by and construed in accordance with the laws of the Province of Ontario and the federal laws of Canada applicable therein.

No Occupation

7. The Receiver recognizes the authorities provided by the California Landlords which establish the proposition that a Receiver which occupies a premises is generally liable for the payment of "occupation rent" to the owner of the subject premises. The Receiver does not, however, accept that it has entered into occupation of the California Properties such that it is *prima facie* liable for payment of occupation rent.

8. The Receiver is not "in" or using the California Properties, which continue to be used and occupied by the tenant (and Debtor), Nygard Inc.

9. As referenced above, paragraph 3 of the Receivership Order specifically provides that the Debtors shall remain in possession and control of the Property and that the Receiver "shall not be or be deemed to be in possession and control of the Property",

unless the Receiver actually takes steps, pursuant to the permissive powers granted under the Receivership Order, to take possession and control of Property.

10. Paragraph 6(a) provides the Receiver with the power to "take possession of and exercise control over the Property". Paragraph 6(b) goes on to provide the Receiver with the power to "receiver, preserve, protect and maintain control of the Property … including, but not limited to, the changing of locks and security codes … the engagement of independent security personnel, the taking of physical inventories and the placement of such insurance coverage as may be necessary or desirable."

11. The Receiver submits there is a distinction, as recognized in the provisions of the Receivership Order, between a Receiver taking possession of and exercising control over Property and taking appropriate steps to preserve and protect Property.

12. In the instant case, the limited steps taken by the Receiver in relation to the California Properties as referenced in the Fifth Report illustrate that it has not taken possession and control of the California Properties; rather, the activities of the Receiver have been focused on preserving and protecting the Property of the Debtors as located in the California Properties. In the circumstances, the Receiver submits the authorities provided by the California Landlords are distinguishable, and there is no obligation on the part of the Receiver to pay occupation rent in this case.

13. While it is true that the California Landlords have not had the right to use the California Properties or access them (outside of the procedures set out in the General Order pronounced by this Honourable Court on April 29, 2020 (the "**General Order**")), the

Receiver submits that in this case, the inability of the California Landlords to use the California Properties does not equate to the Receiver (as opposed to the Debtor, Nygarrd Inc.) being in "occupation", particularly in light of the wording of paragraph 3 of the Receivership Order. Rather, the restrictions on the rights of the California Landlords to use and access the California Properties are simply an extension of the provisions of the Receivership Order prohibiting the exercise of remedies that affect the Property by the California Landlords, and of the Receiver's exercise of its powers to preserve and protect the Property of the Debtors. The Receiver further submits that in issuing the General Order with the provisions relating to access to the California Properties, this Honourable Court was simply endorsing and giving effect to the Receiver's efforts to preserve and protect the Property of the Debtors.

14. Given that the Receiver has not occupied the California Properties, the Debtor Nygard Inc. (which is a "Borrower" under the Credit Agreement with the Lenders), remains the occupying tenant. In relation to that, the closing words of section 7 of each of the Landlord Waivers also make clear that "no rent or other amounts" shall by payable by Nygard Inc. for a period of at least 180 days from and after the commencement of "any insolvency or enforcement proceedings". In the present case, this proceeding was formally commenced on March 11, 2020 (following the filing of a separate "insolvency" proceeding commenced by the issuance of Notices of Intention to Make a Proposal by several of the Debtors on March 9, 2020). Thus, it is also clear there is no separate obligation at this point for Nygard Inc. to pay rent in respect of the California Properties by virtue of the Landlord Waivers.

Landlord Waivers

15. The Receiver further submits that even if it may be said that the Receiver has become an "occupier" of the California Properties, the Landlord Waivers operate to limit the rights of the California Landlords and are clearly meant to extend to the benefit of the Receiver.

16. It is now clear that in interpreting a written contract, Courts are required to consider the "surrounding circumstances", regardless of whether the contract may be said to be ambiguous. The contextual factors to be considered include the purpose of the agreement and the nature of the relationship created by it.

Filkow v. D'arcy & Deacon LLP, 2019 MBCA 61, para. 31-38, Tab 1

17. In considering the Landlord Waivers, it is important to keep in mind the context in which they were entered into, which was as part of a secured loan transaction. To that end, it is obvious that in connection with the Credit Agreement the Lenders were motivated not just to obtain security from the Debtors, but to try and ensure that such security could be enforced in an efficient manner.

18. The Landlord Waivers provided by the California Landlords – who are parties related to the Debtors – clearly reflect an effort by the Lenders to protect (and possibly enhance) the enforceability of their security. As a starting point, it is noted that pursuant to section 4 of the Landlord Waivers, the California Landlords confirmed to the Lenders, *inter alia,* that they disclaimed any interest in the "Collateral" of the Debtors, and

had no “lien, security interest, claim, rights of levy or distraint, mortgage, general assignment, charge, privilege or hypothec in, of or on the Collateral”.

19. The confirmations at section 4 of the Landlords Waivers are stated to remain in effect until such time as the Landlord Waivers are terminated in accordance with Section 14. Section 14, in turn, confirms that the Landlord Waivers continue in “full force and effect” until all the “Obligations” of the Debtors to the Lenders have been fully paid and performed. Obviously, those “Obligations” remain outstanding.

20. Section 7 of the Landlord Waivers then goes on to reference an irrevocable “rent and royalty free license” to be in effect from the commencement of “enforcement proceedings” for a period of 180 days. The closing words of section 7 specifically provide: “For greater certainty, no rent or other amounts whatsoever shall be payable by the Agent (for the 180-day period of its occupation) or the Borrower from and after the commencement of any insolvency or enforcement proceedings.”

21. The California Landlords have focused on the initial wording of section 7, which states: “The Agent, and its officers, employees, invitees, agents and any receiver, receiver and manager or other representatives of the Agent …”. They argue that this wording limits the applicability of section 7 to a receiver who is an “agent” of the Applicant, and note (with reference to certain authorities) that the Receiver in this case (who was appointed by this Honourable Court) is not an agent of the Applicant, but rather an officer of this Court.

22. The Receiver submits the interpretation of section 7 advanced by the California Landlords is unduly restrictive, is not in accordance with the totality of the secured loan transaction and does not make commercial sense. The reference to "other representatives of the Agent" should not be taken to limit the application of section 7 to a privately-appointed receiver acting as an agent of the Applicant. Rather, it appears those words were simply meant to expressly extend the application of the first portion of section 7 to include any "representative of the Agent", without at the same time excluding a receiver (whether private or court-appointed). In considering this point, the Receiver notes that section 7 also clearly references, in two separate places, the commencement of "enforcement proceedings". It is respectfully submitted that this reference to "enforcement proceedings" is meant, in the ordinary context of those words, to encompass proceedings commenced in Court by the Applicant for the appointment of a Receiver.

23. In considering the meaning of "enforcement proceedings" as used in the Landlord Waivers, the Receiver submits that the Credit Agreement and related security documentation are relevant. To that end, Section 8.02(e) of the Credit Agreement (found as Exhibit "D" to the Affidavit of Robert Dean affirmed March 9, 2020) expressly contemplates proceedings in court as an enforcement mechanism available to the Lenders. Section 8.02(e) states:

> **8.02 Remedies Upon Event of Default**. If any Event of Default occurs and its continuing, the Agent may, or, at the request of the Required Lenders shall, taken any or all of the following actions:
>
> …

> (e) whether or not the maturity of the Obligations shall have been accelerated pursuant hereto, proceed to protect, *enforce and exercise all rights and remedies of the Credit Parties under this Agreement, any of the other Loan Documents or applicable Law, including, but not limited to, by suit in equity, action at law or other appropriate proceeding*, whether for the specific performance of any covenant or agreement contained in this Agreement and the other Loan Documents or any instrument pursuant to which the Obligations are evidenced, and, if such amount shall have become due, by declaration or otherwise, proceed to enforce the payment thereof or any other legal or equitable right of the Credit Parties; [emphasis added]

24. Further, the definitions of "Laws" and "Governmental Authority" as found in Section 1.01 of the Credit Agreement state the following:

> **"Laws"** means each international, foreign, federal, state, provincial, territorial and local statute, treaty, rule, guideline, regulations, ordinance, code and administrative or judicial precedent or authority, including the interpretation or administration thereof by any Governmental Authority charged with the enforcement, interpretation or administration thereof, and each applicable administrative order, directed duty, request, license, authorization and permit of, and agreement with, any Governmental Authority, in each case whether or not having the force of law.
>
> **"Governmental Authority"** means the government of the United States, Canada or any other nation, or of any political subdivision thereof, whether state, provincial or local, and any agency, authority, instrumentality, regulatory body, court, central bank or other entity exercising executive, legislative, judicial, taxing, regulatory or administrative powers or functions of or pertaining to government (including any supra-national bodies such as the European Union or the European Central Bank.

25. The Debtor Nygard Inc., among others, also executed and delivered a certain Security Agreement (the "**Nygard Inc. Security Agreement**") dated December

30, 2019 (found as Exhibit "J" to the Affidavit of Robert Dean affirmed March 9, 2020), in favour of the Applicant (as Agent) in connection with the Credit Agreement, to secure payment and other obligations of Nygard Inc., as a Borrower, to the Lenders.

26. The terms of the Nygard Inc. Security Agreement include:

> Section 1.1
>
> (b) Capitalized terms used but not otherwise defined herein that are defined in the Credit Agreement shall have the meanings given to them in the Credit Agreement.
>
> …
>
> 8.1 Remedies. Upon the occurrence and during the continuance of any Event of Default the Agent may, and at the request of the Required Landers, shall, from time to time in respect of the Collateral, *in addition to the other rights and remedies provided for herein, under applicable Law or otherwise available to it*: … [emphasis added]

27. The term "Law", as used in the Nygard Inc. Security Agreement is as defined in the Credit Agreement (set forth above), and includes Canadian law.

28. Thus, in addressing remedies available upon default, the Credit Agreement and Nygard Inc. Security Agreement clearly contemplate the ability of the Lenders to commence court proceedings seeking relief under Canadian law (i.e., an application to the Court for the appointment of a receiver under section 243 of the *Bankruptcy and Insolvency Act* (the "**BIA**")).

29. Sections 243 and 244 of BIA are also of assistance in considering the meaning of "enforcement proceedings" in the Landlord Waivers. In that regard, the

Receiver's appointment by this Honourable Court was made pursuant to section 243(1) of the BIA, following the Applicant's provision of a notice of intention to enforce its security under section 244 of the BIA (as set out in the Affidavit of Robert L. Dean affirmed March 9, 2020, at paragraphs 17 and 18, and Exhibit "A"). Section 243(1.1), and 244(1) and (2) of the BIA state:

> **243(1.1)** In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1) the court may not *appoint a receiver under subsection (1)* before the expiry of 10 days after the day on which the secured creditor sends the notice unless
>
> (a) the insolvent person consents to an earlier *enforcement* under subsection 244(2); or
>
> (b) the court considers is appropriate to appoint a receiver before then.
>
> …
>
> **244(1)** A secured creditor who intends to *enforce* a security on all or substantially all of
>
> (a) the inventory,
>
> (b) the accounts receivable, or
>
> (c) the other property,
>
> of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person shall send to that insolvent person, in the prescribed form and manner, a notice of that intention.
>
> **244(2)** Where a notice is required to be sent under subsection (1), the secured creditor shall not *enforce* the security in respect of which the notice is required until the expiry of ten days after sending that notice, unless the insolvent person consents to an earlier *enforcement* of the security.
>
> [emphasis added]

Sections 243 and 244 of the BIA, Tab 2

30. Based on the language found in section 7 of the Landlord Waivers, considered in light of the provisions of the Credit Agreement and Nygard Inc. Security Agreement, and the language found in the BIA relating to the “enforcement” of security by way of Court appointment of a receiver, the Receiver submits it is fair to conclude that the parties to the Landlord Waivers intended that section 7 would apply in the present circumstances, where the Receiver was appointed by this Honourable Court pursuant to an “enforcement proceeding” commenced by the Applicant.

31. The Receiver further submits that even if the opening sentence of section 7 of the Landlord Waivers is found not to be applicable to a Court-appointed receiver (which is not conceded), the closing sentence of section 7 of the Landlord Waivers does not contain any exclusion in relation to a court appointed receiver, and the Receiver submits that the granting of the 180 period pursuant to which “no rent or other amounts whatsoever” are payable extends to a receiver appointed by this Honourable Court as a result of “enforcement proceedings”.

32. In the result, it is submitted that the Landlord Waivers are clearly intended to provide a rent-free period of time, from landlords related to the Debtors, to enable enforcement of security against collateral stored at the California Properties. Enforcement by means of the court-appointment of a receiver and manager is a remedy available under “applicable law”, and is an “appropriate proceeding”, as described by the Credit Agreement.

33. Enforcement by the court-appointment of a receiver and manager is not excluded as a remedy by either the Credit Agreement or the Landlord Waivers. Indeed, the Credit Agreement contemplates enforcement by the Lenders by way of court-appointment of a receiver and manager.

34. For all the reasons as set out above, the Receiver therefore submits that the motion of the California Landlords ought to be dismissed, with costs payable in favour of the Receiver.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of July, 2020.

THOMPSON DORFMAN SWEATMAN LLP

Per: "Ross A. McFadyen"
G. Bruce Taylor / Ross A. McFadyen
Lawyers for Richter Advisory Group Inc.,
the Court-Appointed Receiver

Most Negative Treatment: Distinguished
Most Recent Distinguished: Hudson King v. Lightstream Resources Ltd. | 2020 ABQB 149, 2020 CarswellAlta 381, [2020] A.W.L.D. 1116, [2020] A.W.L.D. 1123, [2020] A.W.L.D. 1124, [2020] A.W.L.D. 1182, 316 A.C.W.S. (3d) 270 | (Alta. Q.B., Feb 27, 2020)

2019 MBCA 61
Manitoba Court of **Appeal**

Filkow et al v. D'Arcy & **Deacon** LLP

2019 CarswellMan 444, 2019 MBCA 61, [2019] 9 W.W.R. 271, 306 A.C.W.S. (3d) 79, 48 E.T.R. (4th) 190

KEVIN FILKOW and LAINIE FILKOW in their capacity as personal representatives of THE ESTATE OF KEN FILKOW (Applicants / Appellants) and D'ARCY & DEACON LLP (Respondent / Respondent)

Richard J. Chartier C.J.M., Diana M. Cameron, Christopher J. Mainella JJ.A.

Heard: January 23, 2019
Judgment: May 28, 2019
Docket: AI 18-30-09086

Counsel: J.A. Kagan, A.M. Mariani, for Appellants
S.F. Vincent, for Respondent

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Estates and Trusts; Public
Related Abridgment Classifications
Business associations
II Creation and organization of business associations
II.2 Partnerships
II.2.e Fiduciary obligations
Contracts
VII Construction and interpretation
VII.3 Surrounding circumstances
Headnote
Contracts --- Construction and interpretation — Surrounding circumstances
At time of his death deceased was partner and practicing lawyer in respondent law firm, and settlement agreement was entered into between law firm and applicants, personal representatives of deceased's estate — Applicants applied for declaration that law firm breached settlement agreement by allocating partnership income to estate in year following deceased's death — Application judge dismissed application — Applicants appealed — Appeal allowed — Application judge took too narrow view of what was admissible evidence of surrounding circumstances in interpreting settlement agreement — Application judge conflated issues of subjective intent and surrounding circumstances, which resulted in his failure to consider surrounding circumstances regarding formation of settlement agreement — Application judge's approach caused him to fail to consider significant undisputed evidence regarding nature of relationship between parties, general nature of negotiations preceding agreement, knowledge of parties when they entered into agreement and purpose of settlement agreement — Application judge's error in refusing to consider surrounding circumstances was not entirely determinative of matter — It could not be concluded that intent of settlement agreement was to preclude law firm from allocating partnership income to deceased in taxation year following his death — Established accounting practice, which was essentially tax deferral from which deceased undoubtedly benefited during

his lifetime, was never discussed with applicants — Words in settlement agreement and final release did not indicate intention to bind law firm in such manner.

Business associations --- Creation and organization of business associations — Partnerships — Fiduciary obligations

At time of his death deceased was partner and practicing lawyer in respondent law firm, and settlement agreement was entered into between law firm and applicants, personal representatives of deceased's estate — Applicants applied for declaration that law firm breached settlement agreement by allocating partnership income to estate in year following deceased's death — Application judge dismissed application — Applicants appealed — Appeal allowed — At time law firm entered into settlement discussions it owed ad hoc fiduciary duty to advise applicants of its intended allocation of income to estate in year following death of deceased — While issue of whether fiduciary relationship existed along with corresponding duties raised new issue on appeal, that issue should be considered — Fiduciary relationship between deceased and law firm did not continue after his death — There was no evidence that law firm ever made express undertaking to act for benefit of applicants, but given inherent duties of honesty, loyalty and good faith present in partnership, it could be implied that law firm undertook to act in best interests of estate of its deceased partner — There was implied undertaking pursuant to which law firm would act in best interests of deceased's estate in some circumstances, including negotiation of settlement agreement — Applicants constituted defined group, and estate was vulnerable when negotiating settlement agreement — Law firm had all requisite information to factor into its decision to enter into settlement agreement, while estate did not — Issue was not whether accounting practice existed or whether deceased took advantage of it when he was partner, but concern was exercise of power by law firm in failing to disclose accounting practice and its corresponding intent to allocate partnership income to estate in year following deceased's death — Allocation caused estate to incur tax liability in excess of amount it received under settlement agreement, and end result was that allocation effectively negated settlement — If applicants had known of intended allocation of additional partnership income to estate, it would have affected negotiation of settlement agreement — Nature of relationship between estate and law firm placed duty on law firm to provide applicants with complete financial disclosure regarding deceased's financial affairs with law firm while negotiating settlement agreement — Law firm breached fiduciary duty by failing to disclose intended allocation during course of negotiations with applicants.

Table of Authorities

Cases considered by *Diana M. Cameron J.A.*:

Cadbury Schweppes Inc. v. FBI Foods Ltd. (1999), 167 D.L.R. (4th) 577, 1999 CarswellBC 77, 1999 CarswellBC 78, 83 C.P.R. (3d) 289, 235 N.R. 30, 42 B.L.R. (2d) 159, 117 B.C.A.C. 161, 191 W.A.C. 161, 59 B.C.L.R. (3d) 1, [1999] 5 W.W.R. 751, [1999] 1 S.C.R. 142, [2000] F.S.R. 491 (S.C.C.) — considered

Creston Moly Corp. v. Sattva Capital Corp. (2014), 2014 SCC 53, 2014 CSC 53, 2014 CarswellBC 2267, 2014 CarswellBC 2268, 373 D.L.R. (4th) 393, 59 B.C.L.R. (5th) 1, [2014] 9 W.W.R. 427, 461 N.R. 335, 25 B.L.R. (5th) 1, 358 B.C.A.C. 1, 614 W.A.C. 1, (sub nom. *Sattva Capital Corp. v. Creston Moly Corp.)* [2014] 2 S.C.R. 633 (S.C.C.) — referred to

Drader v. Abbotsford (City) (2013), 2013 BCCA 376, 2013 CarswellBC 2522, 12 M.P.L.R. (5th) 199, 48 B.C.L.R. (5th) 92, 35 R.P.R. (5th) 8, 343 B.C.A.C. 237, 586 W.A.C. 237 (B.C. C.A.) — referred to

Elder Advocates of Alberta Society v. Alberta (2011), 2011 SCC 24, 2011 CarswellAlta 763, 2011 CarswellAlta 764, 81 C.C.L.T. (3d) 1, [2011] 6 W.W.R. 191, 41 Alta. L.R. (5th) 1, 2 C.P.C. (7th) 1, 331 D.L.R. (4th) 257, 416 N.R. 198, 499 A.R. 345, 514 W.A.C. 345, (sub nom. *Alberta v. Elder Advocates of Alberta Society)* [2011] 2 S.C.R. 261 (S.C.C.) — considered

Elias et al v. Western Financial Group Inc (2017), 2017 MBCA 110, 2017 CarswellMan 532, [2018] 2 W.W.R. 501, 417 D.L.R. (4th) 695, 76 B.L.R. (5th) 38 (Man. C.A.) — considered

Frame v. Smith (1987), 78 N.R. 40, [1987] 2 S.C.R. 99, 42 D.L.R. (4th) 81, 23 O.A.C. 84, 42 C.C.L.T. 1, [1988] 1 C.N.L.R. 152, 9 R.F.L. (3d) 225, 1987 CarswellOnt 347, 1987 CarswellOnt 969 (S.C.C.) — considered

Garwood v. Garwood Estate (2007), 2007 MBCA 160, 2007 CarswellMan 505, 37 E.T.R. (3d) 44, 225 Man. R. (2d) 30, 419 W.A.C. 30 (Man. C.A.) — considered

Geoffrey L. Moore Realty Inc. v. Manitoba Motor League (2003), 2003 MBCA 71, 2003 CarswellMan 229, 10 R.P.R. (4th) 1, 173 Man. R. (2d) 300, 293 W.A.C. 300, 34 C.P.C. (5th) 21, [2003] 9 W.W.R. 385 (Man. C.A.) — considered

Hodgkinson v. Simms (1994), [1994] 9 W.W.R. 609, 49 B.C.A.C. 1, 80 W.A.C. 1, 22 C.C.L.T. (2d) 1, 16 B.L.R. (2d) 1, 6 C.C.L.S. 1, 97 B.C.L.R. (2d) 1, 117 D.L.R. (4th) 161, 171 N.R. 245, 57 C.P.R. (3d) 1, 5 E.T.R. (2d) 1, [1994] 3 S.C.R. 377, 95 D.T.C. 5135, 1994 CarswellBC 438, 1994 CarswellBC 1245 (S.C.C.) — considered

Investors Compensation Scheme Ltd. v. West Bromwich Building Society (1997), [1998] 1 All E.R. 98, [1998] 1 W.L.R. 896, [1997] UKHL 28 (U.K. H.L.) — considered

Lac Minerals Ltd. v. International Corona Resources Ltd. (1989), 6 R.P.R. (2d) 1, 44 B.L.R. 1, 35 E.T.R. 1, 101 N.R. 239, 36 O.A.C. 57, 1989 CarswellOnt 126, 1989 CarswellOnt 965, 69 O.R. (2d) 287 (note), 26 C.P.R. (3d) 97, 61 D.L.R. (4th) 14, [1989] 2 S.C.R. 574 (S.C.C.) — considered

Livingston v. Livingston (1914), 32 O.L.R. 440, 20 D.L.R. 960, 1914 CarswellOnt 565 (Ont. S.C.) — referred to

Livingston v. Livingston (1912), 21 O.W.R. 901, 1912 CarswellOnt 226, 4 D.L.R. 345, 26 O.L.R. 246 (Ont. H.C.) — considered

Livingston v. Livingston (1916), 26 D.L.R. 140, 1916 CarswellOnt 232 (Jud. Com. of Privy Coun.) — referred to

Perez v. Galambos (2009), 2009 SCC 48, 2009 CarswellBC 2787, 2009 CarswellBC 2788, 97 B.C.L.R. (4th) 1, [2009] 12 W.W.R. 193, 394 N.R. 209, 70 C.C.L.T. (3d) 167, 276 B.C.A.C. 272, 468 W.A.C. 272, 312 D.L.R. (4th) 220, *(*sub nom. *Galambos v. Perez)* [2009] 3 S.C.R. 247 (S.C.C.) — considered

R. v. Barton (2019), 2019 SCC 33, 2019 CSC 33, 2019 CarswellAlta 985, 2019 CarswellAlta 986, 86 Alta. L.R. (6th) 1 (S.C.C.) — considered

R. v. Mian (2014), 2014 SCC 54, 2014 CSC 54, 2014 CarswellAlta 1561, 2014 CarswellAlta 1562, 13 C.R. (7th) 1, 462 N.R. 1, 377 D.L.R. (4th) 385, 315 C.C.C. (3d) 453, [2014] 2 S.C.R. 689, 580 A.R. 1, 620 W.A.C. 1, 319 C.R.R. (2d) 4, 2 Alta. L.R. (6th) 217 (S.C.C.) — referred to

R. v. Suter (2018), 2018 SCC 34, 2018 CSC 34, 2018 CarswellAlta 1266, 2018 CarswellAlta 1267, 26 M.V.R. (7th) 1, 70 Alta. L.R. (6th) 1, 47 C.R. (7th) 1, 363 C.C.C. (3d) 1, 424 D.L.R. (4th) 1, [2018] 2 S.C.R. 496 (S.C.C.) — considered

Rochwerg v. Truster (2002), 2002 CarswellOnt 990, 23 B.L.R. (3d) 107, 158 O.A.C. 41, 58 O.R. (3d) 687 (Ont. C.A.) — considered

Tham Estate v. Cressey Development Corp. (2016), 2016 BCSC 1208, 2016 CarswellBC 1828 (B.C. S.C.) — considered

Statutes considered:

Partnership Act, R.S.M. 1987, c. P30

s. 31 — considered

s. 36(1) — considered

s. 45(1) — considered

Rules considered:

Queen's Bench Rules, Man. Reg. 553/88

R. 14.05(2)(c)(iv) — referred to

R. 38.09 — referred to

APPEAL by applicants from application judge's decision dismissing application for declaration that respondent breached settlement agreement.

***Diana M. Cameron J.A.*:**

Introduction

1 This case considers the nature of a settlement agreement and the legal relationship between the applicants as the personal representatives of the estate of Ken Filkow (the deceased), and the respondent. At the time of his death, the deceased was a practising lawyer and partner in the respondent law firm.

2 The applicants applied for a declaration that the respondent breached the settlement agreement by allocating partnership income to the estate in the year following the death of the deceased (see Manitoba, *Court of Queen's Bench Rules*, Man Reg 553/88, r 14.05(2)(c)(iv)).

3 While I agree with the applicants that the application judge erred in refusing to consider the surrounding circumstances in his interpretation of the settlement agreement, that error is not entirely determinative of the matter.

4 In my view, at the time the respondent entered into settlement discussions, it owed an *ad hoc* fiduciary duty to advise the applicants of its intended allocation of income to the estate in the year following the death of the deceased.

5 For the reasons that follow I would allow the appeal.

Background and Proceedings

6 The deceased passed away in October 2014. In early November 2014, the applicants met with members of the respondent to discuss the return of the deceased's deposit account consisting of working capital invested in the respondent by the deceased (the working capital account). Also at issue was the billing of the deceased's work in progress, the collection of receivables due and owing at the time of his death and other financial issues.

7 As part of the negotiations concerning the estate, the applicants met with the Director of Finance and Administration of the respondent (the director) relating to money owed by the respondent to the estate. It is clear from the director's affidavit that numerous contentious financial issues were discussed between November 2014 and November 2015 regarding the amount of money owed by the respondent to the estate.

8 The negotiations did not go well. The applicants were of the view that the respondent was not forthcoming with financial disclosure. They hired a lawyer to represent their interests in their dealings with the respondent. Through their lawyer, they requested the assistance of the Law Society in their efforts to ascertain the contact information of clients who had failed to pay statements of account of the deceased.

9 On the other hand, the respondent felt that the deceased had overstated to the applicants the amount of working capital that he was entitled to from the respondent. The applicants had also requested additional money, such as a special payment for goodwill and unused funds from the deceased's business promotion account. These latter requests were denied by the respondent.

10 Despite all of the above, the issue of future allocation of taxable income to the deceased after the year of his death was not discussed at any time throughout the negotiations.

11 Eventually, each side appointed a lawyer (the settlement lawyers) in order to attempt to negotiate an agreement. More than a year after the death of the deceased, on December 18, 2015, the agreement was reduced to writing in an email that was sent by the respondent's settlement lawyer to the applicants' settlement lawyer. It stated:

> In addition to the reconciliation payments already made to date, [the respondent] will provide a further one-time and all-inclusive payment to the Estate in the amount of $20,000.00, in full and final satisfaction of any and all further financial entitlement claims, known or unknown.

12 It also included a term that the "Estate and its Personal Representatives ... provide a comprehensive Final Release, in a form satisfactory to [the respondent]."

13 On December 23, 2015, the settlement lawyer for the respondent forwarded a trust cheque in the amount agreed upon as well as "[t]he contemplated Final Release, in required form, for execution purposes."

14 On January 10, 2016, the applicants provided a final release in which they discharged the respondent:

> [F]rom all manner of actions, causes of actions, claims, proceedings, complaints, demands, costs or damages of any nature or kind whatsoever, known or unknown and whether at law, in equity or pursuant to any statute, which the [applicants] now have or may have or which the [applicants'] successors and assigns hereafter can, shall or may have up to the date hereof and, without limiting the generality of the foregoing, for and by reason of or in any way attributable to any past, present or future financial accounting, reconciliation or entitlement that may have been or be alleged by virtue of the [deceased's] status as a former partner and interest holder of the [respondent].

It further provided that the applicants:

> UNDERTAKE AND AGREE to indemnify and hold harmless the [respondent] from and against all claims, charges, taxes, penalties or demands which may be made by the Minister of National Revenue requiring the [respondent] to pay any income tax, charges, taxes or penalties under the *Income Tax Act* (Canada) in respect of income tax payable by the aforesaid ESTATE.

15 Collectively, the December 18, 2015 email and the final release constituted the settlement agreement.

16 A little more than one year after the settlement agreement was concluded, the applicants were made aware that the respondent had filed a T5013 income tax form allocating an additional $54,332 partnership income to the deceased for the 2015 taxation year (the allocation). The allocation would have resulted in an effective tax liability to the estate of approximately $26,000.

17 In an email to the director, the applicants disputed the allocation, claiming that the deceased did not generate any income in 2015 and, upon his death in 2014, he ceased being a partner. Quoting the partnership agreement, to which the deceased was a party prior to his death, the applicants stated that the deceased's share of the profits were to be "*calculated and paid in the same manner and at the same time as the other partners for the fiscal year in which the partner died*".

18 The respondent maintained that the allocation was simply part of "an approved accounting and financial statement practice that resulted in deferral of income tax for each of the partners." The affidavit of the director explained it as follows:

> At year-end, being the 31 st of December of each year, the amount recorded for unbilled disbursements was split equally between all of the partners. So, for example, if there was a balance of unbilled disbursements of $1,000,000 at the end of 2014, and there were 20 partners, each partner was allocated $50,000. The allocation served as a tax deduction, or deferral, for 2014.
>
> Then, on January 1, 2015, the same $50,000 would be added back to each partner as income. So long as in each subsequent year, the amount of unbilled disbursements had grown, there would each year be an additional tax deduction or deferral. If, however, the amount of unbilled disbursements decreased in the following year, then each partner would potentially face an "add-back" to their taxable income.

19 In the respondent's view, the allocation represented the deferred taxable income that the deceased had enjoyed up to December 31, 2014.

20 The applicants filed an application seeking a declaration that the allocation constituted a breach of the settlement agreement. They argued that it was always the intent of the parties that the settlement agreement would conclude all matters between them and it was on that understanding that they executed the final release.

21 The respondent took the position that the evidence provided in the applicants' supporting affidavit material, of their intent that the settlement agreement would conclude all matters between the parties, was inadmissible evidence of subjective intent of a party to a contract. It further argued that it did not sign a final release as part of the settlement agreement and was not subject to a condition barring it from making claims against, or allocating income to, the estate.

22 The application judge dismissed the application. He found that the entire settlement agreement concluded by the parties was set out in the December 18, 2015 email and the final release. In his view, the evidence proffered by the applicants reflecting the parties' intent in entering the settlement agreement constituted inadmissible evidence of subjective intent.

23 Further, the application judge held that the December 18, 2015 email describing the terms of settlement did not prohibit the allocation. Finally, he found that the final release applied only to the applicants and not to the respondent.

Issues

24 The applicants assert that the application judge erred by conflating the issue of subjective intention evidence in the interpretation of a contract with evidence of surrounding circumstances when he refused to consider their evidence regarding the intent of the settlement agreement. They claim that the failure to consider such evidence caused him to wrongly conclude that the wording of the settlement agreement did not prohibit the respondent from allocating partnership income to the deceased for the 2015 tax year, and caused him to fail to imply a term into the settlement agreement prohibiting the allocation.

25 At the hearing of the appeal, this Court raised a question relating to the nature of the relationship: specifically, whether a fiduciary relationship existed between the respondent and the applicants, and, if it did, whether the respondent owed a fiduciary duty to disclose the intended allocation to the applicants prior to entering the settlement agreement. After the conclusion of the oral hearing of the appeal, the Court provided the parties with written notice of the question raised by the Court and the opportunity to make written submissions in accordance with the procedure provided for in *R. v. Mian*, 2014 SCC 54 (S.C.C.) at paras 53-60.

26 Thus, the issues to be determined are:

1. Whether the application judge erred in failing to consider the surrounding circumstances of the settlement agreement;

2. Whether a fiduciary relationship existed between the respondent and the applicants; and

3. Whether the respondent's failure to disclose the intended allocation before entering into the settlement agreement constituted a breach of fiduciary duty.

Ground 1 — Whether the Application Judge Erred in Failing to Consider the Surrounding Circumstances of the Settlement Agreement

27 The question of whether the application judge erred in refusing to consider the surrounding circumstances in his interpretation of the settlement agreement is a question of law to be determined on the standard of correctness (see *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53 (S.C.C.) at para 53).

28 The facts that the application judge relied on to determine the application were that: i) the deceased was a lawyer and partner of the respondent at the time of his death; ii) there was a dispute regarding the proper calculation of income due and owing to the deceased by the respondent; iii) there was an agreement that the respondent would pay the estate $20,000; iv) the release was executed by the applicants as part of the settlement agreement; and v) the respondent later allocated partnership income to the deceased for the 2015 tax year which resulted in a liability to the estate.

29 As earlier indicated, the application judge found that the entire settlement agreement was set out in the email dated December 18, 2015 and the final release. After considering the law governing the admissibility of subjective intent or parol evidence in the interpretation of a contract, he held that there was "no lack of clarity or other factors identified in the case law that would justify the consideration of extrinsic material purporting to reflect the subjective intent of the parties".

30 In my view, the application judge took too narrow a view of what was admissible evidence of surrounding circumstances in the interpretation of the settlement agreement. The settlement agreement constituted a contract that was the result of a year of discussions and negotiations between the parties. In *Sattva*, Rothstein J explained the law regarding the interpretation of contracts (at para 47).

> [T]he interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744, at para. 27, *per* LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at paras. 64-65, *per* Cromwell J.). To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes

> that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning.
>
> [emphasis added]

31 As was noted in *Elias et al v. Western Financial Group Inc*, 2017 MBCA 110 (Man. C.A.), "Courts are required to consider the surrounding circumstances in interpreting a contract regardless of whether the contract may be ambiguous" (at para 69).

32 The law regarding interpretation of a release is stated by Geoff R Hall, *Canadian Contractual Interpretation Law*, 3rd ed (Toronto: LexisNexis, 2016) (at p 260):

> A release is a contract, and the general principles governing the interpretation of contracts apply equally to releases. However, there is also a special rule which is superadded onto the regular ones. This rule comes from *London and South Western Railway v. Blackmore* (1870), L.R. 4 H.L. 610 (H.L.), an 1870 decision of the House of Lords. The rule in *London and South Western Railway* holds that a release is to be interpreted so that it covers only those matters which were specifically in the contemplation of the parties at the time the release was given. The rule allows the Court to consider a fairly broad range of evidence of surrounding circumstances in order to ascertain what was in fact in the specific contemplation of the parties at the relevant time, and it is not uncommon for a significant amount of extrinsic evidence to be examined when the rule is applied. However, like the law of contractual interpretation generally, the scope of permissible extrinsic evidence does not extend to evidence of the parties' subjective intentions; such evidence is strictly inadmissible.

See also *Drader v. Abbotsford (City)*, 2013 BCCA 376 (B.C. C.A.) at para 40.

33 In *Sattva*, Rothstein J observed that, in considering surrounding circumstances, the meaning of words is derived from contextual factors. Importantly, this includes the purpose of the agreement and the nature of the relationship created by it (see *Sattva* para 48). In this regard, Rothstein J cited *Geoffrey L. Moore Realty Inc. v. Manitoba Motor League*, 2003 MBCA 71 (Man. C.A.), where Hamilton JA stated (at para 15):

> Surrounding circumstances are often important because, in the real world, the task of ascertaining contractual intention can be difficult as words do not have immutable or absolute meanings. Rather, words often take their meaning from a multitude of contextual factors including the nature of the relationship created by the agreement and the purpose of the agreement. This point is made in many appellate and Supreme Court of Canada decisions. For example, in *White v. Central Trust Co.* (1984), 7 D.L.R. (4th) 236 (N.B.C.A.), La Forest J.A. (as he then was), wrote (at p. 248):
>
> > (I)n determining what was contemplated by the parties, the words used in a document need not be looked at in a vacuum. The specific context in which a document was executed may well assist in understanding the words used. It is perfectly proper, and indeed may be necessary, to look at the surrounding circumstances in order to ascertain what the parties were actually contracting about.

34 In *Sattva*, Rothstein J further explained the importance of context in interpreting the meaning of words in a contract, quoting the following from *Investors Compensation Scheme Ltd. v. West Bromwich Building Society* (1997), [1998] 1 All E.R. 98 (U.K. H.L.) at 115 (at para 48):

> The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean.

35 He continued to state that the nature of evidence of surrounding circumstances will vary from case to case, but that (at para 58):

> It should consist only of objective evidence of the background facts at the time of the execution of the contract (*King* [*King v Operating Engineers Training Institute of Manitoba Inc*, 2011 MBCA 80], at paras. 66 and 70), that is, knowledge that

> was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. Subject to these requirements and the parol evidence rule discussed below, this includes, in the words of Lord Hoffmann, "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man".
>
> [emphasis added]

36 He described the parol evidence rule as follows (at para 59):

> The parol evidence rule precludes admission of evidence outside the words of the written contract that would add to, subtract from, vary, or contradict a contract that has been wholly reduced to writing (*King*, at para. 35; and Hall [Geoff R Hall, *Canadian Contractual Interpretation Law*, 2nd ed (Markham: LexisNexis, 2012)], at p. 53). To this end, the rule precludes, among other things, evidence of the subjective intentions of the parties (Hall, at pp. 64-65; and *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129, at paras. 54-59, *per* Iacobucci J.). The purpose of the parol evidence rule is primarily to achieve finality and certainty in contractual obligations, and secondarily to hamper a party's ability to use fabricated or unreliable evidence to attack a written contract.

37 He stated that evidence of surrounding circumstances is consistent with the objective of finality underlying the rule because such evidence is an interpretive aid not intended to change or overrule the written words of the contract. Further, reliability concerns informing the rule do not arise because the "surrounding circumstances are facts known or facts that reasonably ought to have been known to both parties at or before the date of contracting" (at para 60).

38 Thus, he concluded that the parol evidence rule "does not apply to preclude evidence of surrounding circumstances when interpreting the words of a written contract" (at para 61).

39 In my view, the application judge conflated the issues of subjective intent and surrounding circumstances resulting in his failing to consider the surrounding circumstances regarding the formation of the settlement agreement. This approach caused him to fail to consider significant undisputed evidence regarding the nature of the relationship between the parties, the general nature of the negotiations preceding the agreement, the knowledge of the parties when they entered into it and the purpose of the settlement agreement.

40 The affidavit evidence filed in the proceedings confirms the following matters were of concern to the parties prior to them entering into the agreement:

- The return of the funds in the working capital account invested by the deceased upon his entry into the partnership;
- The proration of the deceased's income for 2014 based on the number of months that he worked during that year;
- The billing of the deceased's work in progress;
- The collection of the deceased's accounts receivable;
- The provision by the respondent of contact information of the deceased's clients who had not paid out their accounts;
- The provision by the respondent of a special goodwill payment to the estate;
- Payment of the remaining amount of the deceased's 2014 business promotion account;
- A corresponding set-off of the deceased's 2012 business promotion account claimed by the respondent.

41 During the process of negotiation, the respondent specifically contemplated the fact that there could be tax implications to the estate. For example, in his affidavit the director swore that, when discussing the respondent's "Capital B Account" during the negotiations with the applicants, he advised them that "there was some indication that [the deceased] may have been overpaid on this account and that there might be capital gains taxes payable as a result." In my view, this indicates that the respondent

did not intend to recover the "Capital B Account" overpayment to the deceased, but that it would not be responsible for any taxation implications to the estate. Conversely, I cannot conclude that the intent of the settlement agreement was to preclude the respondent from allocating partnership income to the deceased in the taxation year after his death. That established accounting practice, which was in essence a tax deferral from which the deceased undoubtedly benefited during his lifetime, was never discussed with the applicants. Furthermore, neither the words in the settlement agreement or the final release indicate an intention to bind the respondent in such a manner.

42 However, in my view, that does not end the matter. There remains the question of whether a fiduciary duty existed which would have obligated the respondent to disclose the allocation to the applicants prior to executing the settlement agreement.

Ground 2 — Whether a Fiduciary Relationship Existed Between the Respondent and the Applicants

New Issue on Appeal

43 The respondent argues that the Court should not decide whether it had a fiduciary duty to disclose the intended allocation to the applicants. It submits that new issues on appeal are to be permitted only in exceptional circumstances. Moreover, the respondent asserts that the issue of whether or not it had a fiduciary duty to advise the applicants of its intention to allocate partnership income for the year 2015 raises more than simply a new argument or point of law. It contends that the issue constitutes an entirely new claim that should be subject to stringent standards prior to consideration by the Court. The respondent maintains that it would be prejudicial to the parties to decide the issue absent adequate evidence.

44 In *Mian*, the Supreme Court of Canada affirmed that an appellate court has jurisdiction to raise a new issue. However, the Court also underscored that "not all questions asked by an appeal court will constitute a new issue" (at para 31). Of significance to this case, the Court noted (at para 33):

> [I]ssues that are rooted in or are components of an existing issue are also not "new issues". Appellate courts may draw counsel's attention to issues that must be addressed in order to properly analyze the issues raised by the parties. ... However, where appropriate, the court may have to be prepared to grant even a brief adjournment to allow the parties to consider and canvass the issue.

45 In my view, the question posed by this Court does not constitute a new issue as contemplated in *Mian*. In their application, the applicants claim that, because the allocation was not contemplated during the negotiations leading to the settlement agreement, the allocation constituted a breach of the settlement agreement. In support of their argument, they maintain that the application judge failed to consider the surrounding circumstances when interpreting the settlement agreement.

46 As I earlier indicated, *Sattva* states that the nature of the relationship is a relevant factor when considering the surrounding circumstances. The question of whether the relationship is a fiduciary one does not raise a new issue; it is a component of the existing issue of whether the application judge failed to consider all of the surrounding circumstances, which includes the nature of the relationship.

47 Alternatively, if the question — of whether a fiduciary relationship existed, along with corresponding duties — does raise a new issue, I would find that the new issue should be considered by this Court.

48 As was noted in *Mian*, there are two competing concerns raised in the contemplation of whether to consider a new issue. First is the principle of party presentation pursuant to which the court relies on the parties to define the issues and the court remains the neutral arbiter (see para 39). Second is the court's role in ensuring that justice is done (see para 37). In order to strike a balance between these competing principles, the Court stated that the discretion to raise a new issue "should be exercised only in rare circumstances" (at para 41). It specified the test to be considered as follows (*ibid*):

> An appellate court should only raise a new issue when failing to do so would risk an injustice. The court should also consider whether there is a sufficient record on which to raise the issue and whether raising the issue would result in

> procedural prejudice to any party. This test is sufficiently flexible while also providing for an appropriate level of restraint to address the tensions inherent in the role of an appellate court.
>
> [emphasis added]

See also *R. v. Suter*, 2018 SCC 34 (S.C.C.) at para 30; and *R. v. Barton*, 2019 SCC 33 (S.C.C.) at paras 50-51, 151, 253-60.

49 By definition, fiduciaries must display the utmost good faith. In light of the important role fiduciaries play in our society, to allow a fiduciary to act contrary to its duty is of significant concern to the court. As can be seen by my subsequent analysis of the nature of the *ad hoc* fiduciary relationship that existed between the parties, failure to consider the issue in this case would risk an injustice to the applicants. That is, "there is good reason to believe that the result would realistically have differed had the error not been made" (*Mian* at para 45).

50 Regarding the sufficiency of the record, it must be noted that an application cannot generally proceed on contested facts (see Queen's Bench r 38.09; and *Garwood v. Garwood Estate*, 2007 MBCA 160 (Man. C.A.) at paras 30, 40, 48-58). In this case, the evidence before the Court is straightforward and complete. It addresses the relationship between the parties, the knowledge of the parties in the negotiation of the settlement agreement and the failure of the respondent to disclose.

51 As for procedural prejudice, Moldaver J, writing for the majority of the Court in *Barton*, summarized (at para 51):

> When an appellate court decides to raise a new issue, it must give notice to the parties and provide them with an opportunity to respond ([*Mian*] para. 54). As a general rule, notice should be given "as soon as is practically possible after the issue crystallizes" (para. 57), and the notice must ensure the parties are sufficiently informed so they may prepare and respond (para. 54). The form of response required "will depend on the particular issue raised by the court. Counsel may wish to address the issue orally, file further written argument, or both" (para. 59). At the end of the day, "the underlying concern should be ensuring that the court receives full submissions on the new issue" (*ibid.*), and the primary considerations are the dictates of natural justice and the rule of *audi alteram partem* — the duty to hear the other side.

See also paras 253-60 wherein the minority of the Court emphasises that appellate courts should be accorded flexibility in determining how procedural fairness can be achieved depending on the circumstances of the case.

52 In this case, the Court raised the fiduciary issue in oral argument. Thereafter, written notice was provided and, pursuant to the Court's invitation, each of the parties filed written submissions.

53 In light of the above, in my view, the requirements of *Mian* have been met.

The Fiduciary Issue

Positions of the Parties

54 The applicants submit that there existed a per se fiduciary relationship between the respondent and the deceased, which continued with the applicants. They argue that "fiduciary duties owing by a partnership to one of its partners continues even after the death of the partner."

55 Alternatively, the applicants argue that an *ad hoc* fiduciary relationship was created between the respondent and the estate giving rise to a fiduciary duty on the respondent to disclose the intended allocation of partnership income to the deceased prior to entering into the settlement agreement.

56 The respondent submits that the death of the deceased terminated his inclusion in the partnership including any fiduciary duty that the respondent owed to him. It maintains that it did not have a fiduciary relationship with the estate or the applicants as its representatives. It argues that, pursuant to the partnership agreement, it owed only a limited duty to account for and pay the deceased's remaining financial entitlements.

57 Regarding whether or not an *ad hoc* fiduciary relationship was created, the respondent argues that the nature of its relationship with the applicants did not meet the factors, which I later discuss, to be applied in the determination of whether such a relationship is created as articulated in the cases of *Rochwerg v. Truster*, 2002 CarswellOnt 990 (Ont. C.A.) at para 36; and *Elder Advocates of Alberta Society v. Alberta*, 2011 SCC 24 (S.C.C.).

Per se Fiduciary Relationship

58 At the outset, I would dismiss the applicants' argument that the fiduciary relationship between the deceased and the respondent continued after his death. There is no question that, at the time he was a partner, the deceased and the respondent were involved in a per se fiduciary relationship. That is, the partnership was one of a recognised category of fiduciary relationships giving rise to the obligation of one party to act for the benefit of the other (see *Elder Advocates* at para 33).

59 The only authority that the applicants rely on to assert a continuation of the per se fiduciary relationship to the estate is the case of *Livingston v. Livingston*, 1912 CarswellOnt 226 (Ont. H.C.), aff'd in part [1914] O.J. No. 155 (Ont. S.C.), aff'd in part (1916), 26 D.L.R. 140 (Jud. Com. of Privy Coun.). In that case, Middleton J determined that a surviving partner was not a trustee. In *obiter*, he stated that, as a surviving partner "[h]is position no doubt imposes certain obligations and duties which are in their nature fiduciary" (at para 25). In my view, that statement does not stand for the proposition that the per se fiduciary duties attached to a partner in an ongoing partnership survive the death of one of the partners. On appeal, Meredith CJO clarified that the surviving partner owed a duty to the estate to account. He said (at para 13):

> It is, no doubt, clear law that a partner must account to his firm for the profits made by him in any business of the same nature as and competing with that of his firm if he carries on any such business without the consent of his partners.

60 Section 36(1) of *The Partnership Act*, CCSM c P30 (the *PA*) specifically provides that, absent an agreement to the contrary, a partnership is dissolved by the death of a partner. In this case, the respondent's partnership agreement provided that the partnership would continue between the remaining partners in the event of the death of a partner. However, nowhere in the partnership agreement is there mention of a continuing partnership between the estate of a deceased partner and the respondent.

61 The above is consistent with the jurisprudence summarised in *Tham Estate v. Cressey Development Corp.*, 2016 BCSC 1208 (B.C. S.C.) (at para 52):

> Because a partnership is a personal entitlement, on the death of a partner, it does not devolve to his or her successors or estate. Therefore, the deceased partner's personal representative (a designation that encompasses an executor/executrix of the deceased partner's will) is not entitled as a matter of right to become a partner of the surviving partner or partners: *Mills (Re)* (1912), 3 D.L.R. 614 (Ont. H.C.J.).

62 In this case, there is no evidence that there was an agreement that the applicants be admitted in the partnership (see *Tham* at para 55).

Ad hoc Fiduciary Relationship

63 *Ad hoc* fiduciary relationships are those not recognised by the courts as fiduciary per se, but rather, arise out of the specific circumstances of a case. In her dissenting reasons, in *Frame v. Smith*, [1987] 2 S.C.R. 99 (S.C.C.), Wilson J identified the hallmarks of a fiduciary relationship (at para 60):

> (1) The fiduciary has scope for the exercise of some discretion or power.
>
> (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
>
> (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

64 These were later adopted by the majority of the Court in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 (S.C.C.) at 645-46; and *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 (S.C.C.) at 408-9.

65 Regarding the concept of vulnerability, Cromwell J, writing for a unanimous Court in *Perez v. Galambos*, 2009 SCC 48 (S.C.C.), stated that, "while vulnerability in the broad sense resulting from factors external to the relationship is a relevant consideration, a more important one is the extent to which vulnerability arises from the relationship" (at para 68).

66 In *Elder Advocates*, McLachlin CJC stipulated that, while the three "hallmarks" identified by Wilson J in *Frame* were useful in explaining the source of fiduciary duties, they were not a "complete code" (at para 29). She set out the following three elements which must be shown in addition to the vulnerability arising from the relationship as identified by Wilson J in *Frame*:

> 1. The evidence must show that the alleged fiduciary gave an undertaking of responsibility to act in the best interest of the beneficiary or beneficiaries (see para 30);
>
> 2. The duty must be owed to a defined person or class of persons who must be vulnerable to the fiduciary in the sense that the fiduciary has power over them (see para 33);
>
> 3. The claimant must show that the alleged fiduciary's power may affect the legal or substantial practical interests of the beneficiary (see para 34).

67 Thus, it becomes necessary to examine the relationship between the parties pursuant to all of the above criteria. I will deal with the issue of vulnerability as identified by Wilson J in *Frame* in the second element of the *Elder Advocates* analysis.

Element One: Undertaking to Act for the Benefit of the Beneficiary

68 I agree with the respondent that there is no evidence that it ever made an express undertaking to act for the benefit of the applicants. However, pursuant to *Elder Advocates*, such an undertaking may be express or implied (see para 30). In this regard, and as stated by the applicants in their argument, given the inherent duties of honesty, loyalty and good faith present in a partnership, it can be implied that the respondent undertook to act in the best interests of the estate of its deceased partner.

69 As indicated in *Elder Advocates*, "The existence and character of the undertaking is informed by the norms relating to the particular relationship" (at para 31). It may be found "in the relationship between the parties... the result of the exercise of statutory powers, the express or implied terms of an agreement" or by an "undertaking to act" in such a manner (at para 32 quoting from *Galambos* at para 77).

70 In this case there are a number of factors leading to the conclusion that there existed an implied undertaking pursuant to which the respondent would, in some circumstances, including the negotiation of the settlement agreement, act in the best interests of the deceased's estate.

71 First, the former nature of the fiduciary relationship between the deceased and the respondent placed the respondent in a unique position of knowledge regarding the financial affairs of the deceased within the respondent law firm to which the applicants were not privy.

72 Next, article 12.01 of the partnership agreement provides that in the event of a death of a partner, articles 10.03 and 10.04 of the agreement apply. That is, the estate is entitled to payment of the working capital account (article 10.03(a)) and the deceased's share of the profits of the partnership for the year in which he died (articles 10.03(b)(i), 12.01(a)) and future income (receivables) (article 10.03(b)(ii)). Article 10.04 allows the representatives of the estate to purchase the receivables defined in article 10.03(b)(ii) from the partnership.

73 The partnership agreement applies to the receivables and therefore evidences a continuing relationship with the estate of a partner after death. The notion of an ongoing relationship with corresponding duties is also supported by section 45(1) of the *PA*, which provides:

> **Rights of outgoing partner in certain cases**
>
> **45(1)** Where any member of a firm dies or otherwise ceases to be a partner, and the surviving or continuing partners carry on the business of the firm with its capital or assets without any final settlement of accounts as between the firm and the outgoing partner or his estate, then, in the absence of any agreement to the contrary the outgoing partner or his estate is entitled, at the option of himself or his representatives, to such share of the profits made since the dissolution as the court may find to be attributable to the use of his share of the partnership assets, or to interest at the rate of 5% per annum on the amount of his share of the partnership assets.
>
> [emphasis added]

74 As conceded by the respondent, it had a duty to account to the estate (see *Tham* at para 54). While there may not have been a per se fiduciary relationship, there was an ongoing connection with the applicants, which included significant obligations and responsibilities. In my view, all of the above evidenced an implied undertaking on behalf of the respondent to act, above all other interests, in the best interests of the estate when discharging its responsibility to the estate in providing the required information in anticipation of the settlement agreement.

Element Two: Duty to a Defined Person or Class of Persons Who Must Be Vulnerable to the Fiduciary

75 In this case, there is no question that the applicants constitute a defined group. The issue is whether they were vulnerable to the fiduciary.

76 The respondent argues that the relationship between it and the applicants was a standard arms-length commercial relationship of creditor and debtor, which does not attract fiduciary duties. It further argues that the applicants were not vulnerable in that they aggressively pursued their claims against the respondent, including relying on representation by experienced counsel.

77 The applicants argue that they were vulnerable in that the respondent had the exclusive knowledge and power regarding the estate's entitlement to compensation resulting from the deceased's former status as a partner. They maintain that the only knowledge that they had regarding any counterclaims or set-offs by the respondent were those that the respondent chose to disclose prior to entering into the settlement agreement.

78 There is a general principle that fiduciary duties or fiduciary relations should be the exception rather than the rule in commercial relations (see Angela Swan & Jakub Adamski, *Canadian Contract Law*, 3rd ed (Markham: LexisNexis, 2012) at 937). The reason is that experienced individuals of similar bargaining strength are not vulnerable because vulnerability can be prevented by the prudent exercise of bargaining power (see *Frame* at para 63).

79 In *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142 (S.C.C.), Binnie J, writing for a unanimous Court, recognised the above. Nonetheless, he noted that, in *Hodgkinson*, the majority of the Court "held that where the ingredients giving rise to a fiduciary duty are otherwise present, its existence will not be denied simply because of the commercial context" (at para 30). In *Hodgkinson*, the majority of the Court found a fiduciary relationship between contracting parties, stating (at p 407):

> [T]he existence of a contract does not necessarily preclude the existence of fiduciary obligations between the parties. On the contrary, the legal incidents of many contractual agreements are such as to give rise to a fiduciary duty. The paradigm example of this class of contract is the agency agreement, in which the allocation of rights and responsibilities in the contract itself gives rise to fiduciary expectations; see *Johnson v. Birkett* (1910), 21 O.L.R. 319 (H.C.); *McLeod v. Sweezey*, [1944] S.C.R. 111; P. D. Finn, "Contract and the Fiduciary Principle" (1989), 12 *U.N.S.W.L.J.* 76. In other contractual relationships, however, the facts surrounding the relationship will give rise to a fiduciary inference where the legal incidents surrounding the relationship might not lead to such a conclusion; see *Standard Investments Ltd. v. Canadian Imperial Bank of Commerce* (1985), 52 O.R. (2d) 473 (Ont. C.A.), leave to appeal refused, [1986] 1 S.C.R. vi.

80 Furthermore, a fiduciary relationship is not precluded by the fact that the parties were involved in pre-contractual negotiations. In fact, one can exist where the parties have not reached an agreement (see *Lac Minerals* at p 667).

81 In my view, the estate was vulnerable when negotiating the settlement agreement. The respondent had all the requisite information to factor into its decision to enter into the settlement agreement. The estate did not. Specifically, the respondent was privy to its accounting process, its intent to allocate partnership income to the estate in the year following the death of the partner, and had the discretion to disclose this, but failed to do so. This information was not known to the applicants, was not apparent from the T5013 provided for the 2014 taxation year and not provided to them during their negotiations.

Element Three: Power to Affect the Legal or Substantial Practical Interests of the Beneficiary

82 The respondent argues that the allocation did not affect the legal or substantial interests of the estate as the deceased enjoyed the tax deferral created by the accounting practice while he was a partner of the respondent. In his affidavit, the director states that the alternative to allocating the income for the 2015 tax year would have been to allocate it to the estate in the 2014 tax year in addition to the $46,000 it already allocated to the deceased's income in 2014, thereby creating a greater tax liability for the estate. The respondent asserts that it should not have to pay the taxes on the deceased's deferred income as he received the benefit of it while alive.

83 However, the issue is not whether the accounting practice existed or whether the deceased took advantage of it when he was a partner. Rather, the concern is the exercise of power by the respondent in failing to disclose the accounting practice and its corresponding intent to allocate partnership income to the estate in the year after the deceased's death. That allocation caused the estate to incur a tax liability in excess of the amount received under the settlement agreement. The end result is that the allocation effectively negated the settlement. I can easily conclude that, had the applicants known of the intended allocation of additional partnership income to the estate in the amount of $54,000, whether it be in 2014 or 2015, it would have undoubtedly affected the negotiation of the settlement agreement.

84 Thus, in light of the above, a fiduciary relationship existed between the respondent and the applicants during the negotiation of the settlement agreement.

Ground 3 — Whether the Respondent's Failure to Disclose the Intended Allocation Before Entering Into the Settlement Agreement Constituted a Breach of Fiduciary Duty

85 In considering fiduciary relationships, it is important to remember that not every wrong done by a fiduciary will give rise to a breach of fiduciary duty. Rather, it is the betrayal of the trust or loyalty that is at the core of the fiduciary duty that constitutes a breach (see *Galambos* at paras 36-39).

86 A failure to disclose all material information relating to a transaction may constitute a breach of a fiduciary duty. "Partners may owe duties to other partners to disclose material information both in equity and pursuant to statute" (Michael Ng, *Fiduciary Duties: Obligations of Loyalty and Faithfulness*, (Toronto: Canada Law Book, 2003) (loose-leaf updated 2013, release 11) ch 10 at para 10:20.10). In Manitoba, section 31 of the *PA* provides:

> **Duties of partners to render accounts, etc.**
>
> **31** Partners are bound to render true accounts and full information of all things affecting the partnership to any partner or his legal representatives.
>
> [emphasis added]

87 In my view, the above supports the conclusion that the nature of the relationship between the estate and the respondent placed a duty on the respondent to provide the applicants with complete financial disclosure regarding the deceased's financial affairs with the respondent during the negotiation process of the settlement agreement. This included the duty to disclose the intended allocation during the course of its negotiations with the applicants regarding the settlement agreement. The respondent

was well aware that the estate relied on its complete disclosure of the deceased's financial information as it related to the partnership when it entered the settlement agreement. By failing to disclose this essential component of the trust relationship, the respondent breached that duty. While a benefit to the respondent need not be shown, one clearly existed in that the respondent was able to conclude the settlement agreement, thereby ending its legal and financial responsibilities to the estate by reaching a "final settlement of accounts" (*PA* at section 45(1)).

Conclusion and Decision

88 The nature of the relationship between the estate and the respondent was an *ad hoc* fiduciary relationship, which existed until the final settlement of accounts as between them. The respondent breached its fiduciary duty to act for the benefit of the estate by failing to advise the applicants during settlement negotiations of its intention to allocate additional income to the deceased in the 2015 tax year.

89 In their originating application, the applicants requested a declaration that the respondent was in breach of the settlement agreement. A contextual consideration of the factors in this case leads to the conclusion that the respondent owed a fiduciary duty to the applicants to disclose all material facts relating to the situation of the deceased as it related to his financial affairs with the respondent. In light of the above, I would issue a declaration that the respondent owed a fiduciary duty to disclose to the applicants its intention to allocate $54,000 of partnership income to the estate for the 2015 taxation year, which it failed to do.

90 In the result, I would allow the appeal with costs to the applicants in this Court and the Court below.

***Richard J. Chartier C.J.M.*:**

I agree:

***Christopher J. Mainella J.A.*:**

I agree:

Appeal allowed.

Bankruptcy and Insolvency Act

R.S.C., 1985, c. B-3

An Act respecting bankruptcy and insolvency

Short Title

Short title

1 This Act may be cited as the *Bankruptcy and Insolvency Act*.

- R.S., 1985, c. B-3, s. 1
- 1992, c. 27, s. 2

…

PART XI

Secured Creditors and Receivers

Court may appoint receiver

- **243 (1)** Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

  (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

  (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

  (c) take any other action that the court considers advisable.

- **Restriction on appointment of receiver**

  (1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

  (a) the insolvent person consents to an earlier enforcement under subsection 244(2); or

(b) the court considers it appropriate to appoint a receiver before then.

- **Definition of receiver**

  (2) Subject to subsections (3) and (4), in this Part, **receiver** means a person who

  (a) is appointed under subsection (1); or

  (b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under

  - **(i)** an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or
  - **(ii)** a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

- **Definition of receiver — subsection 248(2)**

  (3) For the purposes of subsection 248(2), the definition **receiver** in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

- **Trustee to be appointed**

  (4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

- **Place of filing**

  (5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

- **Orders respecting fees and disbursements**

  (6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

- **Meaning of disbursements**

  (7) In subsection (6), **disbursements** does not include payments made in the operation of a business of the insolvent person or bankrupt.

- 1992, c. 27, s. 89
- 2005, c. 47, s. 115
- 2007, c. 36, s. 58

Advance notice

- **244 (1)** A secured creditor who intends to enforce a security on all or substantially all of

  (a) the inventory,

  (b) the accounts receivable, or

  (c) the other property

  of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person shall send to that insolvent person, in the prescribed form and manner, a notice of that intention.

- **Period of notice**

  (2) Where a notice is required to be sent under subsection (1), the secured creditor shall not enforce the security in respect of which the notice is required until the expiry of ten days after sending that notice, unless the insolvent person consents to an earlier enforcement of the security.

- **No advance consent**

  (2.1) For the purposes of subsection (2), consent to earlier enforcement of a security may not be obtained by a secured creditor prior to the sending of the notice referred to in subsection (1).

- **Exception**

  (3) This section does not apply, or ceases to apply, in respect of a secured creditor

  (a) whose right to realize or otherwise deal with his security is protected by subsection 69.1(5) or (6); or

  (b) in respect of whom a stay under sections 69 to 69.2 has been lifted pursuant to section 69.4.

- **Idem**

  (4) This section does not apply where there is a receiver in respect of the insolvent person.

- 1992, c. 27, s. 89
- 1994, c. 26, s. 9(E)