

CANADA / JUDGMENT

McDonald Bankruptcy (Re)

2017 BCSC 1957

COURT

Supreme Court of British Columbia

DECIDED

31 October 2017

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2017 BCSC 1957 McDonald Bankruptcy (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

McDonald Bankruptcy (Re),

2017 BCSC 1957

Date: 20171031

Docket: B130057

Registry: Vancouver

In Bankruptcy

In the Matter of the Bankruptcy of

R.A. Bruce McDonald

- and -

Docket: S152188

Registry: Vancouver

In Bankruptcy

In the Matter of the Bankruptcy of the Estate of

R.A. Bruce McDonald

Between:

Sandra C.H. Lau

Applicant

And:

Wilhelmina McDonald

Respondents

Before: The Honourable Madam Justice Watchuk

Reasons for Judgment

In Chambers

Counsel for the Applicants Sandra C.H. Lau and Boale Wood & Company Ltd. in its capacity as Trustee in Bankruptcy of R.A. Bruce McDonald:

M.L. Palleson

Counsel for the Respondents Wilhelmina McDonald in her capacity as Trustee of the McDonald Alter Ego Trust and the McDonald Alter Ego Trust:

P.J. Reardon

Counsel for the Respondents Wilhelmina McDonald in her personal capacity, in her capacity as the court-appointed representative of the Estate of R.A. Bruce McDonald, Deceased, in her capacity as Executor of the Estate of R.A. Bruce McDonald, Deceased and 319344 B.C. Ltd., 319345 B.C. Ltd. and Noramco Capital Corp.:

P.J. Roberts

Place and Dates of Hearing:

Vancouver, B.C.

June 25, 2015

August 6, 2015

April 24-25, 2017

Place and Date of Judgment:

Vancouver, B.C.

October 31, 2017

I. ORDER SOUGHT

[1] In both actions, the applicants Sandra Lau and Boale Wood Company ("the Trustee") seek a preservation order (the "Order") over assets previously held in the name of R.A. Bruce McDonald, a bankrupt. Their applications set out the Order sought pursuant to Supreme Court Civil Rules Rule 10-1 and 10-4 and s. 39 of the Law and Equity Act:

- (a) Until further Order of the Court, Wilhelmina McDonald ("Mrs. McDonald"), the McDonald Alter Ego Trust (the "Trust"), Wilhelmina McDonald in her capacity as the Trustee of the Trust, Wilhelmina McDonald in her capacity as a Court-appointed representative of the Estate of R.A. Bruce McDonald, a bankrupt, and Wilhelmina McDonald in her capacity as Executor of the Estate of R.A. Bruce McDonald, deceased, (collectively the "Mrs. McDonald Parties") shall be and are hereby restrained from selling, transferring, granting security in or charging, dealing with, or otherwise encumbering any and all shares or any interest in such shares, held by any of them, directly or indirectly, in 319344 B.C. Ltd., 319345 B.C. Ltd. or Noramco Capital Corp. (collectively the "Companies");
- (b) Until further Order of the Court, the Companies shall be and are hereby restrained from:
 - (i) making any payments to or otherwise bestowing any benefits on the Mrs. McDonald Parties or any of them whether in respect of dividends, redemption of shares, payment of capital, transfers or otherwise; and
 - (ii) making any payment, incurring any obligation or satisfying any obligation on behalf of, for the benefit of, or owed by the Mrs. McDonald Parties or any of them.
- (c) Any payments that the Companies are required to make to the Mrs. McDonald Parties, be they dividends or otherwise, shall be paid into Court or paid to the Bankruptcy Trustee, who shall hold such payments in trust until further order of this Court or agreement between Mrs. Lau, the Trustee and the Mrs. McDonald Parties.
- (d) The Mrs. McDonald Parties shall pay to Mrs. Lau the costs of this application.

II. THE PARTIES, ASSETS, AND CORPORATIONS

- [2] So that the factual background and submissions can be more readily understood, the parties, assets and corporations relevant to the issues to be determined are briefly described in this section prior to the more complete history set out below.
- [3] 441 shares in 319344 B.C. Ltd. (the "319344 Shares") are central to this proceeding.
- [4] 319344 B.C. Ltd. ("319344"), which was a holding company, held 79% of the shares in Noramco Capital Corp. ("Noramco"), the operating company. It also held 100% of the shares of 319345 B.C. Ltd. which held 14% of the shares in Noramco.
- [5] On January 7, 2010, R.A. Bruce McDonald set up a trust (the "Trust").
- [6] Mr. McDonald on the same date, January 7, 2010, purported to transfer the shares of Noramco into the Trust by way of a deed of gift.
- [7] The 319344 Shares in issue in these two proceedings were held by Mr. McDonald at the date of his death, March 4, 2013.

- [8] The estate of Mr. McDonald (the "Estate") was adjudged bankrupt on August 26, 2013 (the "Bankruptcy Order").
- [9] The 319344 Shares previously held by Mr. McDonald were transferred to the Executor of the Estate of Mr. McDonald, Mrs. Wilhelmina McDonald, on October 4, 2013.
- [10] The 319344 Shares remain held by Mrs. McDonald.
- [11] Mrs. McDonald takes the position that Mr. McDonald intended to transfer the 319344 Shares rather than the Noramco shares into the Trust.
- [12] Mrs. McDonald is seeking, in another court action, to rectify the transfer into the Trust so that the 319344 Shares previously held by Mr. McDonald are transferred to the Trust (the "Rectification Action").
- [13] Mrs. Lau holds a judgment against Mr. McDonald in the amount of \$1.4 million (the "Judgment"). In this action she takes the position that the 319344 Shares held by the Estate at the time of its becoming bankrupt on August 26, 2013 should have been transferred to the Bankruptcy Trustee.
- [14] The 319344 Shares are the asset which Mrs. Lau seeks an order to preserve pending resolution of the two actions herein.
- [15] The two actions, described in more detail below, are the bankruptcy action commenced by Mrs. Lau against Mr. McDonald on January 7, 2013, and the Section 38 Action commenced by Mrs. Lau pursuant to section 38 of the Bankruptcy and Insolvency Act on March 13, 2015 seeking ownership of the 319344 Shares.

III. SUMMARY OF PARTIES' SUBMISSIONS

A. Applicants' Submissions

- [16] The applicants submit as follows: When Mr. McDonald died on March 4, 2013, he held 441 shares in 319344. Mr. McDonald's Estate was adjudged bankrupt on August 26, 2013.
- [17] Mrs. McDonald stated that it was her understanding the 319344 Shares were transferred by Mr. McDonald to the Trust, which was established on January 7, 2010, pursuant to a deed of gift also dated January 7, 2010 (the "Deed of Gift"). However, the language in the Deed of Gift is not effective to transfer the 319344 Shares. Rather, it transfers Mr. McDonald's shares in Noramco to the Trust. Mrs. McDonald filed a petition on filed May 25, 2015, seeking to rectify the Deed of Gift so as to make it effective to transfer the 319344 Shares (the "Rectification Petition"). The Rectification Petition has now been converted to the Rectification Action.

- [18] The applicants say that Mrs. McDonald has no arguable right to the 319344 Shares unless and until the Rectification Action succeeds. If the Rectification Action does not succeed, the 319344 Shares would properly have been property of the Estate. The 319344 Shares ought to have been registered in the name of the trustee in bankruptcy and held pending the resolution of the issues between the parties regarding ownership of the 319344 Shares.
- [19] Instead, on October 4, 2013 Mrs. McDonald transferred the 319344 Shares to herself on the basis that she is the executor of the Estate. Mrs. McDonald arranged to have the 319344 Shares transferred and registered in her name by making a written application for the transmission of the 319344 Shares. The applicants submit this was not a valid transaction because the Bankruptcy Order was already in place as of August 26, 2013 and all assets in the Estate had, by law, vested in the Bankruptcy Trustee. The applicants say Mrs. McDonald was aware of the Judgment, and aware the Estate was bankrupt on October 4, 2013.
- [20] When examined on this issue on December 3, 2013, the applicants say Mrs. McDonald was not entirely truthful:
- Q. 88. Okay. So, then, Mrs. McDonald, did all of the assets in trust transfer to you at the date of death?
- A. I'm sorry? Could you say that -
- Q. 99. Did all the assets in the trust get transferred to you when Mr. McDonald died?
- A. I assume so.
- [21] The applicants also note Mrs. McDonald deposed that:
50. Later in October 2013, I discovered that there may have been an issue with respect to the transfer of Bruce's assets to the Trust. Up until then, it was my understanding that all of Bruce's assets had been transferred to the Trust in January 2010.
- [22] Mrs. McDonald is currently the registered owner of the 319344 Shares and is in a position to deal with and benefit from her alleged ownership of the 319344 Shares.
- [23] Since October 4, 2013, the value of the 319344 Shares has decreased with the reduction in value of the assets of 319344 and Noramco. The assets have been subject to a number of transactions including: dividends paid, a payment of a salary of \$3,000 per month to Mrs. McDonald and payment of Mrs. McDonald's legal fees. It is reasonable, the applicant say, to believe that the value of the 319344 Shares is threatened.
- [24] The applicants submit that there are three substantial questions to be tried regarding the claim of Mrs. Lau to the 319344 Shares:
- (a) the Deed of Gift was ineffective to transfer the 319344 Shares from Mr. McDonald to the Trust and there is a substantial question as to whether or not rectification ought to be granted in these circumstances;

- (b) the evidence before this Court is that a transfer of the 319344 Shares to the Trust was never completed. In the circumstances, the Court will not to assist in the completion of a gift; and
 - (c) if there was a transfer of the 319344 Shares, such transfer ought to be set aside as a fraudulent conveyance or, alternatively, pursuant to the provisions of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 ("BIA").
- [25] The proposed Order imposes no material limitations or restrictions on the business of the Companies. The Order would only prevent Mrs. McDonald from selling or encumbering the 319344 Shares or receiving benefits from the Companies, or similar actions with regard to the Noramco and 319345 B.C. Ltd. shares, causing the loss of or further deterioration in the value of the 319344 Shares until the ownership issue can be resolved.
- [26] The applicants say Mrs. McDonald has not evidenced prejudice that would flow from the Order sought. The balance of convenience favours a preservation order in all the circumstances.

B. Respondents' Submissions

- [27] The respondents submit that to obtain a preservation order under Rule 10-1, the applicants must establish on the evidence, not just the pleadings, that they have a proprietary interest in the subject property: *Osooli-Talesh v. Emami*, 2003 BCSC 1924.
- [28] The applicants must also establish they have "a strong prima facie case", not just a fair question to be tried, particularly where they do not directly claim an interest in specific property, but a judgment which can be executed against the property to be subject to the preservation order: *Osooli-Talesh* at para. 54, and *MacMillan v. Northstar Toot Corporation*, 2009 BCSC 148 at para. 17.
- [29] The respondents say Mrs. Lau challenges the Trust not because she claims an interest in it or the shares it owned, but because she wishes to secure assets against which to satisfy the judgment. That is not a proprietary claim.
- [30] The applicants seek not just to preserve the shares of 319344 and Noramco, but also to preserve the funds that are unquestionably the property of 319344 and Noramco solely for the purpose of satisfying the judgment. As a result, they must, with evidence, establish a strong prima facie case that the Trust was established contrary to the provisions of the Fraudulent Conveyance Act, R.S.B.C. 1996, c. 163. The applicants have adduced no evidence on the strength of their case. The best they can say is they are advancing the allegations set out in the conveyance action.

- [31] Further, the applicants bear the onus of establishing as reasonable their belief that the property is threatened with disposition or transfer outside the jurisdiction. The respondents say this requires evidence of special circumstances, including evidence the property will be removed, destroyed, or the respondent has taken steps to avoid debt payment: *First Pacific Credit Union v Dewhurst, Litwin Construction (1973) Ltd.*, (1987) 16 B.C.L.R. (2d) 371.
- [32] The applicants have pointed only to payments and dispositions made by 319344 and Noramco in the ordinary course of their business dealings in 2012 and 2013. The respondents say 319344 paid dividends to the Trust and gave funds to Mrs. McDonald. These payments were made to pay the personal tax liabilities in the Estate, and any funds Noramco paid Mrs. McDonald were for ordinary business expenses and to pay Mrs. McDonald's salary. Beyond this, there is no other evidence to suggest the subject property is "threatened with disposition". The property is not "threatened" in the sense required by the applicable case law. Rather, the property is being used in the ordinary course of business of each of the companies.
- [33] The applicants' evidence is insufficient to establish the requisite "reasonable belief". Indeed, the delay in bringing this application illustrates the absence of any such belief.
- [34] Further, the applicants must establish irreparable harm in the event the preservation order is not granted. Irreparable harm is not harm that can be compensated for by the payment of money. Mrs. Lau's real claim is for payment of the judgment. That can only be satisfied by the payment of money. As a result, the applicants cannot demonstrate they will suffer irreparable harm.
- [35] The applicants also have the burden of establishing that the balance of convenience favours an order preserving the subject property; it is not sufficient to establish only that there might be a risk the property will be disposed of: *W.S. v. T.A.C.*, 2005 BCSC 28, at para. 19.
- [36] In any event, the respondents say damages are an adequate remedy for Mrs. Lau, a judgment creditor. If the funds received by Mrs. McDonald from 319344 and Noramco were improperly distributed to her, then Mrs. Lau has a claim against Mrs. McDonald personally compensable in money.

IV. FACTUAL BACKGROUND

A. The Guarantee

- [37] Mr. McDonald executed a guarantee (the "Guarantee") in favour of Mrs. Lau on July 11, 2008 which guaranteed repayment of a loan (the "Loan") made by Mrs. Lau to Cuprus Mining Corporation ("Cuprus") on July 11, 2008. The Loan was to be paid back in full on January 11, 2009.

- [38] Cuprus did not repay the Loan when due. Oral demands in February and August 2009 and a written demand by counsel for Mrs. Lau on August 7, 2009 were made to Mr. McDonald for payment pursuant to the Guarantee. I note the respondents say they were not aware of the demands until a court action was served.
- [39] On September 17, 2010 Mrs. Lau commenced an action in the British Columbia Supreme Court against Mr. McDonald with respect to the Guarantee (the "Guarantee Action"). On May 22, 2012, Mrs. Lau obtained the Judgment against Mr. McDonald on the Guarantee in the amount of \$1,458,558.71 following a summary trial. The decision in that action is cited as *Lau v McDonald*, 2012 BCSC 866. The Judgment was not appealed. Mr. McDonald, despite demands, made no payment with respect to the Judgment.

B. The Trust and Deed of Gift

- [40] Sometime after the demands from Mrs. Lau, Mr. McDonald established the Trust on January 7, 2010. Under the terms of the Trust, Mrs. McDonald was the Trustee and a beneficiary of the Trust. The Trust provides that upon Mr. McDonald's death all of the Trust assets are to be transferred to Mrs. McDonald if she is alive.
- [41] The Deed of Gift purported to transfer to the Trust "all the issued shares in Noramco Capital Corp. which are beneficially held by Richard Angus Bruce McDonald" (the "First Purported Transfer"). The Deed of Gift confirms that no consideration was paid for the First Purported Transfer.
- [42] As of January 7, 2010, Mr. McDonald did not directly own any shares in Noramco. Rather, Mr. McDonald was the registered owner of the 319344 Shares. 319344 in turn was the registered owner of shares in Noramco directly and indirectly by its wholly-owned subsidiary 319345 B.C. Ltd. ("319345").
- [43] Mr. McDonald did not have a "beneficial interest" in any Noramco shares on January 7, 2010 as there was no trust set up regarding 319344 or 319345.
- [44] In answering outstanding requests made at the December 3, 2013 examination of Mrs. McDonald, counsel for the respondents advised that the 319344 Shares and shares in 319345 were transferred into the Trust by way of the Deed of Gift as of January 7, 2010.
- [45] If the Deed of Gift had been effective to transfer the 319344 Shares, this would have effectively left Mr. McDonald with no assets as of January 7, 2010.

C. Bankruptcy Proceedings

- [46] Mrs. Lau initiated bankruptcy proceedings against Mr. McDonald on January 7, 2013.
- [47] Mrs. McDonald, the widow of Mr. McDonald, is the named executor of the Estate but has not as yet obtained a grant of probate with respect to the Estate. Mrs. McDonald alleges that there were no assets in the Estate, and that is why she has not obtained a grant of probate.

[48] On August 19, 2013, Mrs. McDonald became the representative of the Estate in the bankruptcy proceedings pursuant to an order of Registrar Cameron. Mrs. McDonald appeared in court on that day and consented to the order.

[49] The Bankruptcy Order was made on August 26, 2013.

D. Post-March 4, 2013 Transactions

[50] Following Mr. McDonald's death on March 4, 2013, transactions have occurred involving the distribution of money or other assets from the Companies and/or the Trust, including, payments, transfers, dividends, redemptions or loans, made by one or more of the Companies or the Trust to Mrs. McDonald or the Estate (the "Transactions"). Dora Antulov-Sanvido, the former executive assistant to Mr. McDonald, gave evidence that Mrs. McDonald gave the direction for 319344 to make payments.

[51] In 2013, 319344 paid dividends of \$1,003,890.00 that consisted of \$131,878.00 to 779271 Ontario Ltd. (Ms. Antulov-Sanvido's company), \$435,732.00 to Mrs. McDonald and \$436,280.00 to the Trust. Mrs. McDonald deposes that the dividends were primarily utilized to pay outstanding taxes for the Estate, and the other payments were to pay her a salary and take care of Noramco's other ordinary business.

[52] During 2013, the book value of the assets of 319344 decreased from \$5,097,879.00 to \$4,293,148.00.

[53] During 2013, the book value of the assets of Noramco decreased from \$4,435,228.00 to \$2,307,219.00.

[54] At some point, Mrs. McDonald caused Noramco to begin paying her a salary of \$3,000 per month as president. Further, Mrs. McDonald has been using the assets of Noramco to pay the legal fees of both McMillan LLP and Lawson Lundell LLP in this proceeding and in the Section 38 Action.

E. Transmission of the 319344 Shares to Mrs. McDonald

[55] On October 4, 2013, Mrs. McDonald became the registered owner of the 319344 Shares. The purported transfer (the "Second Purported Transfer") of the 319344 Shares from Mr. McDonald to Mrs. McDonald was effected by Mrs. McDonald making a written application dated October 1, 2013 for transmission of the 319344 Shares, on the basis of her being the executor of the Estate.

[56] The Declaration of Transmission sworn by Mrs. McDonald on October 1, 2013 reads in part:

1. The Deceased [Mr. McDonald] died at Vancouver, British Columbia, on March 4, 2013, testate, and at the date of his death was domiciled at Vancouver, British Columbia;

2. There was registered in the name of the Deceased, 441 common shares of the capital stock of 319344 B.C. Ltd. (the "Company"), represented respectively by certificates numbers 5 and 6;
- ...
5. By virtue of the foregoing the said shares have devolved upon and become vested in the declarant as Executor of the estate of the Deceased. The declarant desires to have the shares recorded in her name as aforesaid upon the share register of the Company."
- [57] The transmission and transfer of the 319344 Shares was effected by a Directors Consent Resolution on October 4, 2013.
- [58] At the time of the Second Purported Transfer on October 4, 2013, Mrs. McDonald ought to have been aware of the Judgment, that the 319344 Shares were the only asset in the Estate and that the Estate was bankrupt. She was present in court when the Bankruptcy Order was granted on August 19, 2012, and consented to the appointment of herself as representative of the Estate for this proceeding.

F. Failure to Complete Transfer

- [59] The transfer of the 319344 Shares to the Trust was never recorded on the Central Securities Register of 319344. The 319344 Shares remained in the name of Mr. McDonald until the Second Purported Transfer. Les Fabian, the principal accountant for Mr. McDonald and the Noramco Group, only became aware of the Trust and Deed of Gift in 2012. Ms. Antulov-Sanvido, executive assistant to Mr. McDonald, was not aware of the Trust or the Deed of Gift until after the death of Mr. McDonald.
- [60] There was no evidence in the Rectification Petition that at any time prior to October 4, 2013, Mr. McDonald, the Trust, Mrs. McDonald, 319344 or anyone else took any steps to purport to complete or perfect a transfer of the 319344 Shares from Mr. McDonald to anyone else, whether in accordance with the articles of 319344, the Securities Transfer Act, S.B.C. 2007, c.10 ("Securities Transfer Act") or otherwise.

G. Section 38 Order and Action - Jurisdiction

- [61] On March 20, 2014, the applicant Mrs. Lau obtained an Order by Master Muir in the bankruptcy proceeding (the "Section 38 Order"), amending the Order of Master Baker of April 29, 2014 and the Order of Master MacNaughton of March 17, 2015. The Section 38 Order authorized Mrs. Lau to commence proceedings in her own name and at her own expense and risk pursuant to section 38 of the BIA against the Mrs. McDonald Parties, the Companies and others with respect to inter alia the current and past ownership of any shares in the Companies, any distribution of assets from one or more of the Companies, or any transfers or purported transfers of assets into or out of the Trust. Pursuant to the Section 38 Order, any surplus after paying Mrs. Lau's claim is to be paid to the Bankruptcy Trustee.

[62] On March 13, 2015, pursuant to the Section 38 Order, Mrs. Lau commenced a Notice of Civil Claim, S.C.B.C., Vancouver Registry, No. S152188 (the "Section 38 Action") against the Mrs. McDonald Parties and the Companies seeking ownership of the 319344 Shares. Mrs. Lau and the Bankruptcy Trustee say that the 319344 Shares are property of the Bankruptcy Trustee since the date of the Bankruptcy Order.

[63] In response to the Section 38 Action, the McDonald Parties say they are applying to rectify the Deed of Gift.

H. Rectification Petition

[64] On May 25, 2015, Mrs. McDonald commenced the Rectification Petition to rectify the Deed of Gift such that the Deed of Gift would read:

All of the issued shares of 319344 B.C. Ltd., which are directly and/or indirectly held by Richard Angus Bruce McDonald as of the date hereof.

[65] The Rectification Petition was heard December 3 and 4, 2015 and March 9, 2016. Mr. Justice Ball gave Reasons for Judgment on September 7, 2016, cited as *McDonald v. Lau*, 2016 BCSC 1651. Mr. Justice Ball held that:

[65] As I have decided that the present proceeding was not properly commenced by petition, it should have been commenced by way of notice of civil claim, it would now be inappropriate to determine whether or not rectification is available based on the evidence before the Court: See *Yates* at para. 50. The contents of the affidavits of the parties have been challenged; said to consist of hearsay and opinion, as well as "understanding", issues which raise the need for the court to decide issues of admissibility based on a principled approach, which issues are better decided by the trial judge.

[66] This Court orders that this proceeding be converted into an action and that the converted action be heard together with Action No. S152188, Vancouver Registry, subject to the discretion of the trial judge."

[66] Mrs. McDonald appealed the order of Mr. Justice Ball. By an order dated November 9, 2016, Mr. Justice Groberman of the Court of Appeal ordered that leave is not required for the appeal and dismissed an application brought by Mrs. McDonald to stay the order of Mr. Justice Ball. No further steps have been taken in the appeal.

V. LEGAL BASIS

A. Preliminary Matters

1. Bankruptcy Proceeding and the Section 38 Action

[67] The respondents raised a preliminary issue as to whether this application is properly brought in the bankruptcy proceeding or in the Section 38 Action. This application could be brought in either proceeding or, as is now the case, jointly in both.

- [68] In this case, the applicants are Mrs. Lau and the Bankruptcy Trustee, and the application is in relation to both the Section 38 Action and the Bankruptcy proceedings. Further, the Section 38 Action is commenced, so the procedural bar in *Re Rayner*, 2005 BCSC 82, raised by the respondents that arose where the bankruptcy proceeding was not yet commenced, does not apply.
- [69] Rule 10-1 allows for a preservation order to be made in relation to "any property that is the subject matter of a proceeding". Although the bankruptcy rules do not have a preservation of assets provision, Bankruptcy Rule 3 states that in cases not provided for, the bankruptcy court is to apply the rules that generally govern civil procedure. The subject matter of the bankruptcy proceeding is the property of the Estate, principally the 319344 Shares. The subject matter of the Section 38 Action is also ownership of the 319344 Shares. This application is based on the proprietary claim of the Bankruptcy Trustee and Mrs. Lau pursuant to the Section 38 Order to the 319344 Shares.
2. Mrs. Lau and the Bankruptcy Trustee claim a proprietary interest in the 319344 Shares which they seek to preserve pursuant to the applications.
- [70] The respondents have called into question the standing or right of Mrs. Lau and/or the Bankruptcy Trustee to bring the application.
- [71] The respondents characterize Mrs. Lau as a "private litigant" or a "judgment creditor". However, Mrs. Lau is pursuing this application and the Section 38 Action in the shoes of the Bankruptcy Trustee pursuant to the Section 38 Order. The Section 38 Order explicitly permits Mrs. Lau to pursue remedies under the BIA that would otherwise be available only to the Bankruptcy Trustee as contemplated by Section 38. In the Section 38 Action a proprietary interest in the 319344 Shares is claimed.
- [72] Mrs. Lau's recovery is limited to the amount of her claim against the Estate. Any surplus from the 319344 Shares beyond Mrs. Lau's permitted recovery, and that of any other participating creditors, is to be paid to the Bankruptcy Trustee. The respondents have taken the position that the assets at issue in this application are in excess of Mrs. Lau's claim, which establishes the Bankruptcy Trustee's interest.
- [73] There are four creditors to the Estate with a total of \$10,399,625.31 in proven claims. The creditors are: Canada Revenue Agency (amount unknown), Destiny Media Technologies Inc. (\$7,500,000), Mrs. Lau (\$1,458,558.71) and Mrs. McDonald (\$1,441,066.60).
- [74] The order sought provides for the Bankruptcy Trustee to hold payments intended for Mrs. McDonald pending a decision on the merits as to the entitlement to such payments.
3. Timeliness of this Application

- [75] It is understood that this is the primary issue taken by the respondents in their submissions that the court should not exercise its discretion to grant the preservation order sought. The following is a brief discussion of the factual background of the timing or delay issue which will be addressed further, primarily in the discussion of balance of convenience.
- [76] The respondents submit that the applicants could have brought this application in December 2013 because that is when the applicants became aware of the transfer of the 319344 Shares to the Trust. The respondents say the examination of Mrs. McDonald on December 3, 2013, supports this. However, Mrs. McDonald's evidence on that day was that "anything he owned was transferred" to the Trust, but she did not know what "all" of Mr. MacDonald's beneficial shares in Noramco consisted of. The request to advise what Noramco shares, beneficially held by Mr. McDonald, were transferred to the Trust was taken under advisement.
- [77] On February 13, 2014, counsel for Mrs. Lau requested responses to outstanding questions from Mrs. MacDonald's examination. On April 23, 2014, counsel for Mrs. McDonald replied and stated the response to the above question taken under advisement was "[t]he Shares owned by Mr. McDonald in 319344 B.C. Ltd. and 319345 B.C. Ltd. were transferred into the Alter Ego Trust." The applicants say that it was not until this response on April 23, 2014, that they knew all the shares were transferred to the Trust. However, the answer given was inconsistent with the language of the Deed of Gift. In the Deed of Gift, "all the issued shares in Noramco Capital Corp. which are beneficially held" by Mr. McDonald were transferred, rather than all the shares he held directly or indirectly in 319344 and 319345. It is understood that Mrs. McDonald has deposed that there was some confusion on these issues following the death of her husband.
- [78] Mrs. Lau obtained a court order to conduct a further examination of Mrs. McDonald, and that examination occurred on July 18, 2014.
- [79] Mrs. Lau also conducted examinations of Les Fabian and Ms. Antulov-Sanvido pursuant to court orders, in order to obtain evidence from other persons knowledgeable about Mr. McDonald's affairs. Ms. Antulov-Sanvido was first examined on August 8, 2014. In that examination she refused to answer questions regarding the assets of Noramco thus necessitating a further application to court. An Order dated October 17, 2014 required Ms. Antulov-Sanvido to answer questions regarding Noramco. Ms. Antulov-Sanvido was re-examined on November 26, 2014 and the last requests left on the record at that examination were answered on December 1, 2014. That evidence formed the basis of this application.
- [80] Mrs. Lau obtained an order amending the Section 38 Order and commenced the Section 38 Action on March 13, 2015. This application was filed on May 11, 2015.

- [81] This application was initially also set for May 11, 2015. It was adjourned at the request of the respondents until June 25, 2015. The application commenced that day but did not complete and was reset for August 6, 2015. During this time, the respondents commenced the Rectification Petition on May 25, 2015, to correct the Deed of Gift by replacing the reference to Noramco in the assets to 319344.
- [82] On August 6, 2015 the Court granted the respondents an adjournment of the application pending the outcome of the Rectification Petition. There was a case planning conference on September 15, 2015, at which the parties decided to wait until a decision in the Rectification Petition decision was reached. Mr. Justice Ball released his Reasons on September 7, 2016 (that the proceeding was not properly commenced), and the Court of Appeal's decision that leave to appeal was not required was made on November 28, 2016. The applicants then obtained two days to complete the application in April 2017.

B. The test for an order for preservation of property under Rule 10-1

- [83] An order sought or made under Rule 10-1 is discretionary. The factors to be considered in the exercise of that discretion are:
- (1) Is there a claim on the evidence to a proprietary interest in the property at issue?
 - (2) Is there is some evidence to render reasonable the belief of the applicant that the property is threatened?
 - (3) Is there is a substantial question to be tried as to whether the applicant may ultimately be entitled to the property in question?
 - (4) Does the balance of convenience favour the granting of the order?

Osooli-Talesh at paras. 43 and 47-52.

- [84] The test developed under Rule 10-1 is essentially the application of the traditional injunction test. As Madam Justice Gray explains in Osooli-Talesh:
- [50] The requirement that there be a claim on the evidence and not just on the pleadings to a proprietary interest in property, and the requirement that there be a substantial question to be decided as to the plaintiff's entitlement to the property, are essentially the same question as whether there is a fair or serious question to be tried.
- [51] The requirement to show that there is evidence to render reasonable the belief that the property is threatened with disposition or transfer is another formulation of the question of whether the applicant would suffer irreparable harm if the application were refused. Lastly, the question of whether the balance of convenience favours the granting of the order is similar to the traditional test for an interim injunction.

- [85] Further, as in the traditional injunction test, consideration of irreparable harm can be considered both in the irreparable harm phase, or factor two in the preservation of property context, and as a factor when weighing the balance of convenience (as in *Tran v 2506448 Ontario Inc.*, 2017 BCSC 1163 at paras. 61-62).
1. A proprietary interest is claimed on the evidence
- [86] On the evidence, I am satisfied the applicants are seeking to enforce an ownership interest in the 319344 Shares. They are not seeking Mrs. Lau's interest as a judgment creditor against the Estate, as alleged by the respondents.
- [87] I accept that there is an evidentiary basis for the applicants' proprietary claim to the 319344 Shares. The Deed of Gift on its face failed to transfer those shares to the Trust. Absent a successful application for rectification, there can be no other result but that the 319344 Shares form part of the Estate. The defendants took no steps to complete or perfect a transfer of the 319344 Shares prior to the Bankruptcy Order. Finally, if a transfer of the 319344 Shares can be made out, the evidence supports the fraudulent conveyance/BIA Claim.
2. There is a reasonable apprehension that the subject property will decrease in value
- [88] The applicants submit there is a reasonable apprehension that the 319344 Shares are threatened given the Transactions and the decrease in value in the Companies that has already taken place as described above in paras. 51-53.
- [89] Mrs. McDonald states that through her position she is causing Noramco to pay her a salary of \$3,000 per month and to fund her legal position in the bankruptcy proceeding, the Section 38 Action, and this proceeding. She deposes that the "defence of the Trust is a cost that ought properly to be paid from the assets that formed part of the Trust", and that "Noramco is the only entity with the financial resources available to pay these legal expenses".
- [90] Mrs. McDonald's justification is problematic. Noramco's assets are not the same as "assets that formed part of the Trust", because the 319344 Shares were never transferred into the Trust. The 319344 Shares therefore became part of the Estate.
- [91] The applicants submit the 319344 Shares never became property of the Trust or, alternatively, that the transfer of the 319344 Shares to the Trust was a fraudulent conveyance (pursuant to the Fraudulent Conveyance Act) or a transfer at undervalue (pursuant to section 96 of the BIA). Mrs. McDonald's claim is that the 319344 Shares were transferred to the Trust and then, pursuant to the terms of the Trust, to her on Mr. McDonald's death. Either way, it is clear that at this point the Trust has no assets. This is not a case of Mrs. McDonald defending the Trust or property of the Trust. Rather, she is defending her own claim to property that she says came to her by way of the Trust. There is no reasonable basis for Mrs. McDonald to have access to the disputed property in order to fund this ownership dispute.

[92] The evidence suggests that Mrs. McDonald has made use of and will continue to use the 319344 Shares to pay her own salary, and to pay the legal fees of these multiple proceedings.

[93] The property at issue has been devalued, and will likely continue to be devalued. As quoted by Mr. Justice Hinkson in *Gary Jackson Holdings Ltd. v. Eden*, 2009 BCSC 1582 at paragraph 26:

The question of preservation of property has repeatedly been treated as one of irreparable harm justifying an injunction. It is obvious that if property which is the subject of this litigation is altered pending trial, damages may not offer complete compensation.

[94] On the evidence, I conclude that the applicants are justified in their apprehension that the underlying value of the 319344 Shares is threatened under Mrs. McDonald's control. The 319344 Shares should be preserved pending trial so that the shares will be available for whomever is entitled to them.

[95] The respondents say the applicants' delay in bringing this application weighs against their reasonable belief that the 319344 Shares are threatened. However, I find that while the applicants could have acted sooner during some periods to file this application, they acted with prudence in collecting the information regarding the Second Purported Transfer. The delay does not impact their reasonable belief that the property is threatened.

3. There is a substantial question to be tried

[96] The respondents say that it is necessary for the applicants to establish a strong *prima facie* case because they do not directly claim an interest in specific property, but rather a judgment that can be executed against the property preserved. However, I have found above that there is a claim on the evidence to a proprietary interest in the 319344 Shares. The strong *prima facie* test is applied where a party seeks a Mareva injunction, securing all of the assets of a defendant in order to secure the payment of a judgment that has not yet been obtained. In this case, the applicants seek to preserve only the 319344 Shares, not all the property of Mrs. McDonald.

[97] This is not an application for a Mareva injunction. The law is clear on the distinction between a Mareva injunction and an order to preserve property pending trial of a proprietary claim: *Osooli-Talesh*, at para. 54.

[98] In *RJR-McDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.), at paras. 49-50, the Court stated that the threshold which an applicant must meet to show a serious question to be tried is a "low one". The applicant is only required to show that the action is "neither vexatious nor frivolous" based on "a preliminary assessment of the merits of the case". "A prolonged examination of the merits is generally neither necessary nor desirable."

[99] It is agreed by the parties that if one of the issues contains a substantial question to be tried, it is sufficient to meet this branch of the test. In other words, each issue in the case is not required to separately be a substantial issue to be tried.

[100] The applicants raised three substantial questions to be tried, outlined above in more detail at paragraph 24:

- (a) whether or not rectification of the Deed of Gift ought to be granted;
- (b) whether or not the court should assist in completing the gift; and
- (c) whether the Deed of Gift should be set aside pursuant to the Fraudulent Conveyance Act and the BIA.

[101] As outlined below, I find there is a substantial issue to be tried with respect to the rectification of the Deed of Gift, and therefore it is not necessary that I address the other questions raised by the applicants.

- (a) Substantial question to be tried with respect to rectification of the Deed of Gift

[102] Rectification arises as an issue as a result of the Rectification Petition and Rectification Action filed by Mrs. McDonald.

[103] In Snell's Equity, (32nd ed., 2011) in the first supplement to this edition, the author commented on the limits to rectification at page 35. He says the intention of the parties at the time the deed was executed is relevant, rather than the intention if they had they realised the mistake at the time. The author says:

There can thus be no rectification if the omission of a term was deliberate, even if this was due to an erroneous belief that the term was unnecessary or that it was sufficiently dealt with in the antecedent oral agreement, or that the term was illegal, or a breach of covenant, and similarly if the instrument intentionally contains a provision which in fact means something different from what the parties thought it meant. Rectification ensures that the instrument contains the provisions which the parties actually intended it to contain, and not those which it would have contained had they been better informed."

[emphasis added]

[104] In the recent case of Canada (Attorney General) v. Fairmont Hotels Inc., 2016 SCC 56, the Supreme Court of Canada reaffirmed the limitations on the remedy of rectification. Fairmont Hotels Inc. ("Fairmont") was involved in the financing of Legacy Hotel's purchase of two other hotels. The financing was intended to be tax-neutral. However, the financing mechanism resulted in unexpected tax liability when Fairmont was acquired and Legacy Hotel terminated the financing agreement. Fairmont sought to avoid that liability by rectification of the directors' resolutions. The Supreme Court of Canada allowed the appeal and found rectification was not available to Fairmont. In doing so, the Court said:

- [3] Rectification is limited to cases where the agreement between the parties was not correctly recorded in the instrument that became the final expression of that agreement. It does not undo unanticipated effects of that agreement. While, therefore, the Court may rectify an instrument which inaccurately records the party's agreement respecting what was to be done, it may not change the agreement in order to salvage what a party had hoped to achieve.
- [13] Because rectification allows courts to rewrite what the parties had originally intended to be the final expression of their agreement, it is "a potent remedy" (Snell's Equity (33rd ed. 2015), by J. McGhee, at pp. 417-18). It must, as this Court has repeatedly stated be used "with great caution", since a "relaxed approach to rectification as a substitute for due diligence at the time a document is signed would undermine the confidence of the commercial world in written contracts": Performance Industries, at para. 31. It bears reiterating that rectification is limited solely to cases where a written agreement has incorrectly recorded the parties' antecedent agreement (Swan and Adamski, at 8.229). It is not concerned with mistakes merely in the making of that antecedent agreement. In short, rectification is unavailable where the basis for seeking it is that one or both of the parties wish to amend not the instrument recording their agreement but the agreement itself.
- [105] A claim for rectification requires evidence that a legal instrument does not accord with what it was intended to record, and the way the instrument was actually recorded: Fairmont at para. 12. The specific terms or omissions in the error must be identified for the court: Fairmont, at para. 32. The prior agreement must have definite and ascertainable terms and must have been in effect when the instrument was executed: Fairmont, at para. 38.
- [106] A court's role in a rectification action is only to correct errors and not to speculate about a party's intentions: Fairmont, at para. 32. A court can only determine whether the written agreement properly records a prior oral agreement of the parties. The prior oral agreement must be definitive and ascertainable, and the error must be in the way the agreement was transcribed into the instrument.
- [107] Rectification is not concerned with mistakes in the underlying agreement. If parties use an ambiguous term in the prior oral agreement or otherwise make a mistake, the doctrine of rectification is not available to interpret or correct a term in a manner that a party wishes the term to be corrected or interpreted. Rectification is not intended to be a substitute for due diligence: Fairmont, at para. 13. Neither is rectification a method to rectify a party's error of judgment, or rectify an instrument to better reflect what would have been a more beneficial arrangement at the time.
- [108] Simply, the court's task is to "restore the parties to their original bargain" and not to import intention, reflecting what could have been done.
- i. Rectification in this Case

[109] The position of Mrs. McDonald in support of the Rectification Action was set out in that petition at paras. 17 -18 and 28-29:

17. Also on January 7, 2010, the Petitioner and Mrs. McDonald signed the Deed of Gift pursuant to which Mr. McDonald transferred to the Petitioner to hold as trustee of the Trust, all of the issued shares of Noramco which were beneficially held by Mr. McDonald at that date.
18. Following the execution of these documents, both the Petitioner and Mr. McDonald understood that all of Mr. McDonald's assets had been transferred to the Trust and that no assets would pass to Mr. McDonald's estate on his death.
28. In establishing the Trust and executing the Deed of Gift, Mr. McDonald intended to transfer all of his assets, including his indirect holdings in Noramco, to the Petitioner to hold upon and subject to the terms of the Trust
29. The lack of reference in the Deed of Gift to Mr. McDonald's indirect holdings in Noramco was an inadvertent drafting error on the part of Mr. Cook.

[110] It is submitted by the applicants that in this case the evidence is not clear as to what assets, if any, Mr. McDonald intended to transfer into the Trust, other than Noramco shares. Mr. McDonald is of course deceased and cannot provide such evidence. Evidence of Mr. McDonald's intention must be gathered from other admissible sources.

[111] The applicants submit that on the evidence before the Court:

- (a) there is no evidence of any statements made by Mr. McDonald. Rather, the evidence is general or consists of Mrs. McDonald's conclusions of what Mr. McDonald allegedly intended;
- (b) Mrs. McDonald is not unbiased. She would be motivated to miscast or exaggerate what Mr. McDonald may have said or to interpret it in favour of the result she is seeking;
- (c) Mr. McDonald, at the time of the transaction in question, December 2009 - January 2010, suffered from severe alcoholism and statements he made or actions he took may not have been reliable;
- (d) Mr. McDonald had resisted entering into estate planning transactions for a period of time prior to the January 2010 transactions. In effect, it appears that Mr. McDonald was "badgered" into signing documents. It is clear that the transactions were principally Mrs. McDonald's project and she had to convince Mr. McDonald to enter into the transaction. Mrs. McDonald, through Dora Antulov-Sanvido, set up the meeting with counsel which put the transactions in place and was the only contact with counsel outside of two meetings, described below. It may well be that Mr. McDonald sought to retain control of his long-time business, Noramco, while providing Mrs. McDonald with the appearance of transferring that control to her as trustee of the Trust;

- (e) if, as is alleged by the Petitioner, the intent was to transfer all of Mr. McDonald's assets into the Trust, there would have been no need for Mr. McDonald to make a will. Yet, Mr. McDonald did make a will at the same time the Trust was set up; and
- (f) at no time prior to October 1, 2013 (the date of the Second Purported Transfer), did anyone take any steps to complete or perfect the transfer of the 319344 Shares from Mr. McDonald to the Trust, Mrs. McDonald or anyone else. The 319344 Shares remained in the name of Mr. McDonald on the central securities register for 319344. Les Fabian, the principal accountant for Mr. McDonald and the Noramco group, only became aware of the Trust and Deed of Gift in the spring of 2014. It appears that Dora Antulov-Sandvido, Mr. McDonald's executive assistant, was not aware of the Trust or Deed of Gift until after the death of Mr. McDonald.

[112] The Trust and the Deed of Gift were put in place by Mr. and Mrs. McDonald with the assistance of counsel, Steve Cook.

[113] Mr. Cook became involved in this matter when Ms. Antulov-Sanvido sent him an email dated November 10, 2009 :

Hi Steve:

Willie McDonald has asked me to follow up with you on a personal matter. It has been some time since Bruce and Willie have updated their wills. Now that their kids are grown the wills should be fairly straight forward. All of their real estate assets are in Willie's name. The only assets in Bruce's name are the shares in Noramco. Willie would like the real estate assets to go directly to Morgan and Ian evenly. Bruce's assets are to go to Willie. They do not need an executor. Also a power of attorney for each of them. Willie and Bruce are available to discuss this - Willie's number is [number redacted]."

[emphasis added]

[114] There were two meetings between Mr. Cook and Mr. and Mrs. McDonald at Mr. Cook's office:

- (a) the first, November 18, 2009, where Mr. Cook obtained instructions; and
- (b) the second, January 7, 2010 where Mr. and Mrs. McDonald signed documents.

[115] Mr. Cook was cross-examined on his affidavit on November 2, 2015. The evidence of Mr. Cook can be summarized as follows:

- (a) at the November 18, 2009 meeting, the only discussion regarding transfer of assets to the Trust was that the shares Mr. McDonald held in Noramco would be transferred into the Trust, consistent with the initial November 10, 2009 email to Mr. Cook from Ms. Antulov-Sanvido;
- (b) draft documents to set up the Trust were sent by email by Mr. Cook's office to Mrs. McDonald on January 10, 2010. The cover letter of that date reads in part:

Once it is executed, we will arrange for Bruce to make a transfer, by way of gift, of his shares in Noramco to the Trust.

Again, this letter is consistent with both Mr. Cook's understanding that Mr. McDonald held shares in Noramco and that it was these shares in Noramco which were to be transferred to the Trust. (Cook Affidavit, para. 7, Letter dated January 6, 2010, pages 3-4 of the exhibits, Application Record Tab 18);

- (c) when Mr. Cook drafted Schedule "A" to the Deed of Gift he understood that Mr. McDonald held shares directly in Noramco and it was his intention that the shares Mr. McDonald held in Noramco would be transferred. The language used in Schedule "A" was designed to do just that, to transfer shares held by Mr. McDonald in Noramco to the Trust. Mr. Cook did not have in mind to transfer anything else.

[116] The applicants submit that this evidence does not meet the test for rectification.

[117] In the case at bar, it is not clear what, if anything, Mr. McDonald intended to transfer into the Trust beyond Noramco Shares. The Rectification Action, in effect, asks the Court to speculate that Mr. McDonald, despite being a capable and sophisticated businessman, did not understand what shares he held in what company or companies and if Mr. McDonald had understood that, he would have agreed to transfer the 319344 Shares.

[118] More significantly, rectification must be based on a prior, certain, oral agreement. At the time the Deed of Gift was drafted and signed, Mr. Cook deposed that he had only discussed with Mr. McDonald that Mr. MacDonald's shares in Noramco would be transferred to the Trust. If this was the prior oral agreement, then there was no error in the Deed of Gift. If the prior oral agreement was uncertain, then there was no agreement upon which to base the rectification. In either case, the Rectification Action could fail. If Mr. McDonald and/or his counsel made a mistake with respect to what Mr. McDonald owned or used an unclear term in the Deed of Gift, rectification is not available to correct or clarify the Deed of Gift.

[119] Lastly, the equitable remedy of rectification is a discretionary one. The Court should not be asked to help a party defeat claimants who have legitimate claims by rectifying instruments which, through error, did not successfully shelter assets. In the case at bar third parties, creditors of the Estate and the Bankruptcy Trustee, would be adversely affected by the proposed rectification. For this reason as well, rectification ought to be refused.

[120] It is not contemplated that the issue of rectification be resolved in this application. On the evidence and the submissions of the applicants, I am satisfied that there is a substantial question to be tried.

- (b) Balance of convenience

[121] The consideration of the balance of convenience involves assessment of a number of factors together to reach an overall conclusion as to where the balance of convenience lies: *Canadian Broadcasting Corporation v. CKPG Television Ltd.*, [1992] 42 C.P.R. (3d) 526, (B.C.C.A.). The points to consider in this analysis were summarized in that case by Mr. Justice Lambert at p. 545, as follows:

In assessing the balance of convenience a judge should consider these points - the adequacy of damages as a remedy for the applicant if the injunction is not granted, and for the respondent if an injunction is granted; the likelihood that if damages are finally awarded they will be paid; the preservation of contested property; other facts affecting whether harm from the granting or refusal of the injunction would be irreparable; which of the parties have acted to alter the balance of their relationship and so affect the status quo; the strength of the applicant's case; any factors affecting the public interest; and any other factors affecting the balance of justice and convenience.

It should be noted that the strength of the applicant's case is a separate factor, which should be considered under the second prong of the test, quite apart from the question under the first prong of the test of whether the applicant has established a fair question to be tried. But the assessment of the relative strength of the parties' cases must recognize the degree to which those cases have not yet been revealed because of the nature of the evidence and the way it has been presented on the injunction application, which may be markedly different from the way it would be presented at trial.

[122] The applicants submit that the balance of convenience favours the preservation order. The proposed Order would preserve the status quo and prevent actions with respect to the 319344 Shares. Without a preservation order the 319344 Shares could lose their value or become valueless, harming the applicants, before the Section 38 Action is resolved. The proposed order imposes no material limitations or restrictions on the business of the Companies. It simply prevents Mrs. McDonald from dealing with or otherwise benefiting from the 319344 Shares and causing the loss of or further deterioration in the value of the 319344 Shares until the issue can be litigated or otherwise resolved.

[123] The applicants submit that given the circumstances, there has been no appreciable delay by the applicants in bringing this application. Rather, Mrs. Lau has diligently pursued her rights under the Section 38 Order to investigate the affairs of the Estate despite the respondents' ongoing opposition and lack of cooperation. There is no basis to refuse the relief sought because of any alleged delay on the part of the applicants.

[124] Further, they submit, there is no evidence or suggestion of any prejudice to the respondents or anyone else as a result of any delay in bringing this application. The general principle is that delay alone will not deprive a plaintiff of a remedy to which the plaintiff is otherwise entitled. In order to accomplish that, prejudice caused by the delay must be shown.

[125] The respondents submit the delay of 17 months in bringing this application is not explained, and that this weighs against the applicants establishing a reasonable belief that the property is threatened. They say the delay is sufficient to refuse to order the protection order sought. Further, they say that damages are an adequate remedy for the applicants.

[126] Justice Sharpe, in *Injunctions and Specific Performance*, looseleaf, (Toronto: Thomson Reuters, 2016), says this about delay in the context of specific performance and injunctions at para 1.830:

[c]onsideration of delay is an aspect of the more general principle which takes into account the injustice of awarding relief against a party who will be prejudiced on account of a change of position related to acts or omissions of the party seeking relief.

[127] Justice Sharpe also indicates that "it has for long been clearly established that delay alone will not be fatal", as there has to be a combination of delay and prejudice to the defendant for the court to deny the plaintiff a remedy to which she is otherwise entitled: para. 1.840. The general principle is that unless the delay produces or is accompanied by prejudice to the defendant, the delay is not material, unless of course there is a statutory limitation period: para. 1.880.

[128] Justice Sharpe notes that "a plaintiff cannot be charged with delay in the absence of knowledge, or the means of knowledge, of the right to proceed against the defendant": para. 1.910. This idea is countered by the plaintiff's failure to follow up on suspicions.

[129] In *Fission Uranium Corp. v. Dahrouge*, 2014 BCSC 1214, Madam Justice Harris considered the defendant's allegations of delay and misleading conduct in the context of the injunction test for a preservation order: para. 167. In that case, delay was determinative because of the resulting prejudice:

[230] It is well-recognized that even a short period of delay may give rise to actual prejudice, where one party has expended resources on the very matter of which the plaintiff complains. See Robert J. Sharpe, *Injunctions and Specific Performance*, loose-leaf (consulted on 1 May 2014), (Toronto: Canada Law Book, 1992), ch. 1 at 1.890:

certain cases may perhaps be identified which are more likely to be productive of prejudice after only a short period of delay. Obviously these are situations where matters are not standing still and where immediate decisions are being taken by the defendant which might reasonably be influenced by the position taken by the plaintiff. Any case in which the defendant is presently spending resources on the very matter of which the plaintiff complains falls into this category.

[232] By the time of the Lakeland demand letters, the defendants had already expended time and resources staking approximately 50 mining claims and had entered into a letter of intent with Lakeland for the purchase of eight mineral properties. In total, the defendants' evidence is that they have spent almost a half million dollars on the properties at issue in this litigation. This is a case where matters were clearly "not standing still" - the defendants expended significant resources on the very matter of which the plaintiff complains over a

significant period of time without objection by the plaintiffs.

[233] In conclusion, taking into account all of the above reasons on irreparable harm, I find 3.0 has not met the requirement of irreparable harm and I dismiss its Injunction Application on that basis

[130] In *Ethiopian Orthodox Church of Canada v. Hohite Semay St. Mary Ethiopian Orthodox Tewahido Church*, 2008 BCSC 797, cited by the respondents, the court dismissed the application on the basis that there was no specific fund as the subject of the dispute. However, the court found if it was wrong on the threshold issue, it would still decline to secure the fund for three reasons. The issue of delay was one of three determinative issues in the alternative argument. There is no indication that delay alone, without significant prejudice, would be enough to deny the order.

i. The Balance of Convenience in this Case

[131] I accept the applicants' explanation summarized in paras. 76-82 above, that they had insufficient information until December 2014 when discoveries were completed.

[132] While the applicants were first alerted to concerns regarding the transfer of the 319344 Shares in December 2013, they received no clear answers on what was transferred or not transferred into the Trust until April 2014. Further, even at that time the inconsistency between the responses received in examinations and the words in the Deed of Gift was not explained. The applicants sought further information through additional examinations following Mrs. McDonald's examination. Delay in these further examinations was due to the failure of the deponents to answer questions appropriately, necessitating court orders. Those responses were only received in December 2014.

[133] There was some delay between December 2014 and the date this application was filed, May 11, 2015. However, during this time Mrs. Lau also filed the Section 38 Action. Further delays after May 11, 2015 were due to adjournments requested by the respondents, relating to the Rectification Petition. The court dates for this application were set following the release of Mr. Justice Ball's Reasons in the Rectification Petition and the Court of Appeal's dismissal of the stay application.

[134] The case law is clear that the impact of delay in each case depends on the circumstances. If there is prejudice resulting from the delay, it weighs more heavily, and it can also tip the scales if it is already a weak case.

[135] In this case, any resulting delay was explained appropriately, and there was no resulting prejudice to the respondents. Therefore, in my assessment of the balance of convenience delay is not determinative.

[136] With respect to the possibility of Mrs. Lau obtaining a judgment against Mrs. McDonald for damages; I accept that damages are not an adequate remedy because:

- (a) Mrs. Lau does seek judgment against Mrs. McDonald in the Section 38 Action. However Mrs. McDonald may take the position that the principal claim of Mrs. Lau and the Bankruptcy Trustee is against the Trust because it was to the Trust that the 319344 Shares were transferred to by Mr. McDonald, in the first instance. The Trust has no assets and Mrs. McDonald may take the position that she has no personal liability as trustee;
- (b) If the 319344 Shares have little value by the time of trial, Mrs. McDonald may take the position that the appropriate remedy for Mrs. Lau is a transfer of the 319344 Shares to Mrs. Lau and the Bankruptcy Trustee and that there should be no personal judgment against Mrs. McDonald;
- (c) If Mrs. Lau were to get personal judgment against Mrs. McDonald for the amount of Mrs. Lau's claim (approximately \$1,458,558.71 plus interest and costs), there is no guarantee that Mrs. Lau would be able to execute on that judgment; and
- (d) In any event, if, as alleged by the respondents, the value of the 319344 Shares is greater than Mrs. Lau's claim, then the value in excess of Mrs. Lau's claim ought to be preserved for the Estate and dealt with by the Bankruptcy Trustee for the benefit of unsecured creditors.

[137] With respect to the respondent's submission that Mrs. McDonald should have access to the 319344 Shares in order to fund the litigation of this and other proceedings as an exemption to any order granted, there is evidence that Mrs. McDonald has significant independent wealth. Further, legal expenses are primarily being incurred in furtherance of her personal claim to the 319344 Shares. There is therefore no need for such an exemption and it does not weigh in the balance of convenience here.

[138] The respondents have put forward no other evidence that they would be prejudiced by the order sought. I find the balance of convenience weighs in favour of granting the preservation order sought.

[139] I am satisfied on the evidence that the tests having been met, this is an appropriate case for the granting of a preservation order. The orders sought by the applicant are granted.

[140] Although not required by Rule 10-1, Mrs. Lau provides an undertaking through counsel to abide by any order the Court may make as to damages as a result of the order sought. The evidence is that Mrs. Lau has substantial net worth. There is no need for an undertaking from the Bankruptcy Trustee.

[141] Costs will be in the cause.

"The Honourable Madam Justice Watchuk"

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