

CANADA / JUDGMENT

Enliven Holdings Inc. v. Qureshi

2020 BCSC 473

COURT

Supreme Court of British Columbia

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2020 BCSC 473 Enliven Holdings Inc. v. Qureshi

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Enliven Holdings Inc. v. Qureshi,

2020 BCSC 473

Date: 20200330

Docket: S1813768

Registry: Vancouver

Between:

Enliven Holdings Inc. and Enliven Financial Inc.

Plaintiffs

And

Murtaza (Monty) Husain Qureshi, Kevin Hon Chi Wong

and Ascendo Financial Solutions Inc.

Defendants

And

Enliven Holdings Inc., Enliven Financial Inc.,

Yuncaï Wang, Yibo Wang, Yuchen Xia, Ling Wang

and Aiyun Wang

Defendants by Way of Counterclaim

Before: The Honourable Mr. Justice Walker

Reasons for Judgment

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Place and Dates of Hearing:

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Place and Date of Judgment:

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March 30, 2020

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Introduction

- [1] The plaintiffs are private Canadian federal corporations closely held by a small number of shareholders primarily residing in China.
- [2] The defendants, Murtaza (Monty) Husain Qureshi and Kevin Hon Chi Wong, are also shareholders of the plaintiffs. They reside in Canada. They are currently directors of the plaintiffs (although throughout much of the material time they were both directors and officers).
- [3] In this action, commenced in December 2018, the plaintiffs are suing Mr. Qureshi and Mr. Wong for numerous torts. The plaintiffs plead causes of action involving multiple breaches of fiduciary duty, fraud, deceit, and unjust enrichment, premised on alleged reckless and dishonest conduct, as well as negligence and gross negligence, all contrary to the best interests of the plaintiffs to whom they owed a duty to serve.
- [4] Mr. Qureshi and Mr. Wong deny the claims. They seek an order that one of the plaintiffs, Enliven Holdings Inc., make a preliminary advance of funds to allow them to defend themselves against the claims in this action and in a separate companion action brought against them by other shareholders.

- [5] At the current time, Enliven Holdings Inc. is a holding company for the operating entity, Enliven Financial Inc. In their submissions, the plaintiffs referred to themselves collectively as the "Company" even though the advance is sought from Enliven Holdings Inc. For ease of reference, I will also refer to both plaintiffs collectively as the "Company".
- [6] The Company also refers to the Chinese investors who are shareholders as the "Investor Group" (as will I). I will refer to Messrs. Qureshi and Wong as the "Applicants" when I refer to them collectively.
- [7] In the companion action (VA S195619), commenced in May 2019, the Investor Group alleges the Applicants created a scheme to obtain funds from Chinese investors through misleading statements. They also allege that the Applicants failed to disclose key facts and information concerning in the investment as they were duty bound to do, and instead, made further misleading statements in order to avoid suspicion and to persuade some shareholders to invest more money. The Investor Group seeks to recover the dollar amount of their investments.
- [8] The claims in the instant action and the one brought by the Investor Group raise essentially the same complaints against the Applicants.
- [9] The Applicants each seek an interim advance of \$200,000 to pay for their defence of both actions, which the parties estimate will involve a 25-day trial. Their application is grounded in the Company's by-laws ("By-laws") and s. 124 of the Canada Business Corporations Act, R.S.C.1985, c. C-44 [CBCA].
- [10] The Company's position is that the Applicants' rights to indemnity are governed by a shareholders' agreement entitled "Unanimous Shareholders' Agreement", which they assert trumps the By-laws and the CBCA (if, they say, the statute is applicable to privately held corporations). They argue s. 124 of the CBCA prevents directors "from accessing corporate funds to pay for an illegitimate defence of potentially legitimate claims."
- [11] The CBCA permits a company to indemnify directors so long as they acted honestly and in good faith in the best interests of the company. This is referred to in some case authorities as a "merits-based" test imposed by the CBCA: *Cytrynbaum v. Look Communications Inc.*, 2013 ONCA 455 at para. 44, leave to appeal ref'd [2013] S.C.C.A. No. 377 [Cytrynbaum CA].
- [12] In these reasons I adopt the parties' reference to the Unanimous Shareholders' Agreement as the "USA".
- [13] In submissions, the Company pointed to dicta in case authorities such as *Manitoba (Securities Commission) v. Crocus Investment Fund*, 2007 MBCA 36 at para. 13, and *Cytrynbaum CA* at paras. 59-63, in support of their submission that the advance indemnity in the CBCA is meant to only apply to public companies and not to privately held corporations such as the plaintiffs. Respectfully, no case dealing with this point either way was cited to me. In any event, I do not need to decide the point since I have determined the application should be dismissed even assuming the CBCA applies regardless of the nature of

the corporation.

Background

- [14] Mr. Wang is the lead member of the Investor Group.
- [15] The relationship between Mr. Yuncai Wang and the Applicants began in 2013, when Mr. Wang first met Mr. Wong and discussed potential business investments in Canadian technology projects in the life sciences sector.
- [16] Mr. Wang is a successful Chinese businessman with a chemical engineering and pharmaceutical background. He founded a company with over 1,400 employees. He can converse in English to a limited degree with a limited ability to read and write it.
- [17] Mr. Wong was, at that time, a vice president of Deloitte Canada's Life Sciences Group. He speaks, reads, and writes Mandarin.
- [18] In September 2014, Mr. Wong introduced Mr. Wang to his business associate, Mr. Qureshi. Mr. Wong often acted as interpreter for Mr. Wang in their discussions with Mr. Qureshi.
- [19] In its written submissions, the Company alleges (and Mr. Wang deposes in his affidavit) that the purpose of the introduction was to "entice" Mr. Wang to invest in a new financial venture to provide unsecured consumer loans to Canadian subprime borrowers through a new, online application to streamline the "end to end" lending process. According to Mr. Wang, the foundation for the new venture was described to him as an advanced, world-class, internet-based technology platform. They would build upon a shell company (Ascendo Credit Service Inc., later renamed Jigsaw Financial) founded by Mr. Qureshi into an online financial services business that used leveraged funds obtained by Mr. Qureshi from various banks.
- [20] Mr. Wang describes the nature of the proposed business plan in his affidavit sworn July 12, 2019:
11. The premise of the business plan seem straightforward: to facilitate Canadian subprime borrowers access to unsecured personal loans and secured loans, Jigsaw was developing software applications to create a platform comprised of a front-end interface for desktop computers and mobile devices and a back-end credit processing/loan approval system. The development of the front-end interface would be completed through a combination of Jigsaw's internal technology resources and outsourcing, and the back-end development would utilize external solutions which were used by other major banking institutions in Canada.

- [21] According to Mr. Wang, he was told the Applicants' plan was to grow the business "organically", leveraging available capital through borrowing from banking institutions who were constrained from entering into this type of business directly. In turn, leveraged funds would be loaned to consumers and managed through a technology platform owned by the Company. Mr. Wang was provided with a five year business plan, which included two acquisition opportunities (one of which was CitiFinancial's non-prime lending business).
- [22] Mr. Wang also understood the Applicants were seeking an equity investment of \$10 million since banks usually require that amount before advancing funds. Mr. Wang was told by Mr. Wong that if he invested \$2 million, Mr. Qureshi would match it, which he did.
- [23] Mr. Wang's evidence in many of these respects is corroborated by objective evidence, e.g., the package of promotional materials provided to him by Mr. Wong in September 2014.
- [24] The business plan is described at the outset of the package:

The Opportunity

Global market events have presented a unique and unprecedented opportunity to build a highly profitable business, with the potential for a new operator to capture the largest share of Canada's near-prime consumer finance space. An ongoing retrenchment from this market by multi-national financial institutions, substantial investor appetite in international markets for Canadian credit products, historically low long-term funding rates, considerable liquidity in search of yield, an active securitization market, increased regulatory oversight and the start of a cyclical economic recovery, complete a near perfect storm.

We have assembled a team of seasoned executives, with multi-disciplined skills in consumer finance who have created strategic alliances with best in class technology and other service providers and are in the process of securing debt financing commitments, to help build a market leading near-prime lending platform in Canada .

· Exceptional Executive Team

- Executive team committed to making a significant personal equity investment in the partnership, aligning their interests with all stakeholders.

ORIGINATION STRATEGIES

RETAIL

- Mobile Offering: A key differentiator of Jigsaw's retail strategy is a comprehensive mobile offering for consumers. Rather than being merely a traditional retailer-branded-card, Jigsaw will offer a mobile app that informs customers in real-time of their credit availability on different items, linking their profile across their retail experience. In addition, we will also accept payments to customer's loan accounts by digitally capturing an image of a cheque.

EXIT

We believe it would take 2-4 years to build this business fully and to maximize the performance and returns. Our financial model conservatively forecasts gross earnings growing to in excess of \$35 million in year 4 (assumes no acquisitions and a conservative growth in receivables to circa \$470 million), with a public valuation likely at a multiple of 8-10 times earnings.

[25] The Company's online business was intended to complement a small collection of bricks and mortar branches. The promotional materials report an intention to open six branches, two in this province, two in Alberta, one in Ontario, and one in the Yukon, as acquired from the lender, CitiFinancial.

[26] The technology platform is also described in the promotional materials:

Investment Highlights

· Significant Developments

Jigsaw has entered into a strategic partnership with a speciality technology service provider to develop a comprehensive end to end technology solution, customized to meet the requirements of the company;

TECHNOLOGY

We are aiming to develop a fully comprehensive, state of the art and robust end-to-end technology platform. The team at Jigsaw has already independently assessed various solution providers. Our initial conclusion is that a combination of outsourcing and in-house technology development maximizes the effectiveness and efficiency of our business. We have carefully evaluated and selected our partners to deliver the best in-class solutions, leveraging the strengths of these platforms.

[27] Mr. Qureshi originally invested \$1,000 and received 10 million shares (at a total cost base of \$0.0001 per share). He later invested \$2 million and (according to Mr. Wang and as also noted in the USA) received four million shares (at a total cost base of \$0.50 per share) after promising Mr. Wang he would match his investment. The details of any investment made by Mr. Wong are not clear but it appears that the investment from Mr. Qureshi is for both himself and Mr. Wong. According to Mr. Qureshi, in September 2014, six million founders' shares were issued to him and four million were issued to Mr. Wong.

[28] The Company claims in its submissions (and Mr. Wang deposes in his affidavit) that the Applicants' representations induced Mr. Wang to make an initial investment of \$2 million into the new business venture (purchasing shares at \$0.50 per share) and to seek out investment funds from other investors in China. Mr. Wang passed along the information provided to him by the Applicants to members of his family and some of his friends and associates, all of whom reside in China. Some of them decided to invest capital in the Company and did so at various times between August 2015 and November 2017. As

mentioned, they and Mr. Wang are referred to by the parties as the "Investor Group".

- [29] Mr. Wang's original investment was made in approximately mid-October 2014. He deposes that he also subsequently invested further sums for a total of \$3.9 million. However, a chart attached to his affidavit suggests that of that sum, he invested \$2.75 million and the remaining \$1.15 million was invested by Chen Wang (it is unclear whether Chen Wang is related to Mr. Wang). Some members of the Investor Group also made more than one investment in the Company. The total amount of the investments from the Investor Group is just over \$10.9 million. The acquisition cost of their private placements for Company shares increased from time to time (e.g., to \$0.75 and then to \$0.90).
- [30] In January 2015, Jigsaw was reorganized and renamed. As a federally incorporated company, it is subject to the CBCA.
- [31] From time to time, one or both of the Applicants advised Mr. Wang more capital investment was required to meet the Company's obligations and implement its business plan.
- [32] Despite Mr. Wang's success in obtaining investment funds from other members of the Investor Group to capitalize the new venture, the business has failed. It owns only one operating business - Spectrum Canada Mortgage Services Inc. - which is a mortgage lending fund ("Spectrum"). A functional fully operating technology platform was never owned by or developed for the Company. The CitiFinancial acquisition did not occur.
- [33] The Company and the Investor Group allege the representations made by the Applicants to Mr. Wang from the outset were knowingly false and made to promote their own self-interests through a "pump and dump" scheme so as to artificially inflate the value of their shares before unloading them. Further, they allege the Applicants continued throughout to act in their own self interest to the detriment of the Company and the Investor Group, persisted in making material misrepresentations, and actively concealed key facts and information and failed to disclose others, all in breach of their duties as directors and officers of the Company.
- [34] The Applicants were directors and officers and ran the business of the Company from the outset. Mr. Qureshi was the Company's chief executive officer and Mr. Wong was its chief operating officer. At or near the end of July 2018, the Company terminated the Applicants' employment. The Investor Group is now in control of the Company. Although no longer officers, the Applicants are still directors of the Company.
- [35] Throughout most of the time material to this application, Mr. Wang was a non-executive member of the Company's board. Mr. Wang deposes that he relied wholly on the representations and information provided to him by the Applicants when his approval of major decisions was required. His evidence is that he had no control of the day-to-day operations of the Company and was not involved in its day-to-day operations until June 2018.

- [36] He says that in June 2018 his concerns about the Company's financial circumstances evolved into suspicions about the Applicants' conduct as a result of Mr. Qureshi's repeated claim that without further funding, the Company had to be wound up. Mr. Wang says that his efforts to obtain financial information by an examination of the Company's books and records were intentionally frustrated by Mr. Qureshi.
- [37] The essence of the Company's claims against the Applicants in this action and of the Investor Group in the companion action is described in its written submissions:
20. The Notice of Civil Claim ("NOCC") in this action alleges that the Promoters [the Applicants] engaged in a series of dishonest activities that abused their duties as directors and officers of Enliven, but also that defrauded the Chinese investors by a series of exaggerated claims and false and reckless representations concerning the business and its "potential". They did so to enrich themselves at the expense of both Enliven and the Investor Group.
 21. By a letter dated December 21, 2018, the Investor Group has put Enliven on notice that they intend to assert a claim against the company for the return of monies Enliven wrongfully obtained from them by false pretenses and/or other wrongful conduct. (Wang #1, Ex. N., p. 147).
 22. The Investor Group has also sued Monty and Kevin [the Applicants] in Vancouver Action No. S-195619 (the "Investor Action") alleging fraudulent misrepresentations, breach of fiduciary duty and breach of the duty to provide them as investors and shareholders with information that is not misleading, is clear and comprehensible, does not conceal material particulars, and that is sufficient to enable them to make informed investment decisions (Wong #1, Ex. B., p. 40).
- [38] The Applicants vociferously deny all allegations. They maintain they made full disclosure of all key facts and information concerning what all of the shareholders knew was a risky start-up venture. The Applicants maintain that Mr. Wang had full access to all of the Company's records throughout. Mr. Qureshi also points out that he too invested \$2 million into the venture. The Applicants deny that the Investor Group paid anything more than fair market value for their shares.
- [39] The Applicants issued a counterclaim in this action, advancing a claim for indemnity. They seek orders they be provided with funds to pay for all costs and expenses to defend themselves in both actions and for damages for breach of the USA, which was entered into by all shareholders and by the Company. In the counterclaim, the Applicants also seek a declaration that it is just and equitable to wind up the Company in light of the loss of confidence between themselves and the Investor Group.
- [40] No steps have been taken in this action or the companion action brought by the Investor Group beyond filing the pleadings and bringing the instant application for an advance payment.

CBCA

[41] The CBCA authorizes a federally incorporated company to indemnify its directors, officers, and other persons against costs that are reasonably incurred to defend a suit, including amounts paid to settle an action or satisfy a judgment:

Indemnification

124 (1) A corporation may indemnify a director or officer of the corporation, a former director or officer of the corporation or another individual who acts or acted at the corporation's request as a director or officer, or an individual acting in a similar capacity, of another entity, against all costs, charges and expenses, including an amount paid to settle an action or satisfy a judgment, reasonably incurred by the individual in respect of any civil, criminal, administrative, investigative or other proceeding in which the individual is involved because of that association with the corporation or other entity.

[Emphasis added]

[42] Section 124(3) provides that indemnification is only permitted where the director, officer, or other individual acted honestly and in good faith with a view to the best interests of the company:

Limitation

- (3) A corporation may not indemnify an individual under subsection (1) unless the individual
 - (a) acted honestly and in good faith with a view to the best interests of the corporation, or, as the case may be, to the best interests of the other entity for which the individual acted as director or officer or in a similar capacity at the corporation's request; and
 - (b) in the case of a criminal or administrative action or proceeding that is enforced by a monetary penalty, the individual had reasonable grounds for believing that the individual's conduct was lawful.

[Emphasis added]

[43] The CBCA also provides in s. 124(5) that a person referred to in subsection (1) is entitled to indemnity for all costs, charges, and expenses reasonably incurred with the defence of any civil proceeding (which would exclude the Applicants' right to indemnity to pursue their counterclaim since it does not involve defending a suit or satisfying a judgment):

Right to indemnity

- (5) Despite subsection (1), an individual referred to in that subsection is entitled to indemnity from the corporation in respect of all costs, charges and expenses reasonably incurred by the individual in connection with the defence of any civil, criminal, administrative, investigative or other proceeding to which the individual is subject because of the individual's association with the corporation or other entity as described in subsection (1), if the individual seeking indemnity
- (a) was not judged by the court or other competent authority to have committed any fault or omitted to do anything that the individual ought to have done; and
- (b) fulfils the conditions set out in subsection (3).

[Emphasis added]

- [44] The statute also permits a corporation to advance funds to its directors, officers, and other persons for their costs. As is the case for indemnity in s. 124(1), s. 124(2) is permissive and not mandatory:

Advance of costs

- (2) A corporation may advance moneys to a director, officer or other individual for the costs, charges and expenses of a proceeding referred to in subsection (1). The individual shall repay the moneys if the individual does not fulfil the conditions of subsection (3).

[Emphasis added]

- [45] However, nothing in s. 124 enshrines a right to an advance. It is something a company "may" do.
- [46] Further, if an advance is made, it is subject to court approval and to the merits-based test in the CBCA: *Cytrynbaum CA* at paras. 46, 48. This has been described as the "supervisory function of the court" over advance payments and indemnity: *Cytrynbaum et al. v. Look et al.*, 2012 ONSC 4578 at paras. 59-60, *aff'd* 2013 ONCA 455 [*Cytrynbaum SC*].
- [47] To bring themselves within the ambit of the merits-based test, the Applicants rely on the presumption in law that directors are presumed to act in good faith: *Cytrynbaum CA* at para. 55; *Blair v. Consolidated Enfield Corp.*, [1995] 4 S.C.R. 5 at para. 35. They say the Company has failed to rebut the presumption.
- [48] The Company opposes the application on numerous grounds. In addition to its submission that there is no right to an advance payment since the USA (and not the By-laws) governs the Applicants' relationship with the Company, it says it has rebutted the presumption of good faith and gone so far as to demonstrate a strong *prima facie* case of bad faith, dishonesty, and other forms of misconduct on the part of the Applicants, disentitling them to indemnity.

Preliminary Objection

[49] The Company raised a preliminary objection to the application. It says that the claim for an advance must be brought by petition, as opposed to a notice of application, since it is grounded in a statute, the CBCA. The Company relies on Rule 2-1(2)(b) of the Supreme Court Civil Rules, which provides:

Commencing proceedings by petition or requisition

- (2) To start a proceeding in the following circumstances, a person must file a petition or, if Rule 17-1 applies, a requisition;
- (b) the proceeding is brought in respect of an application that is authorized by an enactment to be made to the court;

[50] According to the Company, it is mandatory that the relief be sought by petition. Citing *British Columbia (Milk Marketing Board) v. Saputo Products Canada G.P./Saputo Products Laitiers Canada S.E.N.C.*, 2017 BCCA 247 at paras. 43-52, the Company submits that had the application been brought by petition, the matter would have been referred to the trial list since in some instances, a bona fide triable issue concerning the honesty and good faith of the Applicants is apparent on the face of the record (e.g., one of the conflicts in the parties' evidence is the veracity of Mr. Wang's evidence that throughout, he relied on the information he says was provided to him by the Applicants). In proceeding by notice of application, the Applicants are, the Company says, attempting to obtain, through an ordinary application, summary judgment in respect of critical factual issues concerning their honesty and bona fides to avoid the prohibition against indemnity in s. 124(3) of the CBCA.

[51] In my opinion, the Applicants' claim for an interim advance can be founded on an interlocutory application since it involves only a preliminary assessment of the merits of the case. *Cytrynbaum CA* provides the requisite authority. In that case, the Court of Appeal described the approach to be taken in assessing a claim for an advance payment as interlocutory. Advance funding will be refused where the resisting party has established a strong prima facie case of bad faith invoking the limitation in s. 124(3).

[52] I have excerpted the key passages from *Cytrynbaum CA* below:

[52] The second argument is procedural. The appellants' request for advance funding was advanced by way of an originating application rather than as a motion in Look's action. The appellants argue that as they proceeded by way of application which led to a final determination of their claims, the application judge erred by adopting a test applicable to interlocutory proceedings.

- [53] I do not accept the submission that the procedural vehicle chosen by the appellants to advance their claims determines the test to be applied. The applications did lead to a final determination of the appellants' claims for advance funding, but that does not determine the test to be applied. By its very nature, a request for advance funding invites a preliminary assessment of the merits of the case but one that is not final and that does not bind the parties for the purposes of the Look action.
- [54] It is widely accepted that this type of preliminary merits-based assessment is distinct from a final determination of the dispute. When preliminary or interlocutory orders require some assessment of the merits (including, for example, motions for interlocutory injunctions, motions for leave to proceed after the expiry of procedural time periods or motions for a stay pending appeal), the court is cautioned against attempting to make anything approaching a final determination of the issue. The court typically looks to see if the case is "arguable", "raises a serious issue to be tried" or is "not frivolous and vexatious". If a preliminary or interlocutory order will have drastic consequences (including, for example, an interlocutory mandatory injunction or a Mareva or Anton Piller order), the bar is raised to the level of "strong prima facie case".
- [55] Third, I do not agree that the strong prima facie test eviscerates the right to advance funding. In my view, the application judge was correct in finding that s. 124(4) requires some assessment of the merits of the corporation's allegations of bad faith as a condition for advance funding. He correctly acknowledged that the appellants were entitled to the presumption of good faith as officers and directors, but also that the corporation could lead evidence to rebut that presumption. He recognized that the issues of indemnity and advance funding required a balance to be struck between providing adequate protections and incentives to attract strong candidates who foster entrepreneurialism and to encourage responsible behaviour.
- [56] In my view, the strong prima facie case test strikes an appropriate balance between those competing considerations. It is a stringent test that gives significant weight to the protection of officers and directors. It ensures that they will ordinarily receive advance funding but leaves open the possibility that advancement will be denied when there is strong evidence of bad faith.
- [57] Indeed, it seems to me that to accept the argument that advance funding should only be refused when the court is able to make a final determination of mala fides would be inconsistent with the very policy argument upon which the appellants rely, namely, that corporate officers and directors should not be forced to litigate the issue of mala fides without advance funding. The appellants cannot escape the fact that s. 124(4) legislatively imposes the requirement of court approval for advance funding. To set the standard for approval as the equivalent of a final determination would allow the corporation to force officers and directors to defend the entire case on a preliminary motion or application without advance funding.

[58] Finally, I do not agree that the application judge erred in his application of the presumption of good faith mandated by Blair. He gave the appellants the benefit of the presumption of good faith, as required by Blair, but held that Look had overcome that presumption by adducing evidence that made out a strong prima facie case of bad faith. Blair does not establish an irrebuttable presumption of good faith. Nor do I agree that by stating in Blair, at para. 35, that "persons are assumed to act in good faith unless proven otherwise", the Supreme Court should be taken to have precluded a court from making a finding of a strong prima facie case of bad faith when it would be inappropriate for the court to make a definitive finding.

[59] In my view, the application judge correctly refused to advance funding on the basis of the strong prima facie case standard.

[Emphasis added]

[53] Further, Rule 1-2(4) provides that interlocutory orders, including those authorized by an enactment other than the Rules, may be sought by petition or notice of application:

Petitions and applications

(4) If an enactment, other than these Supreme Court Civil Rules or the Supreme Court Family Rules, authorizes an application to the court or to a judge, the application must be

(a) by petition under Rule 16-1 or requisition under Rule 17-1, or

(b) if the application is for an order other than a final order, by application under Part 8,

whether or not the enactment provides for the mode of application.

[Emphasis added]

[54] Since the claim for indemnification is advanced in the counterclaim, it is appropriate for the Applicants to seek interlocutory relief by notice of application as opposed to petition.

[55] In my respectful opinion, the authority cited by the Company - Kaiser Resources Ltd. v. Western Canada Beverage Corp. (1992), 71 B.C.L.R. (2d) 236 - does not assist because, unlike this case, it concerns declaratory relief not raised in existing pleadings. The court's analysis of the various methods in which declaratory relief may be sought (paras. 17-31) has no application to this case, especially where the relief sought by the Applicants is for an order and is raised in their counterclaim.

[56] For these reasons, the preliminary objection is dismissed.

Is an Advance Barred by the USA?

Introductory Remarks

- [57] As I mentioned at the outset, the Applicants rely on the indemnity and advance provisions contained in the By-laws, which were enacted February 15, 2017.
- [58] The Company asserts that the right to indemnification and an advance payment in the By-laws is displaced by the USA, which was executed after the By-laws on September 26, 2017, and amended from time to time to include new shareholders. If the Company is correct, it is not obligated to make an advance because there is no right to apply for one in the USA, and the application must be dismissed.
- [59] The Applicants say in response that the USA should be read as providing a minimum level of indemnification and its provisions are not in conflict with the By-laws.

By-laws

- [60] The key provisions found in the By-laws are extracted below. They provide for indemnity to directors and officers or other persons acting at the request of the Company for actions brought against them by a third party or the Company itself:

10.3 Indemnity.

Every individual who at any time is or has been a director or officer of the Corporation or who at any time acts or has acted at the request of the Corporation as a director or officer (each such individual for purposes of this Section 10.3 being an "Indemnified Person"), shall at all times be indemnified and held harmless against all costs, charges, expenses, damages and liabilities of whatsoever nature or kind (including any amount paid to settle an action or to satisfy a fine or judgment) by the Corporation to the fullest extent possible and in every circumstance permitted by the Act [CBCA]. In addition and without prejudice to the foregoing, but subject to the limitations in the Act regarding indemnities in respect of derivative actions, each Indemnified Person shall at all times be indemnified and held harmless by the Corporation against all costs, charges and expenses, including any amount paid to settle an action or to satisfy a judgment, reasonably incurred by the individual in respect of any civil, criminal, administrative, investigative or other proceeding in which the individual is involved because of the association of the individual with the Corporation or Other Entity, if:

- (a) the individual acted honestly and in good faith with a view to the best interests of the Corporation ; and
- (b) in the case of a criminal or administrative action or proceeding that is enforced by a monetary penalty, the individual had reasonable grounds for believing that the conduct of the individual was lawful.

[Emphasis added]

[61] The By-laws also provide the Company shall make an advance payment in accordance with s. 10.3:

The Corporation shall advance money to a director, officer or other individual for the costs, charges and expenses of any proceeding contemplated by the foregoing provisions of this Section 10.3; provided that the individual shall repay the money if the individual does not meet the conditions set out clauses (a) and (b) above. Nothing in this Section 10.3 shall affect any other right to indemnity to which any individual may be or become entitled by contract or otherwise, and no settlement or plea of guilty in any action or proceeding shall alone constitute evidence that the Indemnified Person did not meet either of the conditions set out in clause (a) or (b) above of this Section 10.3 or the corresponding conditions in the Act.

[62] The provisions in the By-laws concerning advance payments also incorporate a merits-based test and require Court approval:

With the approval of the court (and the Corporation shall be obligated to apply for such approval at the cost and expense of the Corporation unless the Indemnified Person consents otherwise), the Corporation shall advance money to a director, officer or other individual for the costs, charges and expenses of any proceeding contemplated by the foregoing provisions of this Section 10.3; provided that the individual shall repay the money if the individual does not meet the conditions set out in clauses (a) and (b) above in this Section 10.3.

[63] However, in the same section, the By-laws provide that the Company's directors may revoke, limit, or vary the continued application of the right to indemnity in s. 10.3:

From time to time the directors of the Corporation may also revoke, limit or vary the continued application of this Section 10.3, provided that no such action shall affect any right of any individual or any liability of the Corporation which has arisen prior to the date of such action.

[Emphasis added]

[64] The Company's position is that this is what occurred when it entered into the USA with the Company's shareholders, including the Applicants.

The USA

[65] Unlike the By-laws, the right to indemnity in the USA is limited to a cohort of current and past directors and their heirs and executors:

6.5 Indemnity. The Corporation hereby agrees to indemnify each director and his or her heirs and legal representatives, both during and after his or her tenure against all costs, charges and expenses, including an amount paid to settle an action or satisfy a judgment, reasonably incurred by him or her in respect of any civil, criminal or administrative proceeding to which he or she is made a party by reason of being or having been a director of the Corporation provided that:

- (a) he or she acted honestly and in good faith with a view to the best interests of the Corporation;

[Emphasis added]

- [66] No right to an advance payment and no obligation on the Company to make one is provided for in the USA.

Is There A Conflict Between the USA and By-Laws?

- [67] The Company submits that the USA and By-laws are in conflict, such that the former prevails. As noted above, the Applicants disagree, maintaining instead that the USA provides a minimum level of indemnity which is expanded upon by the By-laws.
- [68] In the absence of any evidence to provide context for the enactment of the USA in the face of the By-laws, I have, for the purpose of this application, construed the documents on their face in relation to the temporal aspect of their implementation.
- [69] I accept that in the absence of any other evidence, the Applicants' position would at least be arguable if the By-laws were enacted after the USA; the By-laws could be seen as an expansion of the Company's indemnity obligation contained in the USA. However, the opposite is the case, at least insofar as the evidence brought to my attention on this application. The Company and its shareholders entered into the USA after the By-Laws were enacted, provided for a smaller cohort group entitled to seek indemnity, and did not provide for advance payments.
- [70] In addition, and as noted in the excerpt above, s. 10.3 of the By-laws specifically provides that the Company, through its directors, may "revoke, limit or vary the continued application of" the indemnity provisions found therein. On its face, and in the absence of any other evidence, s. 10.3 contemplates what the Company and the parties did by entering into the USA.
- [71] Although s. 6.8(e) of the USA was not raised in argument by any party, I observe that it provides that the By-laws may be amended in writing by shareholders holding not less than 66% of the shares. The USA was executed by all shareholders.
- [72] For those reasons, there is no conflict between the two. The USA supersedes the By-laws in respect of indemnity rights and obligations.
- [73] However, assuming a conflict does exist, both the USA and By-laws address the result.
- [74] The By-laws provide that they shall be amended to give effect to any unanimous shareholders' agreement:

20.1 Unanimous Shareholder Agreement.

Notwithstanding anything contained in the by-laws, the provisions of the by-laws shall be amended to the extent necessary to give effect to the provisions of any unanimous shareholder agreement in force between Corporation and its shareholders, and to the extent that there is any conflict between the provisions of the by-laws and any such unanimous shareholder agreement, the provisions of the unanimous shareholder agreement shall prevail.

[Emphasis added]

[75] Section 9.1 of the USA also provides that in the event of conflict, the USA shall prevail. That section also requires the shareholders to take steps to amend the Company's articles in the event of conflict between the USA and the articles (the constating document authorizing the By-laws):

9.1 Implementation of this Agreement. The Shareholders covenant and agree with each other and with the Corporation to vote the Shares owned by them at all times, and to cause their respective nominees to the Board, where applicable, to act at all times, in order that the provisions of this Agreement shall govern the affairs of the Corporation to the maximum extent permitted by law. In the case of any conflict between the provisions of this Agreement and the provisions of either the Articles of the Corporation, the Shareholders agree to take or cause to be taken such steps and proceedings as may be required under the CBCA to amend such Articles of the Corporation, as necessary to resolve such conflict so that the provisions set forth in this Agreement shall, to the maximum extent permitted by law, at all times prevail.

[Emphasis added]

[76] Further, s. 6.5(c) of the USA provides that the By-laws shall not be amended to render its indemnity provision ineffective:

(c) The Parties hereby agree that the by-laws of the Corporation will not be amended to render this provision ineffective.

[77] The fact that the Company's articles and By-laws have not been amended does not alter what on the face of the documents is the parties' intent in the event of conflict concerning indemnification.

[78] At one point in his oral submissions in reply, Mr. Qureshi suggested the Company's interpretation of the effect of the USA would exclude the right of indemnity to other classes of persons described in s. 124(1) of the CBCA. The submission was brief, without any reference to authorities, and was not followed up with any submissions concerning the potential impact of any conflict between the USA and the CBCA (e.g., assuming the Company's submission that the CBCA applies only to publicly traded companies is without merit, whether some or all of the indemnity provisions in the USA might be void).

[79] I note that Cytrynbaum CA holds that a company cannot attempt through its by-laws or other documents to oust the merits-based test and the requirement for court approval for advance payments as found in s. 124(4) of the CBCA (which on its face, the USA does not purport to do):

[48] This court held in Bata Industries Ltd., at p. 329, that s. 136 of the OBCA, the Ontario equivalent to s. 124 of the CBCA, is "a comprehensive code of general application by which the indemnification of officers and directors, and former officers and directors, is regulated." Like s. 136 of the OBCA, s. 124 "establishes the circumstances under which a corporation may, with and without court approval, indemnify an officer or director, and when a corporation must indemnify an officer or director" and, "[b]y implication the circumstances under which a corporation cannot indemnify an officer or director." It follows that the by-laws and indemnity agreements cannot oust s. 124(4). Section 124(4), when read with the other subsections of s. 124, provides that court approval is required for advance funding and that approval can only be granted if the officer or director claiming advancement "acted honestly and in good faith with a view to the best interests of the corporation". The application judge correctly held that the provision applied in this case to the directors' and officers' claims for advance funding.

[Emphasis added]

[80] The parties also did not address the point made in Bata Industries, i.e., whether the CBCA is akin to the Ontario statute and a complete code. Nor did they address whether, in light of the permissive language in s. 124(4), the CBCA affords the Applicants the right to apply to court to compel the Company to make an advance payment in the absence of a right to do so found in a company's articles, by-laws, or shareholders' agreement. Instead, the Applicants' grounded their application on the combined effect of the By-laws and the CBCA.

[81] In these circumstances, it is inappropriate for me to embark upon a determination of whether the indemnity provisions in the USA contravene the CBCA and are void as a result.

[82] In conclusion, the indemnity provisions in the By-laws are displaced by the USA, where there is no obligation on the Company to make an advance payment. There is no basis to ground the application on the CBCA because the statute is permissive and does not oblige the Company to make an advance payment. The application is dismissed.

Bad Faith

Introductory Remarks

[83] I will go on to consider the merits-based test in the event that further evidence leads to a future determination that the USA and By-laws may be construed so as to operate without conflict and provide the Applicants with the right to apply for an advance payment.

- [84] The purpose of indemnity is to provide assurance to persons who are prepared to become directors that they will be compensated for the consequences of the responsibilities they take on the company's behalf, so long as they act in good faith in the best interests of the company. Indemnity cannot be grounded on conduct which is in bad faith. Indemnification is decided on the basis of the circumstances existing at the time of the director's conduct and belief to avoid a determination based upon a "hindsight application of perfection": *Bennett v. Bennett Environmental Inc.*, 2009 ONCA 198 at paras. 23-27.
- [85] If the Company demonstrates a strong prima facie case of fraud, which is the test the Applicants say the Company must meet, it will have rebutted the presumption of good faith. Fraud is not limited to false statements deliberately made. It includes misstatements discovered to be inaccurate, although honestly made at the time, which are not corrected: *RC Hotel Ventures Ltd v. Meristar Sub 2C, L.L.C.*, 2008 BCSC 918 at para. 20; *Brownlie v. Campbell* (1880), 5 App. Cas. 925 at 950 (H.L.).
- [86] Bad faith is also referred to as mala fides and encompasses more than fraud against a corporation. According to Bennett, inexplicable and apparently reckless conduct, may lead to the inference that the conduct was deliberate, intentional, and undertaken in bad faith: para. 30. Bad faith may be demonstrated from circumstantial evidence where the responding party lacks direct evidence of it: *Noranco v. MidOcean Partners III*, 2019 ONSC 1173 at paras. 55-56.
- [87] In *Cytrynbaum SC*, the chambers judge described bad faith to include opportunistic or self-seeking behaviour and recklessness:
90. Mala fides or bad faith includes fraud or misrepresentation against a corporation. It may also include conduct coloured by opportunistic or self-seeking behaviour which exhibits a type of dishonesty that should not be countenanced by an award of indemnity: *Bennett v. Bennett Environmental Inc.*, 2009 ONCA 198, 94 O.R. (3d) 481 at para. 29. It can also encompass recklessness, described as conduct that is so inexplicable it leads to the inference of an absence of good faith: *Enterprises Sibeca Inc. v. Frelighsburg (Municipality)*, 2004 SCC 61, [2004] 3 S.C.R. 304 at para. 25.
- [88] Bad faith also includes conduct that is "inimical" to the Company's interests: Blair at para. 35. The Company's interests include performance by its directors of their legal obligations, including proper disclosure to its shareholders and compliance with its articles and shareholders' agreements: *Levy-Russell Ltd. v. Tecmotiv Inc.*, [1994] O.J. No. 650 at para. 574 (Gen. Div.); *Halsbury's Laws of Canada* (online), Business Corporations (2018 Reissue), "Duties and Liabilities of Directors and Officers: Duty to Act Honestly and in Good Faith" (IX.4(2)), at HBC-138 "Nature of duty".
- [89] The CBCA also prescribes the duty of care of directors. They must act honestly and in good faith with a view to the best interests of the corporation, and in doing so may consider the best interests of its shareholders:

Duty of care of directors and officers

122 (1) Every director and officer of a corporation in exercising their powers and discharging their duties shall

- (a) act honestly and in good faith with a view to the best interests of the corporation; and
- (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

Best interests of the corporation

(1.1) When acting with a view to the best interests of the corporation under paragraph (1)(a), the directors and officers of the corporation may consider, but are not limited to, the following factors:

- (a) the interests of
 - (i) shareholders,
 - (ii) employees,
 - (iii) retirees and pensioners,
 - (iv) creditors,
 - (v) consumers, and
 - (vi) governments;
- (b) the environment; and
- (c) the long-term interests of the corporation.

[90] The CBCA also mandates that every director and officer of a corporation shall comply with the statute as well as its unanimous shareholders agreement (in this case, the USA):

Duty to comply

- (2) Every director and officer of a corporation shall comply with this Act, the regulations, articles, by-laws and any unanimous shareholder agreement.

No exculpation

- (3) Subject to subsection 146(5), no provision in a contract, the articles, the by-laws or a resolution relieves a director or officer from the duty to act in accordance with this Act or the regulations or relieves them from liability for a breach thereof

[91] The rationale for placing the burden on the Company to rebut the presumption of the Applicants' good faith is explained by the Ontario Court of Appeal in Bennett:

32. The imposition of the burden on the corporation best balances the promotion of strong director decision-making on the one hand, while discouraging irresponsible behaviour on the other. Finally, as a practical matter, this placement of the burden makes sense because the corporation, and not the individual director, will most likely have the advantage of unrestricted access to corporate documents relevant to the indemnification proceeding.
- [92] A director cannot claim indemnification based on an unreasonable belief. The subjective belief of a director seeking indemnification is determined objectively. The reasonableness of a director's conduct or belief is determined in the context of a director in comparable circumstances at the time; it engages the knowledge and skill set of the individual director and the information and advice the director acted upon or the director's belief was based: Bennett at paras. 35-37. See also: Catalyst Fund General Partner 1 Inc. v. Hollinger Inc. (2006), 79 O.R. (3d) 288 (C.A.).
- [93] The Applicants are highly skilled sophisticated businessmen with education and significant work experience in corporate finance.
- [94] Mr. Qureshi graduated from Boston University with a Bachelor's degree in Finance and Economics. In his affidavit, he explained:
5. I graduated from Boston University with a Bachelors' degree in Finance and Economics. I have more than 20 years' experience in international investment banking, specializing in global securitization and structured and leveraged finance. My former employment experience includes: Managing Director with CIBC World Markets in London; building CIBC's North American structured finance platform; and Vice-President and Head of Sales and Marketing-Structured Finance at JP MorganChase in London.
- [95] In his second affidavit, Mr. Wong, who is a chartered accountant, deposes that he worked with Deloitte Canada in its Life Sciences' Group, and prior to leaving Deloitte, was vice president of that group. He also deposes in para. 5 of his affidavit that he "had several life sciences companies assigned to me as Deloitte was the advisor to their respective corporate finance activities."
- [96] I conclude from their evidence that the Applicants were aware of their obligations to the Company and its shareholders.
- [97] The Company asserts the Applicants' bad faith is comprised of false statements deliberately and recklessly made, concealment of key facts and information, self-dealing, and breach of duty as directors, all in furtherance of their self-interests. The Company and the Investor Group allege that the Applicants engaged in misconduct in order to raise funds from time to time to facilitate their pump and dump scheme.

- [98] The notice of civil claim contains detailed factual allegations to support the Company's claim for fraudulent misrepresentations, breach of duty as directors and officers of the Company, breach of fiduciary duty, knowing assistance of breach of duty, and fraud, deceit, and equitable fraud. Similar allegations are made in the companion action brought by the Investor Group.
- [99] In Ontario, the presumption may not be rebutted by the pleadings alone: *Cytrynbaum SC* at para. 91.
- [100] In this case, the affidavit evidence of the Applicants is in direct conflict with Mr. Wang's evidence in a number of instances. I would not want to decide whether the Company rebutted the presumption of good faith on the pleadings alone, even if approach taken by Madam Justice Maisonville in *Arkansas Teacher Retirement Teach System v. Lions Gate Entertainment Corp.*, 2016 BCSC 432 at para. 210 (where she said the pleadings did not plead any facts sufficient to establish an arguable breach of fiduciary duty) could be said to import a basis to rebut the presumption based on the pleadings alone.

The Alleged Instances of Bad Faith

- [101] In its written and oral submissions, the Company identified the following areas in which it says it has established on the evidence that the Applicants have acted in bad faith:
- (a) The Company did not develop any real or significant business operations of its own during the period 2015 to 2018, and the "promise of 'organic growth' based upon a sophisticated technology platform turned out to be a sham". Instead of growing its own business, all consumer lending was conducted through Spectrum, a mortgage lending business the Applicants "recklessly acquired" in an amount exceeding its value. The Applicants subsequently attempted to conceal the overpayment for the acquisition of Spectrum
 - (b) The Applicants made false and misleading statements about a purported technology program developed for and in use by the Company.
 - (c) The Applicants failed to disclose key information concerning the Company's recently audited financial statements because they knew it would shock shareholders and thwart the Applicants' efforts to raise additional capital and further their pump and dump scheme.
 - (d) The Applicants provided misleading information to the Company's valuator, Deloitte, in an attempt to manipulate the valuation.
 - (e) The Applicants delayed disclosure of Deloitte's preliminary valuation.
 - (f) The Applicants failed to disclose they were paid secret commissions on loan transactions and arranged for an inflated commission to be paid to Mr. Wong's spouse.
 - (g) The Applicants utilized the Company's assets without disclosure and authorization to further the business of Ascendo, which they wholly controlled.

- (h) The Applicants obtained personal benefits, without disclosure and authorization, by charging approximately \$1 million of Company-related transactions through their personal credit cards.
 - (i) The Applicants restricted Mr. Wang's access to the books and records of the Company.
- [102] It is sufficient for the Company to defeat the application if it demonstrates bad faith in any one of those matters.

The Evidence

- [103] The Company says it has established a strong prima facie case based not only on Mr. Wang's evidence concerning his dealings with the Applicants (and his understanding based on those dealings), his investigation (including a review of the Company's records), and his discussions with certain Company employees, but also on the Applicants' own misleading statements, omissions, and other misconduct as reflected in their email communications and in some instances, the Applicants' own affidavit evidence.
- [104] In support of their application, the Applicants submit their own affidavit evidence directly challenges the Company's allegations in the notice of civil claim and Mr. Wang's evidence. They also challenge a considerable portion of Mr. Wang's evidence (which was translated into English) on the basis that it is rife with argument in the guise of evidence, advocacy, inadmissible hearsay, exaggeration, misstatement, vague generalities, and speculation, and in some instances is false and misleading.
- [105] The Company says that Mr. Wang's affidavit was prepared in exigent circumstances where it was compelled to respond to the Applicants' material in a compressed time frame and hence contains hearsay.
- [106] Although hearsay evidence is permissible in interlocutory applications, I agree with the Applicants that some of Mr. Wang's affidavit evidence contains double hearsay. In a number of instances, it descends into the realm of argument and contains conclusory statements of the kind usually found in counsel's argument.
- [107] The numerous direct conflicts in the evidence between Mr. Wang and the Applicants, and the merits of many of the Applicants' complaints about Mr. Wang's evidence can only properly be determined following the testing of their evidence on cross-examination.
- [108] As I understand the Company's position, if their preliminary objection does not succeed, and if I am unable to determine the bad faith issues based on a preliminary assessment of the evidence, the matter should be referred to the trial list since "triable issues" are clearly raised on the evidence.
- [109] The Company submits that although the case dealt with a proceeding commenced by petition, the dicta of the Court of Appeal in Saputo concerning the proper procedure to follow when triable issues are raised on competing affidavit evidence is reinforced by its

subsequent decision in *C.M.R. v. L.F.R.*, 2019 BCCA 371, which concerned an interlocutory application in a family law action. In considering the proper approach to take in *C.M.R.* under the Supreme Court Family Rules, Mr. Justice Goepel (who also penned the reasons for the Court in *Saputo*) said:

- [1] The Supreme Court Family Rules (the "Rules") mandate that in a defended family law case commenced by the filing of a notice of family claim, a final order can only be obtained at trial or on application by way of summary trial (Rule 10-11(1)). Because of ongoing childcare and support issues, family law litigation often continues long after final orders are made at trial. This appeal concerns how such ongoing issues are to be resolved.
 - [8] The two applications were initially set on the assize list. By requisition dated January 16, 2019, the parties, by consent, asked that the matter be removed from the assize list and put on the chambers list to speak to whether the matter should go to trial or proceed by way of chambers. The chambers judge phrased the issue before him as:
 - [3] whether the parties' competing applications can be decided on conflicting affidavit evidence or must be referred to the trial list.
 - [11] As I will set out, both the application before the chambers judge and the appeal were argued on an erroneous premise. At this stage of proceedings, the question before the chambers judge was not whether the applications could be decided on conflicting affidavit evidence or must be referred to the trial list. The proper question was whether the applications raise a triable issue. If the applications raise a triable issue they must be referred to the trial list: *British Columbia (Milk Marketing Board) v. Saputo Products Canada G.P.*, 2017 BCCA 247 [*Saputo*]; *Kerfoot v. Richter*, 2018 BCCA 238; and *Robertson v. Dhillon*, 2015 BCCA 469.
 - [12] This conclusion follows from a consideration of the relevant Rules
 - [17] In this case both the application of the Father and the Mother raise triable issues. They should be referred to the trial list. If the parties cannot agree on the conduct of pre-trial procedures, they should seek directions in the Supreme Court.
- [Emphasis added]
- [110] The Applicants, on the other hand, liken their application to a Mareva injunction application, and argue that if the Company is unable to demonstrate a strong prima facie case on a limited assessment of the evidence, the application should succeed because the Company has failed to rebut the presumption of good faith.
 - [111] Relying on *Blair* at para. 35, the Applicants submit the Company must meet the standard of strong prima facie case and demonstrate it is "likely to succeed at trial", which they assert it has not.

- [112] The meaning of a strong prima facie case is discussed by the Supreme Court of Canada (in the context of an application for a mandatory injunction) in *R. v. Canadian Broadcasting Corporation*, 2018 SCC 5:
- [17] This brings me to just what is entailed by showing a "strong prima facie case". Courts have employed various formulations, requiring the applicant to establish a "strong and clear chance of success" a "strong and clear" or "unusually strong and clear" case; that he or she is "clearly right" or "clearly in the right"; that he or she enjoys a "high probability" or "great likelihood of success"; a "high degree of assurance" of success; a "significant prospect of" success; or "almost certain" success. Common to all these formulations is a burden on the applicant to show a case of such merit that it is very likely to succeed at trial. Meaning, that upon a preliminary review of the case, the application judge must be satisfied that there is a strong likelihood on the law and the evidence presented that, at trial, the applicant will ultimately be successful in proving the allegations set out in the originating notice.
- [Footnotes omitted, emphasis added]
- [113] In response, the Company's position is that in the context of this application, which it says is different from *Blair* where injunctive relief was sought, it is only required to demonstrate "a significant prospect of success".
- [114] In *Cytrynbaum CA* at paras. 54 and 56, the Ontario Court of Appeal said a court considering an application such as the instant one should refrain from making a final determination of the merits and instead determine whether the respondent company has adduced "strong evidence of bad faith".
- [115] For this application, nothing turns on the parties' different approach to the applicable test. From my preliminary assessment of the evidence adduced on the application, I am satisfied the Company has demonstrated a strong prima facie case likely to succeed at trial in respect of three matters:
- (a) the Company's technology platform;
 - (b) non-disclosure of key financial information; and
 - (c) impeding Mr. Wang's access to Company records.
- [116] My determination is based upon the objective evidence, admissions made by the Applicants, and certain unchallenged aspects of Mr. Wang's evidence. In assessing the evidence, I have been mindful of the caution in *Bennett* to avoid a "hindsight application of perfection."
- [117] As a result, I do not need to determine whether conflicts in the evidence concerning other issues should be referred to the trial list.

[118] However, if that had not been the case, then in light of the numerous conflicts in the evidence rising to the level of triable issues, I would have referred the application to the trial list as I am bound to do by the decisions of the Court of Appeal in Saputo and C.M.R.

The Company's Technology Platform

[119] The Company has proven its submission that "it was a fundamental pillar of the [the Applicants'] business plan to have a functioning technological platform through which to promote and deliver consumer lending services", including an online web-based platform.

[120] The Company has also established false statements were made in two separate PowerPoint presentations to Chinese investors where Mr. Wong stated that the Company in fact owned a fully operational consumer online technology program.

[121] According to Mr. Wang, he was told the Company owned a functioning mature web-based technology platform and that he was misled by oral statements and documents translated into the Mandarin language for him by or on behalf of Mr. Wong.

[122] Mr. Wang's evidence is denied by the Applicants who say that he was aware throughout that the Company was in the process of developing a platform with assistance from third parties and that it never owned one.

[123] Evidence concerning the impugned translations comes from Mr. Wong and not Mr. Qureshi. In his affidavit evidence, Mr. Qureshi deposes that his involvement in the technology platform was limited since Mr. Wong was "primarily responsible for" the program. However, Mr. Qureshi's evidence is silent as to his knowledge concerning the translation issues.

[124] Mr. Wong deposed in his first affidavit that he sent the first Mandarin PowerPoint and an English version to Mr. Wang and for review by prospective Chinese investors in late September 2014.

[125] Mr. Wong confirmed in his evidence that the Mandarin PowerPoint contained the following information set out in para. 38 of Mr. Wang's first affidavit. Mr Wong deposed in his affidavit #2:

17. The Mandarin language PowerPoint of September 25, 2014, mistakenly contains the translated words reproduced at paragraph 38 of Yuncai Wang's affidavit #1.

[126] Turning to para. 38 of Mr. Wang's first affidavit, he deposed that the Mandarin PowerPoint stated the Company owns an advanced, functioning web-based system:

owns an advanced and maturely operational web-based system and has everything required to conduct online lending business with 90% of the tasks being completed automatically, which could substantially reduce CitiFinancial's operational expenses, optimize customer experience and improve the efficiency of funds and meet all the prerequisites for scale operation.

[Emphasis added]

[127] The English PowerPoint provides a different account, i.e., the Company was aiming to develop the program relying on outsourcing in addition to in-house services. The reference to Jigsaw in the English version, excerpted below, is to the name of the venture before its name change to "Enliven":

We are aiming to develop a fully comprehensive, state of the art and robust end-to-end technology platform. The team at Jigsaw has already independently assessed various solution providers. Our initial conclusion is that a combination of outsourcing and in-house technology development maximizes the effectiveness and efficiency of our business. We have carefully evaluated and selected our partners to deliver the best in-class solutions, leveraging the strengths of these platforms.

[Emphasis added]

[128] In fact, the Company never owned any such technology and instead relied, unsuccessfully, on third parties to provide it with technology and software.

[129] Mr. Wong admitted that the Mandarin version is incorrect, but says was provided to Mr. Wang on two separate occasions as the result of an honest mistake:

14. I did mistakenly provide Yuncai [Mr. Wang] with mistranslated PowerPoints on two occasions, one of which is referred to, without context, at paragraph 38 of Yuncai's affidavit #1. These were both honest mistakes, as I explain below.

[130] Mr. Wong explained that on the first occasion, he sent both the English and Mandarin versions in September 2014 to Mr. Wang and his lawyer, advising them that the Mandarin version was translated for convenience and the English version was the "most accurate". He says it was not his intention to represent that the Company owned a working technology platform.

[131] Mr. Wong does not, however, identify who was responsible for the translation nor how the error occurred.

[132] For the second occasion, Mr. Wong confirms that he sent Mr. Wang a PowerPoint in Mandarin with essentially the same information over a year later, in December 2015, to review in advance of a meeting with an institutional investor.

[133] Mr. Wong deposed this error resulted from a "cut and paste".

[134] I find Mr. Wong's explanations for the errors deficient and am unable to accept them for several reasons.

[135] First, there is no information to explain who translated both Mandarin PowerPoints from the English versions and the circumstances in which the translations were undertaken.

- [136] Second, there is no evidence to explain the context in which a cut and paste occurred and how it led to error.
- [137] Third, when comparing the English and Mandarin versions on their face, there is no correlation between the words used to suggest a possible translation error. Not only is there a significant difference in the language between the two concerning ownership and the venture's aim to develop the platform, the Mandarin versions refer to CitiFinancial and the English versions do not.
- [138] Fourth, Mr. Wong speaks and reads Mandarin. If there was a mistranslation, it should have been obvious to him when he sent the PowerPoints to Mr. Wang and his lawyer.
- [139] Even assuming the misstatements in both Mandarin PowerPoints were an unintended mistranslation, Mr. Wong did not take any steps to correct the errors nor to notify Mr. Wang and recipients of the document of the errors once he discovered them.
- [140] I also reject Mr. Wong's explanation that Mr. Wang knew from two English presentations Mr. Wong sent to him that the Company did not own a functioning technology platform.
- [141] In seeking to defend his actions, Mr. Wong deposes at para. 20 of his second affidavit that he sent English language presentations to Mr. Wang to "translate to Mandarin for prospective institutional investors in anticipation of the CitiFinancial acquisition".
- [142] Mr. Wong's evidence is that the English version he sent states "that a technology platform is being developed but is not complete", and as proof attaches a document he later received from Mr. Wang's assistant translating into English the Mandarin translation of the original English document. The document he received from Mr. Wang's assistant contains both the English and Mandarin versions for a ready comparison.
- [143] Despite Mr. Wong's assertion, the document he received from Mr. Wang's assistant contains statements suggesting the Company owned a functioning, robust platform:

PLATFORM MIGRATION

Enliven's technology platform is cutting edge, robust, scalable and planned for tomorrow's needs. In stark contrast, CitiFinancial's back end system is built on legacy software more than two decades old, with no mobile or online origination capability. Enliven will, at the time of closing, migrate all customer accounts to the Enliven system, utilizing the professional services provided by Strategic Information Technology, a proven platform provider for 5 of Canada's top 6 banks and Enliven's core banking system provider. We believe CitiFinancial's legacy system will be too costly to run in parallel and therefore, only the extracted data will be housed on archive servers and backup purposes.

[Emphasis added]

[144] The document also suggests that what was in development at that time was the Company's mobile application for users to borrow through an online app:

Key Milestones Reached

- Nearing completion of stage 1 of 2 build-out of the company's technology platform, which will provide customers an unprecedented experience through the latest mobile app technologies to delivering loan advances on the go;

[Emphasis added]

[145] Therefore, I am unable to accept Mr. Wong's submission that he has established that Mr. Wang was aware of the true facts concerning the Company's technology platform or further, that Mr. Wong reasonably held that belief.

[146] There is no evidence that Mr. Wong took steps to clarify any of these matters with Mr. Wang or his assistant.

[147] In these circumstances, the Company has rebutted the presumption of good faith in respect of this issue. It has, at a minimum, demonstrated Mr. Wong's conduct was inexplicably reckless and the evidence is sufficient for me to draw an inference that it was intentional, not done in the Company's best interests let alone the interests of other shareholders, and as a result, in bad faith.

Non-Disclosure of Financial Information

[148] I am satisfied the Company has demonstrated a strong prima facie case of bad faith concerning the Applicants' failure, and in other instances their delay, to disclose key facts and information surrounding the audit conducted by the Company's auditors, Ernst & Young ("EY"), and the Deloitte valuation process.

[149] I begin with the EY audit.

[150] Internal emails between the Applicants and the Company's Chief Financial Officer ("CFO") show that Mr. Qureshi was highly concerned with the impact of certain write-downs and other adjustments made by EY to the Company's financial statements on the Company's existing shareholders and the Applicants' ability to raise additional capital. Mr. Qureshi's concerns were not limited to a negative adjustment to the Company's goodwill.

[151] In one email, dated September 22, 2017, copied to one of the individual's at Deloitte working on the valuation, Mr. Qureshi expressed his concerns to the CFO, which included his concern that the Investor Group would think the Company overpaid to acquire Spectrum:

As mentioned to you when we talked about this, these impairment charges and the related adjustments between what we presented to our investors in China and what the final audited numbers will look like, will significantly impact our ability to complete the next equity round we were planning on closing. We had previously discussed whether the impairment charge would be

impacted by us shifting revenues into Spectrum (from the mortgage realtor financing program as an example) and you said you would ask the CBV if a change in projections would shift the needle. Did you have that discussion with the CBV and what was the conclusion? I'm pretty sure the nuances of IFRS will not be easy to explain to these investors, they'll see the bottom line loss and immediately assume we significantly overpaid for an acquisition which is now worth less than half on paper.

Secondly, are there any other items we can adjust to mitigate the impact? The lawyers handling the Crelogix claim are quite comfortable speaking to EY about the high likelihood of getting our \$250K back. I realize we can make these adjustments later, the problem is in the optics while we are trying to raise capital now!

Please do whatever we possibly can to argue the case to smooth the numbers out, these adjustments will be very hard to explain.

[Emphasis added]

[152] In another email Mr. Qureshi sent to the CFO the same day, he expressed his concern to explain the effect of the write-downs and adjustments to the Company's existing shareholders:

The impairment issue may have been fine for a public company but is extremely damaging to the financing prospect of a private company. I think we are going to have a real problem explaining this to our investors and it may well impact the equity investment they had committed to.

Now we have to discuss damage control, is there anything we can do at this stage to address the impairment issue without falling afoul of the financial statements delivery requirements? I don't care how much work we have to do at our end to support a revised valuation, Spectrum's base case projections were a ridiculous basis for it in the first place!

[Emphasis added]

[153] The CFO advised Mr. Qureshi in two separate emails, also sent that day, that it was too late to remedy the numbers. I have excerpted some of the CFO's advice below:

Unfortunately, there are no other items that we can propose as adjustments that would mitigate the effects of the deposit and impairment issues. Everything else is tied down and pretty well set in concrete.

The impairment issue is a problem. To truly answer this one would take a long explanation but I will try to keep it short.

Yes, I spoke with EY as they are the decision makers on what they accept or don't accept from the CBV. EY's position was that to suddenly receive completely new projections now that EY and we are aware of the size of the impairment immediately raises their antennae. [Refer back to CPAB above]. The swing in the revenues leading to the bottom line outcomes that would deal with the impairment would have to be very large. EY would want to audit the heck out of all the

assumptions including looking for documentary evidence to back up the change in the forecasts and the credibility thereof.

On a practical level - there would have to be a ton of work done on our end (you and Kevin) - it couldn't just be throwing new numbers in a spread sheet - it would require all the costs of the new initiatives to also be stated

All of this would take several weeks to accomplish assuming it would pass muster with EY.

I have spoken with EY and Daniel Sturgess and they have reconfirmed several items:

1. for goodwill testing you can't "bolt on" new streams of business that would under IFRS constitute a separate cash generating unit .
2. if the hurdle in 1 could be overcome the new projections would have to have dramatically large jumps in revenue .
3. they would need to see documentation
4. Daniel has his professional concerns and says there isn't enough time for him to do all the work he would need to do to allow him to work with the new numbers and .
5. EY has a list of issues with this. They would want to have you swear that when they come in next year the projections for 2018 were met .
7. The investors in China should be told that writing off the goodwill is actually a standard tactic in N. America that management uses because it eliminates future work and charges from the valuers and auditors for supporting the goodwill. The goodwill is a non-cash item and bankers and investor in N. America generally do not give it any weight when assessing a company. They see it merely as an accounting item that means nothing in the real world.

[Emphasis added]

[154] In an email sent on September 26, 2017, Mr. Qureshi passed along to Mr. Wang what the CFO suggested (in point no. 6 above) and some information concerning certain negative adjustments to the financial information he had previously given to him. He withheld his concerns, including his concern over the impact of the EY financials on the Company's ability to raise further funds.

[155] In contrast with his internal communications with the Company's CFO, Mr. Qureshi's email to Mr. Wang discloses only some of the information, and inconsistent with his concerns in his emails with the CFO, Mr. Qureshi's email to Mr. Wang is framed in a positive, upbeat, and reassuring tone.

[156] Mr. Qureshi's tone can be gleaned from these excerpts, where he reassures Mr. Wang that certain negative adjustments in the financial statements are of no consequence:

I wanted to provide you with a status update on some of the key items we have been working on:

- 3) We have now completed the audit of our consolidated financial statements for the year, a draft of which I have attached for your review. There may be some minor changes before the auditors sign off but the end version should be substantially the same. We were required to make some adjustments to the previous internally prepared unaudited draft we gave you, which really are a consequence of the IFRS accounting methodology. The key adjustments to the previous draft are as follows:
- a) Goodwill impairment charge of \$1.3 million on the acquisition of Spectrum. This is based on a very conservative view of the expected results of Spectrum over the next 5 years and these results are discounted back to the present at a very high discount rate. (31%). Please note, when any prospective investor reviews our financial statement, intangible assets such as goodwill are usually discounted before they assess the value of the company. In practical terms, this adjustment should not be viewed as a detrimental impact to the value of the business.

[157] He went on to reinforce his view to Mr. Wang that EY was too conservative:

- b) Allowance charged as an expense to income for the deposit amount of \$250,000 we placed in our lawyer's trust account as part of the previous Creologiix acquisition effort. This is shown on the income in expenses as Acquisition costs. We have had discussions with our lawyers and they are extremely confident of having this deposit returned to us once the sale of the residual assets of Creologiix is complete. Unfortunately, EY [the Company's accountants] took a more conservative accounting view. We fully expect the amount to be returned to us and when it is, it will be booked as a recovery and represented as an addition to income
- c) An acceleration of the amortization of the two deferred annual payments to Carol and Derek for the purchase of Spectrum. This is strictly a timing issue as it means that in fiscal 2018 the amortization of this item will be reduced by \$118,046 thus improving the 2018 results. Note: this amortization will be reduced to zero from July 1, 2018 onward and thus again helping to improve the financial results.

The combined effect of #b and #c above once the deposit amount is returned to us is a benefit to the 2018 results of \$368,046.

[Bold in original; underling emphasis added]

[158] I now turn to Mr. Wang's evidence concerning what he was told about the Deloitte valuation and an anticipated range of share values.

[159] According to Mr. Wang, Mr. Wong told him in August 2017 the Company was engaging Deloitte to conduct a valuation of the Company and the preliminary results indicated a share value between \$1.25 and \$1.35. Mr. Wang also deposes that the Applicants subsequently made a similar representation to induce other shareholders and his friends to invest a further \$3.6 million:

67. Monty and Kevin never told me or the Enliven Board about the process that they were undertaking with respect to the valuation. Before securing the inflated Deloitte valuation, Kevin mentioned to me on August 16, 2017 that they were engaging Deloitte to conduct a valuation of Enliven, and the preliminary results indicated a per share value between \$1.25 to \$1.35. Kevin and Monty later used it to induce other shareholders and my friends to invest in the \$3.6 million (there was in fact a firm commitment to invest \$3.5 million as per Monty's proposal in the board meeting) financing round in September 2017 at the \$0.90 per share price on the basis that they were obtaining extra value acquiring shares at share prices below the company's intrinsic share price value.
- [160] What does the evidence establish?
- [161] To start with, the Applicants became highly concerned when Deloitte initially advised them in September 2017 of a preliminary valuation of \$0.25 cents per share.
- [162] After receiving advice from Deloitte in September 2017 of a preliminary valuation of \$0.25 per share, the Applicants engaged in ongoing dialogue with Deloitte in an attempt to enhance the valuation. That information was not disclosed to the Investor Group. Nor was the preliminary valuation of \$0.25 per share.
- [163] Mr. Wong acknowledges in his evidence that he engaged in "considerable back and forth with Deloitte over the valuation". Mr. Qureshi also took issue with Deloitte's initial valuation because it only took into account the Company's tangible assets and not its future potential (and in that respect, Mr. Qureshi deposes that the revenue projections given to Deloitte were prepared by Mr. Wong and others at the Company). Despite Mr. Qureshi's seeming distance from any personal involvement in those revenue projections, which were ultimately heavily discounted by Deloitte, the objective evidence shows Mr. Qureshi's ongoing efforts to persuade Deloitte to enhance its valuation.
- [164] The Applicants were unhappy when they saw that Deloitte heavily discounted their financial projections in their final valuation report and sought to have Deloitte revise their opinion, to no effect.
- [165] Mr. Qureshi did not disclose to Mr. Wang the preliminary valuation of \$0.25 per share and the efforts he and Mr. Wong made to persuade Deloitte to increase its valuation.
- [166] Between September 27 and November 17, 2017, certain members of the Investor Group invested a further \$2,929,999.40.
- [167] Deloitte sent its final version of its valuation report to the Applicants by email on November 9, 2017. In it, Deloitte reported the fair market value of the Company's shares to range between a low of \$0.68 a share, to a mid point of \$0.98, and a high of \$1.67. When it added the equity financings that occurred in September and October 2017 from investors who could not know of Mr. Qureshi's concerns, Deloitte reported a value per share in the singular at \$0.98.

[168] The Applicants submit that there is no consequence in respect of the information provided (and not provided) to Mr. Wang and the Investor Group in this period because those members of the Investor Group who invested further capital acquired shares at \$0.90 cents a share.

[169] I disagree.

[170] The Company has established key facts and information were not disclosed to the Investor Group. It has also established that the information provided by Mr. Qureshi to Mr. Wang was selective, incomplete, and framed in a misleading manner.

[171] Those members of the Investor Group who acquired shares between September and the latter part of November 2017 did so in the absence of knowledge of:

- (a) issues arising from EY's adjustments to the Company's financial statements;
- (b) Mr. Qureshi's concern to raise additional capital;
- (c) Deloitte's initial assessment of the share value at \$0.25 cents and the basis for it;
- (d) Deloitte's opinion concerning the range of the fair market value of the shares; and
- (e) the significant discount Deloitte placed on the financial projections provided by Mr. Wong.

[172] Likewise, the other members of the Investor Group who did not acquire additional shares during this period were not provided with key facts and information in which to assess their investment in the Company.

[173] The Applicants did not disclose the Deloitte valuation to the Board or to Mr. Wang until January 6, 2018. The Applicants have not demonstrated any reasonable basis for their delay. Nor does their later disclosure of the Deloitte valuation relieve the Applicants of their disclosure obligations at law.

[174] In the circumstances, the Applicants have not acted in the best interests of the Company. The Company has rebutted the presumption of good faith.

Access to the Company's Records

[175] The Company has demonstrated that Mr. Qureshi attempted to impede Mr. Wang's access to the Company's records contrary to the USA, and as a result, acted in bad faith.

[176] The USA gives each "Principal Shareholder" (such as Mr. Wang) and their authorized representatives the right to visit and inspect the Company's records and permits them to make copies:

6.12 Inspection Rights. The Corporation shall permit the Principal Shareholders, or their authorized representatives, to visit and inspect the business of the Corporation, including its corporate and financial records (which they may copy), and to discuss its business and finances with officers of the Corporation, during normal business hours following reasonable notice and as often as may be reasonably requested.

[Underlining emphasis added]

[177] As a director, Mr. Wang also had a right to access and review the Company's documents.

[178] On multiple occasions between May and August 2018, Mr. Qureshi told Mr. Wang that he wanted the Company wound up unless shareholders were prepared to inject a further \$3 million. In his evidence, Mr. Wang deposes that his concerns about the financial health of the Company evolved to suspicions concerning the Applicants:

46. In May 2018, I had a face to face discussion with Monty in Hong Kong, during which Monty repeatedly ask me to agree to [an] additional \$3 million equity raise from private investors, in order to increase funding for Enliven's lending portfolio as well as to improve the company's cashflow. I mentioned to Monty that I plan to visit the company in the near future to gain better understanding about the company's financial and operational status, which Monty has agreed. However, Monty expressed that if I cannot agree to further equity investment then he will propose to liquidate the business. Since then Monty has demanded me and the board to agree to liquidate the company in over 20 times [on] separate occasions, both himself personally or through litigators he hired. It was after this interaction that I first began to lose confidence in Monty and Kevin and first had concerns about their conduct.

[179] As a result, Mr. Wang undertook to audit and review the Company's operations, and attempted to review its books and records. According to Mr. Wang, Mr. Qureshi took active steps to prevent him and his authorized representatives from doing so. In his affidavit, Mr. Wang deposes:

47. From the end of June to the end of July 2018, as a director I have undertaken an audit and review of Enliven's business operation, which Monty repeatedly attempted to prevent. In response to my review and audit, on July 26, 2018, Monty asked Enliven's CFO and VP of Operations to take away all book and records of Enliven which I was reviewing, and he completely refused my rightful access to this information. On July 29, 2018 Monty opined that any review or audit of the company should be conducted by an independent third-party professional.

[180] The Applicants have tendered certain communications between Mr. Wang and Mr. Qureshi and Mr. Qureshi's lawyer into evidence.

[181] From those documents I am able to find the following.

[182] In June and July, Mr. Wang was allowed access to and did review some Company documents. He was initially assisted by third parties without objection from Mr. Qureshi. He sought to review additional Company documents, including the Applicants' reimbursement vouchers and documents concerning Spectrum. Mr. Wang advised Mr. Qureshi that he would be assisted by two individuals (one of whom was a translator) "to learn about the financial situation" of the Company. Mr. Qureshi agreed to provide access to documents. No objection was made to the third parties assisting Mr. Wang with his review of Company documents.

[183] To arrange the attendance at the Company's office, Mr. Wang wrote to Mr. Qureshi by email on July 15, 2018, advising him of his intention to proceed with his "unfinished review". He asked the Applicants to send him bank statements showing payments for their expenses charged to the Company. He followed this up with an email on July 20, advising them that he would attend on July 25 with two individuals (including a translator). He followed it up with a further email advising that he would also be joined by his assistant to review the Applicants' reimbursement vouchers and financial vouchers for Spectrum and that he would be assisted by others:

Dear Monty,

As discussed before, we will go to the company office to continue the unfinished review work at 1:30PM. Today, we mainly review your and Kevin's reimbursement vouchers and the financial vouchers of Spectrum from the acquisition to June 30, 2017. Please continue to support us. In addition, my assistant, Ms. Hui Guo, will participate in this afternoon's work to help Ms. Wang Ling review the above documents. Ms. Yihui Li will help me as a translator at the scene. Thanks.

Kind Regards

Yuncaï

[184] Mr. Qureshi responded as follows at 1:15 p.m. advising the records would be available for review. He did not object to attendance by third parties:

Dear Mr. Wang,

The credit card statements you requested for both Kevin and myself have substantially been received and are ready for your review. I have put the finance team on alert to assist with any additional requirements as relates to Spectrum's invoice reconciliation. As you are aware, Michael is attending a mandatory professional development course today but Stephen and Kwong are available in the office.

Kind regards

Monty

[185] Mr. Wang took some documents away with him following his review at the Company's office. Mr. Qureshi sent him an email at 5:39 p.m. insisting that he return the documents immediately, reminding him that, "the company records are strictly confidential and contain private information that ought not to be disclosed to or shared with third parties."

[186] A few minutes later, he sent a follow-up email to Mr. Wang stating:

May I also remind you that we have not consented or agreed to any third parties to review such confidential and private information.

[187] Mr. Wang apologized in a responding email for taking the documents and returned them to the Company's office that evening. In that email and another, Mr. Wong advised Mr. Qureshi that he took copies of the documents.

[188] In one of his affidavits, Mr. Qureshi acknowledged he advised the CFO that the two individuals Mr. Wang brought with him were "not to be given any further access to the company's books and records."

[189] The next day, a lawyer acting for Mr. Qureshi (and not the Company) sent a letter to Mr. Wang. The letter made a number of complaints regarding Mr. Wang's recent request to add items (concerning the Applicants' status with the Company) to the agenda of the upcoming board of directors' meeting scheduled for July 27, 2018, certain restrictions placed on the Company's operations by Mr. Wang acting on behalf of the Investor Group (including removal of some of Mr. Qureshi's duties as chief executive officer), Mr. Wang's removal of certain Company records from the office the day before, and the review of those records by third parties assisting Mr. Wang.

[190] The complaints concerning third party review of the Company's records read as if Mr. Qureshi's lawyer was advancing a position on behalf of the Company as opposed to Mr. Qureshi personally. The letter demanded Mr. Wang return copies as well as originals of documents:

I am advised that Mr. Yuncai Wang attended at the offices of Enliven yesterday with three other individuals to review confidential and private records of the Companies. No authorization was given for the other three individuals to review business records that they are not entitled to receive. As you know, there are privacy and confidentiality obligations that Mr. Yuncai Wang has an obligation to uphold, which it appears he has breached. Further, I am instructed that when he left the office yesterday, he took these confidential and private business records with him out of the Companies' offices. Any such records must be immediately returned, along with any copies.

If Mr. Yuncai Wang requires an interpreter for the meeting on Friday, please advise and a qualified certified interpreter will be obtained for the meeting. No guests will, otherwise, be permitted at the meeting.

[Emphasis added]

[191] By then, Mr. Wang had returned all of the documents he had taken with him.

[192] Those comments as well as those expressed by Mr. Qureshi the evening before overlook that under the USA, Mr. Wang had the right to assistance from third parties and to make copies of Company documents. They also overlook that Mr. Qureshi did not object when Mr. Wang advised him that he was bringing third parties to assist him in his review.

[193] The only explanation provided by Mr. Qureshi for denying third party access to review the documents is his statement in an email to Mr. Wang on July 30, saying that the reference to "authorized representatives" in section 6.12 of the USA "clearly intended to apply where the Principal Shareholder was a corporation." Mr. Wang falls within the definition of Principal Shareholder and there is no such restrictive language spoken of by Mr. Qureshi apparent on the face of the USA.

[194] There is no explanation from Mr. Qureshi for his demand that Mr. Wang return copies of Company documents.

[195] On July 29, at 1:00 p.m., Mr. Wang sent the following email to Mr. Qureshi explaining that his review was not complete and he would attend the next day with third parties to review documents, including those concerning Spectrum:

Dear Monty,

Ms. Ling Wang and Ms. Hui Gou will go to the company at 1:00pm on Monday to review the financial and contract documents related to Spectrum. Please cooperate with us.

Kind regards

Yuncaï

[196] Mr. Qureshi responded at 9:18 p.m., and took issue with Mr. Wang's request:

Mr. Wang,

In light of the proposals you presented at the board meeting, my understanding is that your review has substantially been completed. If that is indeed the case, I would like to request a full summary of your review and results to date and if it is not, to specifically explain the necessity and purpose of any further review.

[Emphasis added]

[197] Mr. Wang responded at 10:10 p.m., and was clear that the scope of his review included a fulsome review of records concerning Spectrum:

Dear Monty,

The review of Enliven was not fully completed, for example, part of the external payment voucher regarding your and Kevin's reimbursement has not been seen. The review of Spectrum's financial and business related documents is expected to begin tomorrow, please provide cooperation and support. Please respond if you will provide relevant documents for Ms. Ling Wang and Ms. Hui Guo (translator) to review at 1:00 pm tomorrow.

[Emphasis added]

[198] On July 31, Mr. Wang wrote to Mr. Qureshi setting out his concerns from his review of Company records thus far, and proposed a special committee be appointed (and that the Applicants be excluded from the Committee):

Dear Monty,

As we previously discussed, the purpose of my review of the records of Enliven is to ensure the business of the company is carried out lawfully and properly, in the best interests of the company. More specifically, from my initial review, I have reason to believe that there are issues with improper related party transactions (e.g., unauthorized commissions), irregular recording or improper authorizing of expenses and reimbursements, lack of proper and timely reporting to the Board in relation to significant developments in the company (including adverse developments), and failure to make full, true and plain disclosure to investors and potential investors about the status of the company (including its prospects) and the purposes of past financings.

As you know, I have not completed my review, and as I trust you understand, I cannot arrive, and have not arrived, at any conclusions on these issues at this time. However, I understand your concerns, and as a matter of fairness, I have decided to pause my review at this time. I think it would be proper to ask the Board to consider whether the Board should set up a special committee which shall retain qualified and independent professionals to conduct a thorough review and investigation into these matters. I think this would be a fair step to take that would be in the best interests of the company. I also think that you and Kevin should not be on the special committee or continue as the CEO and COO, respectively, when such a review takes place. I think this would be in the best interests of the company as it would minimize the impact on its operations and maximize the effectiveness of the independent investigation and review. I plan to propose these matters to the Board for a determination at the proposed meeting on August 8, 2018.

[Emphasis added]

[199] Counsel advised me that a special committee was in fact struck and that no report has been released as of this time.

[200] The Applicants' employment with the Company was terminated at or near the end of July 2018.

[201] The Applicants argue that none of these events have significance since a special committee of the board has been established to investigate Mr. Wang's concerns.

[202] From my assessment of the objective evidence, I am satisfied of the following facts:

- (a) Mr. Wang was allowed access to review certain Company documents in June and July 2019;
- (b) no objection was initially taken to Mr. Wang bringing third parties to assist him;
- (c) when Mr. Wang took copies of documents away with him, he was told by Mr. Qureshi that third parties could not assist in his review;
- (d) Mr. Wang returned those documents forthwith when asked to do so;
- (e) Mr. Wong was then told by Mr. Qureshi's lawyer that Company records could not be reviewed by third parties and to return copies of the Company's documents;
- (f) Mr. Wang advised Mr. Qureshi that his review was not finished, he intended a fulsome review of records concerning Spectrum, wished third party assistance, and asked for Mr. Qureshi's cooperation;
- (g) Mr. Qureshi's response was to request an explanation for continued review and to be given a summary of results of the review taken thus far;
- (h) Mr. Wang's right to unfettered access to the Company's documents (including his right to make copies) under the USA and as a director was impeded; and
- (i) Mr. Wang's right to assistance from third parties was also impeded.

[203] It is contrary to the Company's best interests and s. 122(2) of the CBCA for one of its officers and directors to breach the shareholders' agreement - the USA - to which the Company was a party or for its chief executive officer to fetter the rights of one of its directors without good reason. In this case, no such reason has been provided.

[204] In the totality of the circumstances, I accept the Company's submission that in the absence of any other evidence, it is appropriate to infer that Mr. Qureshi acted out of self-interest in seeking to impede Mr. Wang's access to the Company's documents.

[205] Regardless, the Company has established a strong prima facie case that Mr. Qureshi did not act in its best interests and was not acting in good faith.

Directors and Officers Insurance Policy

[206] After the conclusion of hearing of the application, and while my decision was under reserve, the Company brought an application seeking leave to adduce fresh evidence concerning advances made to the Applicants for their defence costs under a directors and officers insurance policy issued by AIG ("AIG policy"). The Company's evidence is that it only just learned of the advance and its position is that it is a material fact that the Applicants ought to have disclosed. The Company also seeks an order requiring the

Applicants to disclose all of their communications with AIG.

- [207] The Applicants oppose the Company's application on the basis that AIG's funding is not material to the question of an advance payment and in any event their communications with AIG are privileged. The Applicants cite *Manitoba Securities Commission v. Crocus Investment Fund*, 2006 MBQB 19 and *General Accident Assurance Co. v. Chrusz*, [1999] O.J. No. 3291 in support of their position.
- [208] I will deal with materiality first.
- [209] I agree with the Applicants that AIG's funding of defence costs is not material to the question of the Company's legal obligation to make an advance payment (e.g., under either the By-Laws or the USA).
- [210] However, the amount advanced by AIG is material because it impacts the quantum of any order I would have made for advance payments if I had determined the Company was obliged to do so.
- [211] In their notice of application, the Applicants sought an order that they each receive an advance of \$200,000 with liberty to apply for future advances. The Applicants' position is that these are reasonable and appropriate amounts to cover their past and future anticipated defence costs.
- [212] One piece of fresh evidence the Company seeks to adduce is that AIG has advanced as much as \$268,000 to the Applicants (the actual amount has not been disclosed by the Applicants). The source of the Company's evidence is said to be the insurance broker who assisted the Company in placing coverage with AIG. If I had authorized an advance payment of \$200,000 to each Applicant, without knowing of AIG's advance payments, the Applicants would have collectively received up to an additional \$268,000, well beyond what they contended was a reasonable and appropriate amount. In that event, the Applicants would have received additional undisclosed compensation without the requisite court supervision, resulting in a total amount that I would not have approved at this juncture.
- [213] Referring to my earlier discussion of ss. 122(1) and (1.1) of the CBCA and the case law dealing with good faith, I am also of the opinion that the Applicants' tenders to AIG for coverage and AIG's advance of defence costs are material to the issue of the Applicants' good faith as directors of the Company because of the potential consequences to the Company and the other directors and officers. I have reached that conclusion for the reasons below.
- [214] To start with, disclosure of the amount of AIG's advance payments is material to the quantum of any advance payment. The Company should not be required to pay more than it would otherwise be ordered to pay by a court exercising its supervisory authority over requests for advance payments, especially since any advance payment the Company is ordered to make comes from its own funds.

- [215] Next, the Company is potentially exposed to a claim by AIG to recover all of the funds AIG advances to or on behalf of the Applicants. AIG's position (conveyed on the fresh evidence application by counsel it instructed to attend) is that it has the right in certain circumstances to subrogate against the Company for repayment of all funds it advanced to or on behalf of the Applicants up to policy limits of \$5 million.
- [216] In addition, the AIG policy, paid for by the Company, insures the Company and all of the Company's directors and officers up to a limit of \$5 million, including defence costs. Unlike commercial general liability policies, the AIG policy limits are eroded by defence costs paid by AIG, leaving reduced funds available under the AIG policy to respond to any claims made against the Company and its other directors and officers during the policy period or any other time the AIG policy permits claims to be tendered for coverage.
- [217] These issues were not considered in Crocus Investment (the relevance of insurance was only briefly touched upon at para. 49) and accordingly, I do not find the decision to be of assistance to this application.
- [218] Consequently, I grant the Company leave to adduce fresh evidence concerning the advance from AIG.
- [219] I turn now to the request for production of the Applicants' communications with AIG. The General Accident decision and others to the same effect in this province are clear that an insured's communications with its insurer are privileged where it is established that their dominant purpose is for litigation or are otherwise protected by common interest privilege. Not every communication between an insured and its insurer is privileged. For example, and as found in General Accident, investigations carried out by an insurer to determine whether the claim falls within the coverage grant are not privileged: para. 51.
- [220] In General Accident, the court was made aware of the different categories of communications in issue. No such list was provided to me. I do not fault the Company for this because it only just learned of the AIG advance payments and is not aware of the various categories of documents that exist. I also note that in General Accident, the insurer appeared on the application and assisted the court with submissions concerning the categories of documents.
- [221] I have determined that this part of the Company's application should be adjourned so that it can be formally served on AIG and so the Applicants can provide an updated list of documents setting out their claims for privilege in Part 3. I leave it to counsel to work out the timelines for service on AIG, delivery of the Applicants' amended list of documents, and rescheduling the application.

Conclusion

[222] The Company is not obligated to provide an advance in light of the provisions of the USA, which displaces the indemnity provisions in the Bylaws. The CBCA is permissive and provides the Company may make an advance so long as court approval is obtained.

[223] In any event, the Company has rebutted the presumption of good faith on the part of the Applicants in three respects: ownership of the Company's technology platform; disclosures surrounding financial information; and access to the Company's records. For all other alleged instances of bad faith, I would send them to the trial list.

[224] The Applicants were obliged to disclose to the Company and the Court their requests for coverage to AIG and the quantum of AIG's advance payments.

[225] The application brought by the Applicants for the Company to make advance payments is dismissed.

"Walker J."

The Honourable Mr. Justice Walker

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