

Court File No. CV-13-10331-00CL  
Court of Appeal File No. M44532

**COURT OF APPEAL FOR ONTARIO**

BETWEEN:

8527504 CANADA INC.

Applicant  
(Respondent)

and

SUN PAC FOODS LIMITED

Respondent

**APPLICATION UNDER** Section 243 of the *Bankruptcy and Insolvency Act*,  
R.S.C. 1985, c.B-3, and Section 101 of the *Courts of Justice Act*, R.S.O. 1990, c.C.43

Court File No. CV-14-10543-00CL  
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Respondent  
(Moving Party)

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**MOVING PARTY'S FACTUM**

February 12, 2015

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## PART I - IDENTITY OF MOVING PARTY, PRIOR COURT & RESULT

1. Liquibrands Inc. ("Liquibrands"), the respondent/moving party creditor, seeks leave to appeal the decision of Justice Newbould dated December 4, 2014<sup>1</sup>, in three matters heard together on November 28, 2014 and in respect of which a single endorsement was released giving rise to three separate orders:

- (a) An Order dismissing Liquibrands' motion for, *inter alia*, an Order directing the trial of an issue to determine whether 8527504 Canada Inc. ("852") and Bridging Finance Inc. ("Bridging") (collectively referred to as the "Lenders") were in breach of the Forbearance and Amending Agreement between 852, Sun Pac Foods Inc. ("Sun Pac") and Liquibrands dated September 11, 2013 (the "Forbearance Agreement") and, if so, appointing a receiver over the litigation commenced by Sun Pac and Liquibrands against the Lenders on November 12, 2013 (the "Action") and for leave to continue the Action (the "Liquibrands Motion");<sup>2</sup>
- (b) An Order granting a motion brought by the court-appointed receiver, BDO Canada Limited ("BDO"), in Court File No: CV-13-10331-00CL for approval of receiver's reports and for distribution of liquidation proceeds (the "BDO Motion");<sup>3</sup> and
- (c) An order granting an application brought by 852 in Court File No. CV-14-10543-00CL (the "852 Application") for an order appointing BDO as receiver over Liquibrands.<sup>4</sup>

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<sup>1</sup> Endorsement of Justice Newbould dated December 4, 2014 ("Newbould Endorsement"), **Motion Record, Tab 4.**

<sup>2</sup> Order of Justice Newbould dated December 4, 2014 ("Liquibrands Order"), **Motion Record, Tab 5.**

<sup>3</sup> Order of Justice Newbould dated December 4, 2014 ("BDO Order"), **Motion Record, Tab 6.**

<sup>4</sup> Order of Justice Newbould dated December 4, 2014 ("852 Order"), **Motion Record, Tab 7.**



2. Justice Newbould ordered BDO to conduct a marketing process for the sale of the Action.<sup>5</sup>  
No party sought that relief.<sup>6</sup>

## **PART II - SUMMARY OF FACTS AND THE DECISION OF NEWBOULD J.**

3. Anticipating a \$250 million supply contract with Canada's largest retailer, Loblaws Inc. ("Loblaws"), 852 agreed to finance Sun Pac so it could fulfil early stages of the contract, sell a division to repay the Lenders and finalize new financing.
4. Csaba Reider ("Reider") owns Liquibrands and Liquibrands owns Sun Pac. Liquibrands is the second secured creditor of Sun Pac.<sup>7</sup>
5. 852 agreed with both Sun Pac and Liquibrands to fund Sun Pac's continuing operations.
6. Sun Pac required funding to continue operations as it refinanced and sold a division to repay the Lender. The parties knew that absent funding, operations would be suspended.
7. On October 4, 2013, the Lenders refused to advance funds.<sup>8</sup>
8. Sun Pac operations were suspended.
9. 852 declared Sun Pac in default for failing to continue operations.
10. Liquibrands and Sun Pac sued 852.

<sup>5</sup> See the 852 Order ¶ 2(j), **Motion Record, Tab 7**, and the BDO Order ¶ 9, **Motion Record, Tab 6**.

<sup>6</sup> The marketing process for the sale of the Action was proposed by 852 in its Supplementary Factum dated November 25, 2014, which was short-served and which sought new relief not otherwise before the Court. See the email from Sam Rappos dated November 25, 2014 at 4:35 PM attaching 852's supplementary factum and brief of authorities, **Motion Record, Tab 8**.

<sup>7</sup> Affidavit of Csaba Reider sworn April 3, 2014 ("Reider Affidavit") ¶¶ 4 & 9, **Motion Record, Tab 9**.

<sup>8</sup> Reider Affidavit ¶ 21.



11. 852 put Sun Pac into receivership and liquidated the company. The receivership order stayed the action.
12. The Sun Pac receiver declined to continue the litigation. Liquibrands sought leave to continue it and to appoint another Sun Pac receiver for that purpose.
13. The Motions Judge acknowledged a dispute whether 852 was in breach of the lending agreement in failing to advance the loan. He declared, "I do not intend to get into that issue, although I was invited to do so." It is the primary material issue for Liquibrands and Sun Pac and its creditors.
14. The Motions Judge put Liquibrands into receivership and authorized the receiver to sell the Sun Pac/Liquibrands litigation. 852 is permitted to bid and arguably bid with the proceeds of the loans 852 declared owning when it declined to fund and appointed a receiver.
15. 852 is a shell corporation.<sup>9</sup> 852 is the assignee of the loan from Bridging.
16. The Lenders default suspended Sun Pac's operation and the Lenders declared the suspension of operations justified the Sun Pac receivership.<sup>10</sup> The Lenders relied on the consequence of their default to allege Sun Pac's default. Under the order appealed, neither Sun Pac nor Liquibrands will be able to advance that claim.
17. The particulars of the loan are as follows: Pursuant to a "Forbearance Agreement" dated September 11, 2013, 852 agreed to lend a "Facility D" loan calculated to be \$1.15 million on or

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<sup>9</sup> Reider Affidavit ¶¶ 6, 13, 14, **Motion Record, Tab 9**. See also the transcript of the Cross-Examination of Natasha Sharpe dated June 9, 2014 ("Sharpe Cross"), P.168, Q 824 – P.170, Q.836, **Motion Record, Tab 10**; Assignment of contracts made as of May 23, 2013 between Bridging and 852, Exhibit 37 to Sharpe Cross, **Motion Record, Tab 11**.

<sup>10</sup> Reider Affidavit ¶¶ 55-58; transcript of the Cross-Examination of Csaba Reider on July 17, 2014 ("Reider Cross"), P.126, Q.510, **Motion Record, Tab 12**.



about October 1, 2013, and agreed not to take any steps to enforce any loan agreement or security prior to the earlier of: (a) December 9, 2013; or (b) the occurrence of an Event of Default.<sup>11</sup>

18. The Lenders enforced security on November 12, 2013 alleging suspension of operations constituted default.

19. The purpose of the loan was to finance Sun Pac while it sold its "Breadcrumbs Division", repaid its loan and refinanced. The lending agreement gave Sun Pac to November 6 2013 to enter an agreement to sell the "Breadcrumbs Division".<sup>12</sup> The Lenders declared they would not advance on October 4, 2013 a month before the date for the sale of the "Breadcrumbs Division". The declaration crippled Sun Pac.

20. Both Sun Pac and Liquibrands are parties to the "Forbearance Agreement"<sup>13</sup> and both have a contract claim and loss from the Lenders default. Liquibrands bound itself to the agreement and gave security for the agreement<sup>14</sup> in the belief that all parties were bound to perform honestly in the performance of their obligations in a manner that fulfilled the reasonable expectations of each party.<sup>15</sup>

21. Sun Pac lost the advantageous contract to supply Loblaws as a result of the receivership.<sup>16</sup>

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<sup>11</sup> Reider Affidavit ¶¶ 25, 26, 31, **Motion Record, Tab 9**; Forbearance and Amending Agreement dated September 11, 2013 between Sun Pac, Liquibrands and 852 ("Forbearance Agreement"), s.31(iv), Exhibit J to Reider Affidavit, **Motion Record, Tab 9J**.

<sup>12</sup> Reider Affidavit ¶¶ 13, 16; Transcript of the Rule 39 Examination of Jenny Coco dated May 22, 2014 ("Coco Exam") P.43, Q.213-215, **Motion Record, Tab 13**.

<sup>13</sup> Forbearance Agreement, **Motion Record, Tab 9J**.

<sup>14</sup> Ibid s. 20(c); Sharpe Cross PP.138-140, Q.660-671, **Motion Record, Tab 14**.

<sup>15</sup> See *Bhasin v. Hrynew* infra note 55.

<sup>16</sup> Reider Affidavit ¶¶ 21, 56, 57





22. Between October 4, 2013 and November 12, 2013, Sun Pac solicited interim financing to repay the defendants.<sup>17</sup> The defendants refused to postpone their security to facilitate the financing notwithstanding their failure to satisfy their obligation to fund the Facility D loan.<sup>18</sup>

23. Sun Pac was unable to find alternative financing with the Lenders' security attached to assets.<sup>19</sup> Sun Pac could not continue operations.

24. Liquibrands and Sun Pac issued their Action against the Lenders prior to Mesbur J.'s receivership order.

25. The Action asserted the defendants breached an agreement to fund the Facility D loan.<sup>20</sup> Liquibrands and Sun Pac asserted in the Action:

(a) The parties contemplated that if the Lenders breached their obligations to fund Sun Pac, it would be unable to continue operations, complete equity financing and sell the Breadcrumbs Division to satisfy the loan.

(b) 852 owed a duty of honesty and good faith in the performance of the lending agreement, in funding the Facility D loan and facilitating the financing necessary to repay the lenders and perform the Loblaws contract.<sup>21</sup>

26. 852's breach of contract eviscerated and defeated the objectives of the agreement that the parties entered into.<sup>22 23</sup>

<sup>17</sup> Reider Affidavit ¶¶ 51, 52, Motion Record, Tab 9.

<sup>18</sup> Ibid ¶¶ 24, 54.

<sup>19</sup> Reider Cross, p. 111, Q. 435-436, Motion Record, Tab 15.

<sup>20</sup> Exhibit P to Reider Affidavit, ¶30, Motion Record, Tab 9P.

<sup>21</sup> Exhibit P to Reider Affidavit, ¶¶ 30, 36.

<sup>22</sup> Exhibit P to Reider Affidavit, ¶ 37.

<sup>23</sup> Exhibit Q to Reider Affidavit ¶ 2, Motion Record, Tab 9Q.



27. Mesbur J.'s order appointed a Receiver of "the assets, undertakings and properties of the Debtor acquired for, or used in relation to a business carried on by the Debtor, including all proceeds thereof (the "Property")".<sup>24</sup>
28. Mesbur J. ordered that "no Proceeding in respect of Sun Pac be continued except with the written consent of the Receiver or with leave of the Court and any and all Proceedings under way in respect of Sun Pac were stayed and suspended pending further Order of Court".<sup>25</sup>
29. The Action was a proceeding outstanding on the date of the Receivership and stayed.
30. The order authorized BDO to continue prosecution of proceedings. BDO declined to continue the Action.<sup>26</sup>
31. Liquibrands sought leave to appoint a receiver to continue the Action on behalf of Sun Pac.<sup>27</sup>
32. In response, 852 sought to put Liquibrands into receivership as a guarantor of Sun Pac.<sup>28</sup>
33. The Motions Judge found:
- (a) In August 2013, Sun Pac decided to sell the Breadcrumbs Division for \$3.1 million and requested additional funding to continue operating.<sup>29</sup>
  - (b) On September 11, 2013, 852, Sun Pac and Liquibrands signed a Forbearance and Amending Agreement to provide Sun Pac with a temporary bridge loan pending

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<sup>24</sup> Exhibit Q to Reider Affidavit ¶ 8, Motion Record, Tab 9Q.

<sup>25</sup> Reider Affidavit ¶ 59, Motion Record, Tab 9.

<sup>26</sup> Reider Affidavit, Motion Record Tab 9.

<sup>27</sup> See the Liquibrands Motion, Motion Record, Tab 16.

<sup>28</sup> See the 852 Application, Motion Record, Tab 17.

<sup>29</sup> Newbould Endorsement ¶ 7, Motion Record, Tab 4.



obtaining equity and debt financing for an anticipated Loblaws contract; to complete a sale of a Breadcrumbs Division to repay the bridge loan.<sup>30</sup>

- (c) 852 agreed not to take any steps to enforce any of the loans or its security prior to the earlier of December 9, 2013 or the occurrence of an Event of Default.<sup>31</sup>
- (d) On November 11, 2013, 852's lawyers concluded that Sun Pac's operations had shut down on November 7, 2013. As a result, 852 commenced a receivership application heard on November 12, 2013.<sup>32</sup>
- (e) BDO was appointed as receiver of Sun Pac on November 12, 2013.<sup>33</sup>

34. Liquibrands applied for an Order directing the trial of an issue that the Lenders breached the terms of the Forbearance Agreement and, if the declaration be given, an Order:

- (a) lifting the stay of proceedings in the Action and for leave for Sun Pac and Liquibrands to continue the Action against 852 and Bridging;
- (b) declaring Liquibrands is entitled to claim under its general security agreement in priority to claims by 852 and Bridging;
- (c) appointing msi Spergel Inc. ("Spergel") as receiver of the remaining assets of Sun Pac for the purposes of advancing the litigation and disposing of the proceeds of realization and litigation; and

<sup>30</sup> Newbould Endorsement ¶ 8, Motion Record, Tab 4.

<sup>31</sup> Ibid ¶ 9.

<sup>32</sup> Ibid ¶ 16.

<sup>33</sup> Ibid.



(d) declaring that Liquibrands' guarantee of Sun Pac debt is unenforceable; and an Order requiring BDO to pay the proceeds of realization of the assets of Sun Pac payable to 852 and/or Bridging into Court, or alternatively to be held in trust by counsel to BDO, pending a final decision of the Court on the declaration and the action thereafter, if any, or pending further Court order.<sup>34</sup>

35. The threshold issue and indeed the material issue for Liquibrands and Sun Pac was whether the Lenders breached their duty of honest performance and their obligation to advance the loan.<sup>35</sup>

36. The Motions Judge acknowledged there was a dispute and erred in concluding, "I do not intend to get into that issue, although I was invited to do so."<sup>36</sup>

37. Liquibrands took the position the order of Mesbur J. stayed the Action and, as BDO declined to advance the Action.

38. The Motions Judge found BDO and Liquibrands was entitled to continue the Action on behalf of Sun Pac without the necessity of obtaining leave to do so.<sup>37</sup>

39. Liquibrands sought an order that the remaining proceeds of Sun Pac's liquidation be paid into Court pending determination of the threshold issue.

40. Liquibrands, as a second creditor, has security over the assets of Sun Pac behind the security of 852.<sup>38</sup> The Motions Judge erred in finding that Liquibrands was not entitled to the payment into court order as it did not have a proprietary claim against specific funds.

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<sup>34</sup> Liquibrands Motion, Motion Record, Tab 16.

<sup>35</sup> Newbould Endorsement ¶ 14, Motion Record, Tab 4.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid ¶ 20.





41. The Action issued and counsel to 852 was notified of the Action prior to obtaining the receivership order against Sun Pac on November 12, 2014. The Motions Judge erred in finding the claim amounted to a collateral attack on the order of Mesbur J.<sup>39</sup>

42. Liquibrands asserted there was a serious issue to be tried on the Lenders breach of contract and if the contract was breached the Lender's claim on the proceeds of realization.

43. The Motions Judge found there may be a serious issue to be tried regarding the Action for damages by Sun Pac and Liquibrands against 852 and Bridging.<sup>40</sup> The Motions Judge erred in finding there was no serious issue to be tried regarding Liquibrands' claim to the proceeds of the sale of Sun Pac's assets held by BDO and that 852 alone had the right to those proceeds.<sup>41</sup>

44. Liquibrands asserted that its guarantee included a duty of honesty and good faith pursuant to section 16 of the *Personal Property Security Act* as repeated in the lenders' affidavit evidence.<sup>42</sup> Its guarantee preserved its equitable remedies.

45. The provisions of the Guarantee provided:

24. Representations and Warranties: The Guarantor represents and warrants to the Creditor, upon each of which representations and warranties the Creditor specifically relies, as follows:

...

(7) Due Execution, etc. This Guarantee has been duly executed and delivered by or on behalf of the Guarantor and constitutes a valid and binding obligation of the Guarantor enforceable in accordance with its terms, except as enforceability may be limited by .....

<sup>38</sup> Newbould Endorsement ¶ 24, Motion Record, Tab 4.

<sup>39</sup> Ibid ¶¶ 24, 25.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid ¶ 26.

<sup>42</sup> Affidavit of Natasha Sharpe sworn May 13, 2014 (Sharpe Motion Affidavit") ¶ 52, Motion Record, Tab 18; Affidavit of Natasha Sharpe sworn April 11, 2014 ("Sharpe Application Affidavit") ¶ 20(e), Motion Record, Tab 19.



general principals of equity (regardless of whether enforcement is sought in a proceeding in equity or at law.<sup>43</sup>

46. The Motions Judge erred in finding Liquibrands contracted out of equitable rules. The guarantee is unenforceable if Liquibrands succeeds in its action against 852.<sup>44</sup>

47. The Motions Judge erred in finding that the Action was collateral or property used in the business of Sun Pac for the purposes of the receivership.<sup>45</sup>

48. The Motions Judge erred in ordering BDO to conduct a marketing process for the sale of the Action.<sup>46</sup> The order permits the Lenders to profit from their own breach of contract.

49. The Motions Judge erred in approving the distribution of the proceeds of realization to pay fees and disbursements and to make a distribution to 852 and/or Bridging, and failing to order that those funds be held in trust pending the outcome of the Action.<sup>47</sup>

### **PART III - LIST OF ISSUES**

50. Should leave to appeal the order of Justice Newbould dated December 4, 2014 be granted?

51. If yes, should this appeal be heard together with the appeal in Court File No.: CV-14-10543-00CL (Court of Appeal file no.: M44533)?

### **PART IV - LAW AND AUTHORITIES**

52. Section 193 of the *Bankruptcy and Insolvency Act* ("BIA") states:

<sup>43</sup> S. 24(7) Guarantee and Postponement, Exhibit D to Sharpe Application Affidavit, Motion Record, Tab 19D.

<sup>44</sup> Newbould Endorsement ¶ 32, Motion Record, Tab 4.

<sup>45</sup> Newbould Endorsement ¶ 37.

<sup>46</sup> Newbould Endorsement ¶¶ 37 & 38.

<sup>47</sup> Newbould Endorsement ¶ 39.



193. Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:

- (a) if the point at issue involves future rights;
- (b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
- (c) if the property involved in the appeal exceeds in value ten thousand dollars;
- (d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and
- (e) in any other case by leave of a judge of the Court of Appeal.<sup>48</sup>

53. This Court has asserted that there is no automatic right of appeal from a receivership order.<sup>49</sup>

54. Section 195 of the BIA states that all proceedings under an order appealed from are stayed until the appeal is disposed of.<sup>50</sup>

50. The test for granting leave to appeal under section 193 of the BIA is set out by this Court in

*Pine Tree Resorts*:

[29] Beginning with the overriding proposition that the exercise of granting leave to appeal under s. 193(e) of the Bankruptcy and Insolvency Act is discretionary and must be exercised in a flexible and contextual way, the following are the prevailing considerations in my view. The court will look to whether the proposed appeal,

- (a) raises an issue that is of general importance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole, and is one that this Court should therefore consider and address;
- (b) is *prima facie* meritorious, and

<sup>48</sup> *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ("BIA") s. 193.

<sup>49</sup> *Business Development Bank of Canada v. Pine Tree Resorts Inc.* 2013 ONCA 282 (CanLII) ("*Pine Tree Resorts*")

¶ 12, *Liquibrands' Book of Authorities* ("Authorities"), Tab 4.

<sup>50</sup> BIA section 195.



(c) would unduly hinder the progress of the bankruptcy/insolvency proceedings.<sup>51</sup>

55. This appeal involves a question of honesty and fairness and whether a party to a contract may profit from their own breach.

56. 852's default put Sun Pac in the position that it could not pay employees. That, in turn, caused 852 to declare a default by Sun Pac ceasing business operations. 852 impermissibly benefited by its own breach or wrong by relying on the cessation of business operations as an Event of Default.

57. 852's failure to make the Facility D loan payments was a material contributing cause of Sun Pac's insolvency. 852 is barred by its own wrong from relying on Sun Pac's cessation of operations as a basis for terminating the transaction.

58. A party is precluded from taking advantage of and benefitting from a state of affairs produced by its own wrong. A party cannot use its own breach or default in satisfying a condition precedent as a basis for being relieved of its contractual obligations....<sup>52</sup>

[N]o man can take advantage of his own wrong.... A party who seeks to obtain a benefit under a continuing contract on account of his breach is just as much taking advantage of his own wrong as is a party who relies on his breach to avoid a contract and thereby escape his obligations.<sup>53</sup>

59. A commercial contract is to be interpreted: (a) as a whole, in a manner that gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective; (b) by determining the intention of the parties in accordance with the language they

<sup>51</sup> *Pine Tree Resorts* ¶ 29, **Authorities, Tab 4.**

<sup>52</sup> *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2010 ONCA 310 (CanLII) ("Southcott"), ¶ 13, **Authorities, Tab 6.**

<sup>53</sup> *Barclays Bank PLC v. Devonshire Trust*, 2013 ONCA 494 (CanLII) ¶ 149, (citing *Alghussein Establishment v. Eton College* ("Eton College"), [1991] 1 W.L.R. 587 H.L. (Eng.), at p. 594), **Authorities, Tab 1.**





have used in the written document and based upon the "cardinal presumption" that they have intended what they have said; (c) with regard to objective evidence of the factual matrix underlying the negotiation of the contract, but without reference to the subjective intention of the parties; and (to the extent there is any ambiguity in the contract); and (d) in a fashion that accords with sound commercial principles and good business sense, and that avoid a commercial absurdity.<sup>54</sup>

60. 852's conduct breached the common law duty to perform the terms of the Forbearance Agreement honestly, and specifically: (i) 852 unilaterally accelerated the date for Sun Pac to present a contract for the sale of its Breadcrumbs Division; (ii) 852 misled Sun Pac about its intention to place Sun Pac into receivership; and (iii) 852 refused to advance funds it was to obliged to advance contrary to the terms of the Agreement knowing that the failure to advance funds would result in the termination of Sun Pac's operations and the inability to finance an advantageous contract with Loblaws.

61. The Supreme Court of Canada has declared that contracting parties must be able to rely on a minimum standard of honesty and good faith from their contracting partner in relation to performing a contract.<sup>55</sup>

62. The facts of this case invite the application of the evolving doctrine of equitable subordination<sup>56</sup>: 852 and Liquibrands rank *pari passu* as secured creditors of Sun Pac; Liquibrands alleges that 852 committed a wrong entitling it to an equitable remedy; the misconduct resulted in

<sup>54</sup> *Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust*, 2007 ONCA 205 (CanLII) ("*Ventas*") ¶ 24, **Authorities, Tab 8.**

<sup>55</sup> *Bhasin v. Hrynew* 2014 SCC 71 (CanLII) ¶¶ 74-75 & 80, **Authorities, Tab 2.**

<sup>56</sup> See *CDIC v. Canadian Commercial Bank* [1992] 3 SCR 558 at p. 609, 1992 CanLII 49 (SCC), **Authorities, Tab 5**; see also *Sun Indalex Finance, LLC v. United Steelworkers*, [2013] 1 SCR 271, 2013 SCC 6 (CanLII) ¶ 77, **Authorities Tab 7.**



the unfair advantage of 852 over Liquibrands and other creditors; and equitable subordination is not inconsistent with the BIA<sup>57</sup>. In *Sun Indalex Finance, LLC v. United Steelworkers*, [2013] 1 SCR 271, 2013 SCC 6 (CanLII), the Supreme Court of Canada acknowledged the evolving law of equitable subordination, the expectation of future determination and the relevant of evidence of lenders wrong or inequitable conduct, saying:

[77] Counsel for the Executive Plan's members argues that the doctrine of equitable subordination should apply to subordinate Indalex U.S.'s subrogated claim to those of the Plan Members. This Court discussed the doctrine of equitable subordination in *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, 1992 CanLII 49 (SCC), [1992] 3 S.C.R. 558, but did not endorse it, leaving it for future determination (p. 609). I do not need to endorse it here either. Suffice to say that there is no evidence that the lenders committed a wrong or that they engaged in inequitable conduct, and no party has contested the validity of Indalex U.S.'s payment of the US\$10 million shortfall.

63. The Motions Judge erred by declining to direct the trial of an issue with respect to 852's breach of contract by failing to advance a loan and Liquibrands' equitable defences to the claim on the guarantee.

64. Where orders permit a secured party to profit from their own default, the result is a commercial absurdity. Security agreements are interpreted so as to avoid commercial absurdity.<sup>58</sup>

65. Liquibrands was entitled to defend the guarantee claim on the terms of the guarantee and the evolving law of equitable subordination. The Motions Judge erred by failing to find that the Liquibrands guarantee was subject to the laws of equity and by finding that the terms preclude Liquibrands from contending that the guarantee may be unenforceable.

<sup>57</sup> *CDIC* supra at pp. 609-610, **Authorities, Tab 5**; See also *Bulut v. Brampton (City)*, 2000 CanLII 5709 ¶¶ 48-53 (Ont. CA) where the Ontario Court of Appeal applied equitable principles to subordinate a prior secured claim to a subsequent charge, **Authorities, Tab 3**.

<sup>58</sup> *Ventas* supra ¶ 24, **Authorities, Tab 8**.



66. It would be an absurd commercial result for a guarantee to remain enforceable despite the demand being made on the guarantee as a consequence of the lender's wrongful and dishonest conduct.

67. Sun Pac and Liquibrands were entitled to a hearing on their claims. The Motions Judge acknowledged the claims and effectively barred Liquibrands and Sun Pac from showing that 852 was in breach of the Forbearance Agreement and breached its common law duty of honesty in the performance of the Forbearance Agreement.

68. The appeals are closely related and the orders arise from a single written endorsement as a result of the motions and application being heard together, so it would be inappropriate for this motion or for the appeals to be determined independently.

69. The issues raised in the proposed appeal are:

- (a) of general importance to the practice in debtor/creditor and bankruptcy/insolvency matters and to the administration of justice as a whole; and
- (b) are *prima facie* meritorious.

70. The appeal will not unduly hinder the progress of the insolvency proceeding since the liquidation of Sun Pac is complete and the majority of liquidation proceeds have been disbursed.

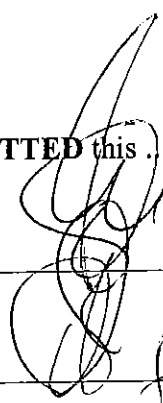
71. The proposed appeal raises an issue of general importance to the practice of bankruptcy and insolvency given the recent recognition of the common law obligation to perform contractual obligations in good faith and the Supreme Court of Canada's declaration that the doctrine of



equitable subordination is left for future determination. Without leave, the issue cannot be determined.

72. Sections 182(2), 193 and 195 of the *Bankruptcy and Insolvency Act*; Rules 61.03.1(1), 61.16(1), 63.02(1) of the *Rules of Civil Procedure*; and sections 6(1)(b), 6(2) of the *Courts of Justice Act*.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this ..... day of February, 2015.



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**SCHEDULE "A"**

**LIST OF AUTHORITIES**

- 1     *Barclays Bank PLC v. Devonshire Trust*, 2013 ONCA 494 (CanLII)
- 2     *Bhasin v. Hrynew*, 2014 SCC 71 (CanLII)
- 3     *Bulut v. Brampton (City)* 2000 CanLII 5709
- 4     *Business Development Bank of Canada v. Pine Tree Resorts Inc.* 2013 ONCA 282 (CanLII)
- 5     *CDIC v. Canadian Commercial Bank* [1992] 3 SCR 558
- 6     *Southcott Estates Inc. v. Toronto Catholic School Board*, 2010 ONCA 310 (CanLII)
- 7     *Sun Indalex Finance, LLC v. United Steelworkers* [2013] 1 SCR 271
- 8     *Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust*, 2007 ONCA 205 (CanLII)



## SCHEDULE "B"

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

#### *Appeals*

##### *Court of Appeal*

193. Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:

- (a) if the point at issue involves future rights;
- (b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
- (c) if the property involved in the appeal exceeds in value ten thousand dollars;
- (d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and
- (e) in any other case by leave of a judge of the Court of Appeal.

R.S., 1985, c. B-3, s. 193; 1992, c. 27, s. 68.

##### *Stay of proceedings on filing of appeal*

195. Except to the extent that an order or judgment appealed from is subject to provisional execution notwithstanding any appeal therefrom, all proceedings under an order or judgment appealed from shall be stayed until the appeal is disposed of, but the Court of Appeal or a judge thereof may vary or cancel the stay or the order for provisional execution if it appears that the appeal is not being prosecuted diligently, or for such other reason as the Court of Appeal or a judge thereof may deem proper.

R.S., 1985, c. B-3, s. 195; 1992, c. 27, s. 69.

##### *No stay of proceedings unless ordered*



8527504 CANADA INC. (Applicant / Respondent)  
8527504 CANADA INC. (Applicant / Respondent)

-and- SUN PAC FOODS LIMITED (Respondent)  
-and- LIQUIBRANDS INC. (Respondent / Appellant)

Court File No. CV13-10331-00CL / CV-14-10543-00CL  
Court of Appeal File No. M44532 / M44533

**COURT OF APPEAL FOR ONTARIO**

**MOVING PARTY'S FACTUM**

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