SUPREME COURT OF NOVA SCOTIA
Citation: *Peill v. Soil and Sea Co-op Limited*, 2023 NSSC 286

Date: 20230927
Docket: 508012
Registry: Halifax

Between:

Edward Peill, David Peill, Michael Peill, and Kathi Peill

Plaintiffs

v.

Soil and Sea Co-op Limited, Peter Peill, Lyndhurst Farms Limited, and Minas Seed Co-operative Limited and 3324949 Nova Scotia Limited

Defendants

Decision

Motions for Summary Judgment / Injunctive Relief / Contempt of Court / Striking Jury Notice

Judge:	The Honourable Justice Denise Boudreau
Heard:	May 8, 9, 10, 2023, in Halifax, Nova Scotia
Final Written Submissions:	July 14, 2023
Counsel:	Tipper McEwan and Calvin DeWolfe, for the Applicants Robert Pineo, Michael Scott, Matthew MacLellan, for the Respondents (Peter Peill, Lyndhurst Farms Limited, and Minas Seed Co-operative Limited and 3324949 Nova Scotia Limited) Ian R. Dunbar, for the Respondent (Soil and Sea Co-op Limited)

By the Court:

[1] This Court heard five motions brought forward by the various parties here. It was agreed that I would hear evidence over the course of multiple days, and that all evidence would be admissible as to all five motions.

[2] The parties are family members (or companies of those same family members) embroiled in an unfortunate dispute over a family enterprise, the defendant "Soil and Sea".

[3] Given that the individual litigants all have the last name "Peill", I will refer to them by their first names. The corporate defendants I will refer to as "Soil and Sea", "Lyndhurst", "Minas Seed", and the numbered company will be referenced as "Numberco".

[4] Further, given that motions I heard were brought forward by both the plaintiffs and the defendants, I shall not reference anyone as an "applicant" or "moving party" or "respondent" in this decision, for fear of causing confusion. Rather I shall reference the parties throughout as "plaintiffs" or "defendants".

Background

[5] This case has had a long and complicated history. I was provided with multiple and lengthy affidavits from various individuals. I will limit myself, in this decision, to mentioning only those facts that are most relevant to the motions before me.

[6] The individual parties to this action (Edward, David, Kathi, and Peter) are siblings. They, along with their other siblings (Michael and Hilda), and their mother Dorothy, were the original seven members of the defendant co-operative Soil and Sea, created in 1989 in accordance with the *Co-Operative Associations Act*, RSNS, 1989, c. 89 (the "*Act*"). Soil and Sea was created to manage various Lunenberg properties inherited by Dorothy.

[7] In the early years, Soil and Sea was not a profitable enterprise. At various times, when Soil and Sea needed money, loans would be provided by Peter and/or his various companies (the corporate defendants).

[8] The family had other money issues as well. Sometime during the late 80s or early 90s, a relative from Germany, Heinrich Schoeller, decided to assist the family financially. The family patriarch Jock Peill was terminally ill at that time and, it would appear, had contacted Mr. Scholler and shared his concerns about financial issues. Mr. Scholler sent a significant amount of money as a result (the exact amount is not clear to me, but in the range of $375,000 to $400,000) (the "Schoeller funds").

[9] Peter notes his belief that the Schoeller funds were originally sent to help Minas Seed and Lyndhurst (companies started by Jock and taken over by Peter). It appears that the Schoeller funds were deposited in accounts of either Peter himself, or of Lyndhurst.

[10] It then appears that for the next number of years, disputes arose as to what to do about Soil and Sea, and its assets/debts. By 2005/6 there were a number of competing discussions amongst family members as to various proposals: either to develop the property, or to subdivide the property.

[11] Peter agreed to co-ordinate a development proposal and to use some of the Schoeller funds to do so. The funds would be "loaned" to Soil and Sea at the same interest rate he/his companies had charged previously (9%). According to David, it was later discovered by family members that, at the same time, Peter was "loaning" other portions of the Schoeller money to his company Lyndhurst, but at a lower interest rate than he was charging Soil and Sea.

[12] No development proposal was ever completed or submitted by Peter.

[13] As I previously noted, tensions were increasing during this time. In particular, some of the Peill siblings were becoming displeased with Peter's position in Soil and Sea.

[14] In or around May 2006, Dorothy asked all of her children to return their shares of Soil and Sea. The evidence suggests that she did so because she was tired of her children fighting about it.

[15] Most of the Peill siblings did voluntarily relinquish their shares at that time. Edward, notably, did not.

[16] A directors' meeting of Soil and Sea was called on June 7, 2006. It was noted that most of the members had relinquished their shares, but not all. The minutes of this meeting contain the following notation:

> 5) Remaining outstanding shares from Eve Rowsell and Edward Peill are being recalled immediately.

[17] At the end of this June 7 meeting, Dorothy asked Peter and David to stay on as members of the co-operative. This was required in order to meet the requirements of the Articles of Association of a co-operative (minimum three members). David and Peter agreed.

[18] Also on June 7, 2006, following the meeting, Dorothy wrote an email to Edward and advised him as follows:

> Dear Edward, After speaking with you yesterday, I called the Inspector of Co-ops to verify our previous conversation. Following his instructions I called a meeting and your share was officially withdrawn. You will be receiving your 5$ membership fee by registered mail with notification. It would not be fair to the others if you withheld. …

[19] On June 14, 2006, Dorothy sent Edward a further registered mail letter:

> Mr. Edward L. Peill;
>
> Under it's current structure Soil and Sea Co-op has failed to achieve the original goals as set out by Mrs. Dorothy Peill.
>
> Therefore:
>
> Mrs. Dorothy Peill has formally requested all members of Soil and Sea to voluntarily return their shares. As of June 14/ 2006 five members have complied.
>
> Mrs. Peill has appointed an interim board of directors during the restructuring of Soil and Sea.
>
> Enclosed is a cheque representing the original share value of five dollars, which formally conclude your membership in Soil and Sea Co-op. The Co-op Act states that upon receipt of this letter you have 30 days to appeal.
>
> Please direct all communications in regards to an appeal IN WRITING to Mrs. Dorothy Peill.
>
> Sincerely

Dorothy Peill

[20] The letter enclosed a personal cheque from Dorothy to Edward, in the amount of $5. The letter also enclosed a separate document, not referenced in the letter, which read as follows:

> I _____, HEREBY RELINQUISH MY SHARE IN SOIL AND SEA CO-OPERATIVE TO DOROTHY PEILL ON THIS _____ DAY OF _____, 2006.
>
> Signed: _____
>
> Witness: _____

[21] Edward did not sign this document. He wrote to Dorothy on July 17, 2006, at which time he advised her that he would not return his share in Soil and Sea until a competent Board of Directors of non-family members had been established, and until he was confident that those directors would manage Soil and Sea in a responsible manner. It was Edward's belief that all of his siblings had relinquished their shares at that point.

[22] Dorothy wrote an email to Edward on July 5, 2007:

> Hi Edward,
>
> You are no longer a member of Soil and Sea Co-op as per the registered letter received by you on June 15, 2006.
>
> I have restructured the Co-op and have appointed Peter Peill and David Peill as Directors. I also have an outside advisor.
>
> I am extremely happy with the progress we are making.
>
> Love Mom

[23] Since that time, Edward has not participated in the governance of Soil and Sea, nor has he attended any member meetings or directors' meetings. However, Edward maintains that he is still a member. He notes that he has never returned or relinquished his share in Soil and Sea, and that in his view, the process that purported to remove him as a member was invalid. He notes that over the years since the 2007 events, he has raised the issue of his membership with various members of the family to discuss.

[24] In 2008 Edward hired legal counsel to explore his options in relation to his membership in Soil and Sea. Correspondence was sent by his counsel to Soil and Sea seeking information, as well as confirmation that Edward remained a member.

Edward was then invited to a meeting to discuss the matter. Edward responded by seeking documentation, as well as confirmation that his legal counsel could attend the meeting. In the end, no meeting occurred.

[25] Edward notes that he did not initiate formal legal proceedings at that time; either because he could not afford it at the time, or because he was reluctant to initiate legal proceedings against family members, or both.

[26] According to Edward's affidavit, the issue of his membership was next raised with Soil and Sea in November 2014, in a letter co-signed by himself and his siblings Michael and Kathi to Soil and Sea. (I note that the context of the letter seems to indicate that it was actually written by Kathi):

> To Whom it May Concern:
>
> In the process of writing my will, I was asked the status of my Soil and Sea share by my lawyer. I explained the current situation and based on the bylaws of the Co-operative Associations Act Page 18 Section 29-2, all of us - myself, Hilda, Mike and Edward - are still members in the eyes of the law. In discussion with my siblings, we all agreed we don't wish to upset our mother but the time has come when this issue must be settled, since it determines the transition of our estates.

[27] The letter goes on to request financial statements and minutes since 2005.

[28] This stimulated some further communication between the parties. In the end, the directors of Soil and Sea once again confirmed their view that Kathi and Edward were no longer members of Soil and Sea.

[29] In 2019, due to some unrelated investments (the exact details of which are not relevant to these motions, but they involve investments made by Peter and his wife in an unrelated company), Soil and Sea came into a windfall of nearly three million dollars.

[30] As a result of that, repayment was made to Mr. Schoeller, with interest, by Peter. It is the belief of David that this repayment was made at a rate of interest less than Peter had been collecting from Soil and Sea, and that Peter took the difference for himself. It is further noted by David that Peter had requested more money from Soil and Sea to repay Mr. Schoeller, which David did not agree to.

[31] By this time (2019) Soil and Sea was comprised of two non-family members, Allan Connors and Brian Twohey, and two remaining family members, David and Peter.

[32] Given its new financial situation, Soil and Sea sought advice from an accountant as to tax liability, who suggested the following: first, that Mr. Connors and Mr. Twohey should resign to avoid tax consequences for themselves; and second, that Soil and Sea be converted from a co-operative into a trust. However, it was noted that should Mr. Connors and Mr. Twohey resign, Soil and Sea would have only two members, which was not permitted for a valid co-operative. Therefore, a third member was required while Soil and Sea remained a co-operative.

[33] The accountant suggested that the defendant Numberco could become a member of Soil and Sea on that temporary basis, allowing it to remain a co-operative until such time as it could be converted to a trust. The plan also called for gradual transfer of share holdings in order to minimize tax liability.

[34] This plan was agreed upon by all parties involved. David, in particular, notes that while he did agree to Numberco becoming a temporary member of Soil and Sea, that was only because it was a recommended step towards the conversion from a co-op to a trust.

[35] The share price for Numberco to join the Soil and Sea membership was agreed upon as $800,000. (It is noted that Numberco has never actually paid this.)

[36] By 2020, both Mr. Connors and Mr. Twohey had resigned. At Soil and Sea's annual general meeting on February 26, 2020, the Board unanimously passed a motion to work towards the conversion of Soil and Sea to a trust. No caveats or concerns were raised at that time. There was agreement to accept the return of both Mr. Twohey's and Mr. Connors' shares, to have one share issued (of a value of $800,000) to Numberco, and to have Dale Kelly act as representative of Numberco.

[37] At that same meeting, it was confirmed that Mr. Kelly was appointed President and Chairman of Soil and Sea, that Peter was appointed Treasurer, and that David was appointed Secretary.

[38] According to David, around that time Peter had requested a "finder's fee" from Soil and Sea for having brought it the windfall investment. The Board agreed to a $150,000 "finder's fee". However, it was David's understanding that the amount would not be disbursed until after Soil and Sea was converted into a trust. He notes that the money was in fact disbursed (through Lyndhurst) soon thereafter.

[39] Peter's affidavit describes a different transaction. He notes that the $150,000 was simply Soil and Sea's share in the cost of the borrowed money from Mr. Schoeller. He says that at no time was it suggested that this payment was dependant upon the conversion of Soil and Sea to a trust.

[40] In any event, soon after the "conversion to trust" plan had been agreed to, it started to appear (to some of the parties involved) that Peter was trying to slow the process or throwing up "roadblocks" to the conversion process. Peter started making requests; for example, he sought a shareholder's agreement to prevent shares being disposed of before conversion; he also sought an indemnity agreement for himself personally against any adverse tax consequences. These requests, according to David, had not been made or mentioned before, or at the time, that all had agreed to the conversion.

[41] Dale Kelly also began to believe that Peter was trying to "back away" from the trust plan. He made those concerns known to Peter. Mr. Kelly also stated that he felt Peter was trying to "control his vote" on the Soil and Sea Board, which displeased Mr. Kelly.

[42] The deteriorating relationship between Mr. Kelly and Peter resulted in Mr. Kelly resigning as the Numberco representative from the Soil and Sea Board, at the invitation of Peter, in May 2020.

[43] Peter, for his part, disagrees that "conversion" had been definitively agreed to. Peter notes his understanding that the "conversion to trust" proposal was, in fact, a "draft" proposal being discussed, and that he was quite properly seeking a shareholder's agreement on certain matters before proceeding further with any corporate re-structuring.

[44] Following the resignation of Mr. Kelly, Peter sought to convene a second annual general meeting of Soil and Sea. He proposed it be held in June 2020. David did not agree with this process and did not attend this meeting. In fact, David is unaware if this June 2020 meeting happened; at the time he understood that it had been postponed, but later information seemed to suggest otherwise (see the quote at para. 48 below, item #2)

[45] In the summer of 2020, the provincial Registry of Joint Stocks advised Soil and Sea of a problem; as a co-operative it required three directors to continue operations and only two were listed.

[46] David notes that he then proposed Tony Sampson (a non-family member) as the third member. David did not recognize Numberco as a valid third member of the Board. Peter, on the other hand, proposed Rachel Aalders (who is/was an employee of Numberco, and the daughter of his sibling Kathi) to represent Numberco at the Board.

[47] Discussions followed about having a meeting to deal with this issue. David notes that he told Peter he was unavailable until November 26 due to work commitments; and further, confirmed that he was not agreeable to having Rachel Aalders sit on the Board. Peter disagreed and noted that Numberco, as a member of the Board, could appoint a representative of its choosing.

[48] Despite this dispute, Peter convened a "Directors' meeting" of Soil and Sea on November 19, 2020. Only Peter and Rachel Aalders were present. The Minutes include the notation "David Peill sent notice via email that he would be unable to attend." The Minutes further note:

> Meeting items
>
> 1. Formally acknowledged and accepted the resignation from the board of Dale Kelly, effective May 5th.
>
> 2. Formally approved the filling of the vacancy in the Board by Rachel Aalders, the delegate of 3324949 Nova Scotia Limited effective June 22nd, 2020.
>
> > Rachel had been appointed to the board of directors as the representative of the 3324949 membership at the Adjourned AGM June 22nd.
>
> 3. As per the Inspector requirements, officers were appointed.
>
> It was agreed:
>
> Peter Peill would be President/Chair/Treasurer.
>
> Peter has been acting property manager since, May 2020 as no one was acting in the position and will continue to have that responsibility.
>
> Rachel Aalders is appointed Vice President and Secretary.
>
> ...
>
> David Peill is a director and will not hold an office.
>
> …

[49] The Minutes go on to provide lengthy points of purported and alleged "facts" as justification for the elevation of Peter and Rachel to total control of Soil and Sea, and the exclusion of David from control of that company going forward.

[50] David notes that, in his view, this meeting was not a valid directors' meeting as there was no quorum of directors present. Further, David notes that he disputes the facts/issues listed about him in the Minutes, and that they had not been raised with him previously. He had received no notice that these issues would be raised at this meeting.

[51] A Soil and Sea "Members' meeting" was convened on December 3, 2020, again with only Peter and Rachel Aalders in attendance. The two of them passed a resolution on that date, indicating that from that point forward "two-thirds shall constitute a quorum of members." As David notes, this would permit Peter and Rachel Alders to conduct Soil and Sea business entirely in his absence.

[52] David further notes that since that time, to his knowledge, Rachel Aalders has always voted with Peter on any issue before the Board of Soil and Sea. He believes that Rachel has never disagreed with Peter on any issue at any members' or directors' meeting. Rachel Aalders also continues (at least at the time that David's evidence was filed) to be employed by Lyndhurst.

[53] Further to all of this, David notes that over the past number of years Soil and Sea has paid funds to Peter and/or his related companies for various reasons, including payment of dividends and consulting fees. David is unclear as to whether these funds were always approved by the directors, and whether (as in the case of fees) they were truly necessary. To put it plainly, David (along with his fellow plaintiffs) believes that Peter has been enriching himself from Soil and Sea over many years, to that company's detriment.

[54] Peter denies these allegations and is of the view that any amounts paid to him, or his companies, were entirely legitimate.

[55] Moving forward into 2021, disputes continued to arise. David had owed money to Soil and Sea for rentals and boat storage fees, along with an outstanding loan made to him; disputes arose about those loans and amounts. David also disagreed with work he saw being done on Soil and Sea property and communicated those to Peter and Rachel Aalders.

[56] On July 30, 2021, a Notice of Action and Statement of Claim was filed by Edward, David, and Kathi, as against Peter, Soil and Sea, and Peter's companies.

[57] On September 2, 2021, Rachel Aalders sent an email to David and Peter noting as follows:

> Director's of Soil and Sea Co-op Ltd.
>
> I am writing to notify you of a meeting of the Director's of Soil and Sea Co-op Ltd. to be held on September 8th at 11:00 am via conference call.
>
> Please use 1 800 ...
>
> Agenda:
>
> Removal of David Peill as a director.
>
> Sincerely,
>
> Rachel Aalders
>
> Secretary
>
> Soil and Sea Co-op Ltd.

[58] David immediately responded to this communication and objected. Ms. Aalders responded by referencing his overdue accounts.

[59] At that time the plaintiffs brought a request for injunctive relief before this Court. A Consent Order for Interim Injunction was issued on September 7, 2021, providing (inter alia) that the September 8, 2020, meeting would not occur; that David would remain as a director and member of Soil and Sea; and that Soil and Sea "quorum" would be defined (for both directors and members) as three.

[60] Further, the order subjected Peter to a number of prohibitions: not to seek to remove David as a director or member; not to seek to add additional members; to make best efforts to schedule meetings when David was available; to not call meetings without ten days prior notice (such notice to include the subject matter of the meetings); to not dispose of assets of Soil and Sea except in the ordinary course; and to not pay himself (or his companies) any further dividend income or consulting fees.

[61] Peter was also specifically subject to an order in relation to the lands of Soil and Sea. This part of the order reads as follows:

> (f) not to take any steps to alter, or to cause others to alter, the lands held by Soil and Sea by tree cutting, excavation, construction, or by removing rocks or other natural materials;

[62] The plaintiffs say that since the time this order was issued, Peter has been in breach of this condition. More specifically, they say that Peter has removed stones from Soil and Sea property for his own use, and also that he has excavated on the lands of Soil and Sea. They have brought a motion seeking for Peter to be found in contempt.

[63] David advises that he first noticed stakes in Soil and Sea land in May 2022. He wrote to Peter and Rachel Aalders reminding them of the injunction. No response was received. In June 2022, David advises, a trench was excavated on the land apparently for power and water lines.

[64] Also, in the fall of 2022 there was a rock pile on Soil and Sea property. It is noted that this rock pile is now gone. A rock wall has also been built on Peter's property, which adjoins a piece of Soil and Sea property; the plaintiffs believe that the wall also extends onto the Soil and Sea property. Such would, they argue, also constitute a breach of the interim injunction.

[65] Peter has responded that the rocks were harvested (for part of his rock wall project) from Soil and Sea back in the winter of 2020-2021 (prior to the order). While Peter acknowledges that he was invoiced for the rocks in November 2021, he notes that they were harvested for him and had simply remained stored on Soil and Sea land until their use.

[66] Peter notes that the rock wall is, in his view, entirely on his land. Because of erosion, it can be difficult to determine the exact point where the boundary line of Soil and Sea ends. Peter believes there to be no encroachment upon the lands of Soil and Sea, or if there is any, it is minimal.

[67] Peter further notes that he remains the property manager for Soil and Sea lands, which means he needs to address issues from time to time arising on the land. He notes that in June 2022, he oversaw the addition of a pathway to run from a house to a dock on the lands for the benefit of rental guests. This area became

swampy at certain times, and Peter determined that the path would benefit from the installation of a "French drain" to render the pathway more usable. Peter acknowledges that the installation of this drain did require some lifting of turf and earth. He notes that the pathway, with this new drainage installed, has not changed the grade of the land and has improved the property. He notes having personally observed guests using the new improved route to access the dock and other amenities.

[68] Peter also notes that some remedial work on the land is unavoidable. For example, during hurricane Fiona in September 2022, two large trees were knocked over on Soil and Sea property causing damage. Peter needed to fix the damage and haul the trees away to allow booked rentals to continue. Peter does not consider the interim injunction to be meant to prevent him from effecting this type of work, as it is within the necessary and usual course of the business of Soil and Sea.

[69] Lastly, it should be noted that Kathi is the owner of a small building located on Soil and Sea land, subject to an agreement between the parties. Since 2022, certain events have occurred which have caused Kathi to be concerned that Peter and/or Rachel are unilaterally changing the terms of this agreement.

Notice of Action and Statement of Claim

[70] As I previously noted, the action upon which these motions are based was originally filed in July 2021. It has been amended twice.

[71] The active pleading at present (Second Amended Notice of Action - February 17, 2023) makes a number of allegations as against Peter and his various companies (all of which are named as defendants).

[72] The plaintiffs claim for the following substantive relief:

1. They seek declarations that: (i) Edward remains a member of Soil and Sea; (ii) Numberco is not a member of Soil and Sea.
2. They claim that the conduct of Soil and Sea has been oppressive, and seek damages awarded against Peter, and an order winding up Soil and Sea.
3. They claim that Peter has breached a valid and enforceable agreement with David (to convert Soil and Sea into a trust) and seek specific performance of that agreement (or damages in the alternative).

4. They claim that Soil and Sea and Peter are trustees for and on behalf of the Peill siblings and seek an order winding up the trust and distribution of assets.

5. They claim that Peter is in breach of his fiduciary duties to Soil and Sea. In relation to Lyndhurst and Minas Seed, they claim that these defendants are liable for "knowing assistance" and "knowing receipt". The plaintiffs seek damages and a full accounting of funds.

[73] The plaintiffs further seek punitive damages, interest, and costs.

[74] The defendants have essentially denied all claims made by the plaintiffs.

In terms of the defendant Soil and Sea specifically, it should be noted that that company became the subject of an order appointing a receiver-manager in January 2022. Further to that order, Soil and Sea has filed a separate statement of defence, as well as a counterclaim (against David for the unpaid accounts previously mentioned) and crossclaim (against Numberco for the unpaid share amount).

The present motions

[75] As I indicated, the parties have made a number of motions, all of which were heard at the same time, with one set of evidence on all motions.

1. The plaintiffs seek summary judgement as to two issues: first, the claim that Edward remains a member of Soil and Sea; second, the claim that Numberco is not a valid member of Soil and Sea.

2. The defendants seek summary judgement as to a number of issues: first, the invalidity of Edward's membership in Soil and Sea (essentially, the inverse of the plaintiffs' position); second, whether the issue of Edward's membership is barred by the doctrines of latches and estoppel, or whether the issue of his membership is statute barred due to the expiry of a limitation period; third, whether Soil and Sea is or has ever been a trust or trustee; and last, whether Edward and Kathi have standing to bring forward their claims.

3. The plaintiffs seek interlocutory injunctive relief in relation to the ongoing operation of Soil and Sea, in particular limiting what actions can be effected by the defendants.

4. The plaintiffs seek an order finding that the defendant Peter Peill has acted in contempt of court.

5. The plaintiffs also seek that the defendants' jury notice be struck and that the trial proceed as a judge alone trial.

[76] As a preliminary issue, I note that a great many affidavits were filed by both sides in relation to these motions (for a total of, by my count, 37 affidavits), with a number of key affiants filing multiple, and at times lengthy, affidavits. For example, Peter Peill swore five affidavits, Edward Peill six, David Peill seven, Dale Kelly four, and so on. None of the affidavits were objected to on that basis.

[77] From the Court's perspective, this made for a difficult and complicated record. I recognize that multiple motions would likely cause the filing of multiple affidavits. However, the affidavits were not always delineated by motion. Often the affidavits contained responses to other affiants on various topics, which then caused further responses from other affiants yet again. The practical reality for the Court, therefore, was that if I wished to know what any affiant had said about any particular topic, I had to repeatedly review and compare multiple and lengthy affidavits from that one person. In my view, not all these responses and further responses were necessary to the issues before the Court.

[78] To add to the record, and despite the very lengthy (even exhaustive) evidence already deposed by all affiants, both parties chose to cross-examine most of these affiants during the hearing. Again, in my view, not all of this was entirely productive.

[79] I say all of this to note that this Court was left with a very large, unfortunate, and challenging collection of evidence at the end of this (these) motion hearing(s). Such caused a great deal of extra work, time, and effort which could have been avoided if the evidence had been simplified in its presentation and/or narrowed in scope.

[80] I take this opportunity to remind all counsel that the Court's time is not without limits, both inside and outside the courtroom. While counsel is to represent their client's interests, such can be effected with a view towards focusing on those issues that are most important.

Preliminary issue / affidavit of Dorothy Peill

[81] The defendants have filed an affidavit from Dorothy Peill dated November 29, 2021. I am advised that Dorothy has since that time passed away. The defendants request that her affidavit be admitted into evidence.

[82] The plaintiffs object and ask that the affidavit be struck on the basis that it is "inadmissible hearsay". They cite *CPR* 39.04, part of which reads:

> 39.04 Striking part or all of affidavit
>
> (1) A judge may strike an affidavit containing information that is not admissible evidence, or evidence that is not appropriate to the affidavit.
>
> (2) A judge must strike a part of an affidavit containing either of the following:
>
> > (a) information that is not admissible, such as an irrelevant statement or a submission or plea;
> >
> > (b) information that may be admissible but for which the grounds of admission have not been provided in the affidavit, such as hearsay admissible on a motion but not supported by evidence of the source and belief in the truth of the information.
>
> (3) If the parts of the affidavit to be struck cannot readily be separated from the rest, or if striking the parts leaves the rest difficult to understand, the judge may strike the whole affidavit.

….

[83] The plaintiffs point out that the affidavit of Dorothy Peill is an out of court statement tendered for its truth, and she is not available for cross-examination. They submit that the affidavit is *prima facie* inadmissible.

[84] The plaintiffs further submit that the affidavit should not be admitted pursuant to the principled approach to hearsay described by the Supreme Court of Canada in *R. v. Khelawon*, 2006 SCC 57. While they acknowledge that the death of the affiant would meet the first criteria of necessity, they dispute that the affidavit meets the second criteria of reliability. They submit that the facts of this case raise the possibility of coercion and/or incapacity of the deponent given her declining health. The plaintiffs believe that undue influence was being exerted upon Dorothy by certain members of the family.

[85] In the alternative, the plaintiffs seek for certain portions of the affidavit to be struck as being inadmissible for various reasons.

[86] The defendants submit that the affidavit of Dorothy does meet both criteria of *Khelawon.* The affidavit is under oath, which they say makes it sufficiently

reliable to meet the threshold for admissibility. They contend that the plaintiffs' submissions regarding capacity and coercion amount to nothing but speculation and/or unproven allegations.

[87] The defendants further point out that both of Dorothy's end-of-life caregivers, her granddaughters Rachel Alders and Eve Rowsell, have provided affidavits attesting to the circumstances of the swearing of Dorothy's affidavit; in particular, they have attested that they did not exert or observe any influence or coercion upon Dorothy. These affiants note having observed Dorothy working with counsel to draft and edit her affidavit and doing that herself. The defendants further note that the plaintiffs had the opportunity to cross-examine both Ms. Aalders and Ms. Roswell on these points and did not do so.

[88] I have reviewed the case provided to me, *Bellton Farms Ltd. v. Campbell*, 2016 NSCA 1, which permitted an affidavit to be admitted in similar circumstances.

[89] In my view, the affidavit of Dorothy does meet the criteria of *Khelawon* and should be admitted. It is clearly "necessary" given her death. In my view, the document is also of sufficient reliability to meet threshold admissibility. It was made under oath. I have evidence from third parties relating to its creation and execution. While the plaintiffs may have concerns, I cannot find that the evidence before me supports the exclusion of the affidavit on that basis.

[90] Of course, my ruling on this issue is limited to admissibility on the motions before me.

[91] As to the rest of the concerns raised by the plaintiffs about the affidavit, I note the following specific sections:

1. Paragraph 22: This references a discussion Dorothy had with a third party, a Mr. Skibbens. I do not accept the words she attributes to Mr. Skibbens for their truth as they are hearsay. Such evidence can only be admissible to explain or give context to what an affiant then does or says.
2. Paragraph 28: The last part of this paragraph references Dorothy's belief that Edward was the person who signed for/received the registered letter. She provides no reason or foundation for this belief. Strictly speaking, such is not properly within an affidavit. I will strike this part of the paragraph so that paragraph 28 now reads:

> 28. The registered letter dated June 14, 2021, was sent to Edward's home. I recall it was signed for by a "John Smith". Edward lived alone at the time.

I might note, however, that as far as I am concerned this change will have no practical effect on the matter at hand. Edward has filed an affidavit acknowledging receipt of this registered letter and has attached it as an exhibit. Why there was any further debate about its mailing/receipt is unclear to me.

3. Paragraph 41: In this paragraph, Dorothy attests that she has "never witnessed Peter being dishonest". That is her experience and her evidence. I see no reason, on its face, that she could not say so in an affidavit. Having said that, it is not evidence of any use to this Court. It does not prove or disprove any fact in dispute.
4. Paragraph 44: I agree that this paragraph is not in the nature of evidence. It is inadmissible opinion and/or is in the nature of a plea. I shall strike paragraph 44 in its entirety.
5. Paragraph 45: Sentence #2 ("I am disappointed …") on its face is irrelevant opinion. Sentence #3, while of marginal relevance to the motions before me, is not entirely irrelevant; there is a debate among the parties relating to Rachel's involvement in Soil and Sea. The drafting of sentence #3 leads me to conclude that it is referencing sentence #2 (It starts "As such," ….) Therefore, sentence #2 should stay so as to provide context for sentence #3. The paragraph shall remain as is.

Summary Judgment (plaintiffs)

[92] The plaintiffs seek summary judgment as to two claims which they have brought forward:

(a) the invalidity of Numberco's membership in Soil and Sea;

(b) the validity of Edward's membership in Soil and Sea.

[93] I quote the classic summary judgment test from *Shannex Inc. v. Dora Construction Ltd.*, 2016 NSCA 89:

First Question: Does the challenged pleading disclose a "genuine issue of material fact", either pure or mixed with a question of law?

If Yes, it should not be determined by summary judgment. It should either be considered for conversion to an application … or go to trial.

…

A "material fact" is one that would affect the result. …

The moving party has the onus to show by evidence there is no genuine issue of material fact. But the judge's assessment is based on all the evidence from any source. …

…

Second Question: If the answer to #1 is No, then: **Does the challenged pleading require the determination of a question of law, either pure, or mixed with a question of fact**?

If the answers to #1 and #2 are both No, summary judgment "must" issue. …

Third Question: If the answers to #1 and #2 are No and Yes respectively, leaving only an issue of law, then the judge "may" grant or deny summary judgment: Rule 13.04(3). Governing that discretion is the principle in *Burton*'s second test: **"Does the challenged pleading have a real chance of success?"**

…

It is for the responding party to show a real chance of success. If the answer is No, then summary judgment issues to dismiss the ill-fated pleading.

Fourth Question: If the answer to #3 is Yes, leaving only an issue of law with a real chance of success, then, under Rule 13.04(6)(a): **Should the judge exercise the "discretion" to finally determine the issue of law?**

If the judge does not exercise this discretion, then: (1) the judge dismisses the motion for summary judgment, and (2) the matter with a "real chance of success" goes onward either to a converted application under Rules 13.08(1)(b) and 6, as discussed below [paras. 37-42], or to trial. If the judge exercises the discretion, he or she determines the full merits of the legal issue once and for all. Then the judge's conclusion generates issue estoppel, subject to any appeal.

…

A party who wishes the judge to exercise discretion under Rule 13.04(6)(a) should state that request, with notice to the other party. The judge who, on his or her own motion, intends to exercise the discretion under Rule 13.04(6)(a) should notify the parties that the point is under consideration. …

[36] Each party is expected to "put his best foot forward" with evidence and legal submissions on all these questions, including the "genuine issue of material of

> fact", issue of law, and "real chance of success": Rules 13.04(4) and (5); *Burton*, para. 87.
>
> …
>
> **Fifth Question**: If the motion under Rule 13.04 is dismissed, **should the action be converted to an application** and, if not, what directions should govern the conduct of the action?

1) Numberco's membership in Soil and Sea

[94] According to the evidence before me, and as described hereinabove, Numberco was voted in as a member of Soil and Sea at its annual general meeting on February 26, 2020. That fact does not appear to be controversial, at least on its face. However, that transaction is now the subject of serious dispute for various reasons.

[95] David notes that the membership of Numberco was agreed upon only as a temporary measure as part of the transition of Soil and Sea from a co-operative over to a trust. As things turned out, that transition never actually took place.

[96] Furthermore, the plaintiffs note that Numberco is wholly owned/controlled by Peter. It is recognized by all (including Peter) that he has the power to change Numberco's representation on the Soil and Sea board at any time. In the view of the plaintiffs, that means that Peter is given two votes on any given issue; such a situation is entirely contrary to the principles and laws governing co-operatives.

[97] In support of their position, the plaintiffs point to the evidence of Dale Kelly, the previous representative of Numberco. Mr. Kelly testified about disagreements that he and Peter had during his tenure, and that he felt that Peter was attempting to influence him. He eventually resigned from that position with Peter's approval.

[98] The plaintiffs further note that the present representative of Numberco, Rachel Aalders, has voted "with" Peter on every issue so far (at least up until the filing of the evidence before me).

[99] The plaintiffs submit that Numberco is not a valid member of Soil and Sea. They submit that Peter controls the Numberco representative and therefore controls two votes at Soil and Sea. The plaintiffs suggest that there is no genuine issue of material fact in that suggestion; they say that it is, essentially, undeniable. They seek this Court to order summary judgment on that issue.

[100] The defendants oppose summary judgment on this issue. They say that the allegations being made by the plaintiffs are not borne out by the evidence and/or are disputed. For example, Ms. Aalders herself asserts being independent of Peter, and having accepted the position (as representative of Numberco) on the condition that she would be allowed to vote as she deemed appropriate for Soil and Sea and its future.

[101] The defendants submit that there are, therefore, material questions of fact that require adjudication. The very fact that is deemed "undeniable" by the plaintiffs (i.e., that Peter controls two votes), is denied by Ms. Aalders. That conflict in the evidence will need to be addressed at trial.

[102] As a motions judge hearing a summary judgment motion, I am not entitled to weigh evidence and decide which I accept and which I do not (*Hatch Ltd. v. Atlantic Sub-Sea Construction and Consulting Inc.*, 2017 NSCA 61). Such disputes of fact require resolution by a trial.

[103] Furthermore, even if that particular issue was undisputed, in my view, such would not end the matter. The question being debated is Numberco's membership in Soil and Sea. It is entirely unclear to me whether, even if the Court were to accept the plaintiffs' submission that Peter and his control of Numberco gives him two votes at the Soil and Sea board, such would invalidate Numberco's membership in Soil and Sea. Such seems, on its face, to be a mixed question of law and fact which again, in my view, requires a trial.

[104] I conclude that there are genuine issues of material fact and substantive mixed questions of fact and law that exist as to this issue of Numberco's membership in Soil and Sea. The plaintiffs' summary judgment motion on this issue is denied.

2) Edward's membership in Soil and Sea

[105] The plaintiffs also seek summary judgment as to the issue of whether Edward continues to be member of Soil and Sea. They say he is, and further, that there is no material issue of fact or law to be addressed by a Court in making that determination.

[106] As noted hereinabove, all Peill siblings were asked by their mother Dorothy to return their shares in Soil and Sea in May/June 2006. Some did; Edward did not.

[107] At a directors' meeting on June 7, 2006, Dorothy moved for Edward's share to be recalled. This motion was passed. A registered mail letter was sent to Edward on June 14, 2006, informing him that his share was being recalled and indicating that he could appeal within 30 days. The letter also enclosed a cheque for $5 (the original share value).

[108] Edward acknowledges receipt of this correspondence. He has never relinquished his share in Soil and Sea. The plaintiffs are of the view that the process purporting to exclude Edward from membership was not properly and legally done. They say that Edward therefore remains a member and that summary judgment should issue on that point.

[109] The defendants oppose this motion. In their view, proper procedures were followed to recall Edward's share. Furthermore, they note that Edward has had no involvement with Soil and Sea in any capacity from 2006 forward. In fact, the defendants have brought forward an opposing summary judgment motion; they seek summary dismissal of this claim and a finding that Edward is not a member of Soil and Sea.

[110] I have been directed to the *Co-Operative Associations Act*, RSNS, c. 98, s. 29, which provides as follows (in part):

> 29(2) A member who fails in the observance of any of the regulations or the by-laws of the association may, by resolution of the board of directors, be excluded from membership in the association whereupon he shall be entitled to a refund of any amount held to his credit in share capital or loan capital and deposits and upon which the association has no lien or other lawful claim but
>
> > (a) notice shall be sent by the board of directors by registered mail to such member to his last known address setting forth a date not sooner than one month after the date of mailing the notice upon which he is to be excluded from membership in the Association and stating the reasons therefor;

[111] It has also been pointed out that the by-laws of Soil and Sea also contain a provision for exclusion from membership:

> 8. Exclusion from Membership: Members may be excluded from membership according to Section 29 of the Co-operative Associations Act and Regulations 4 and 6 of that Act and also if a member acts in a manner contrary to the best interests of the Co-operative.

[112] The plaintiffs note that these provisions were not followed in the “recalling” of Edward’s share. The minutes of the directors’ meeting of June 7, 2006, note only that “Remaining outstanding shares from Eve Rowsell and Edward Peill are being recalled immediately." There is no mention of Edward having, in the words of the *Act*, failed "in the observance of any of the regulations or the by-laws of the association." Such a finding appears, at least on its face, to be a requirement of s. 29 of the *Act*.

[113] David notes that Edward's behaviour had nothing to do with the recalling of his share; Dorothy simply wanted everyone to return their shares. David recalls later discussing possible justifications for the recall(s) with Peter and Dorothy, but those discussions were held after the motion had already passed in respect of Edward.

[114] The defendants submit that the Board did, in fact, consider Edward’s conduct in moving to exclude him and recall his share. They point to the evidence of Peter, who says that the issue was discussed specifically in relation to Edward, and prior to the decision of June 7, 2006.

[115] There is competing evidence on this point as well. I repeat that as a summary judgement motions judge, I am not entitled to weigh competing evidence and make findings. I am limited, in the first instance, to determining whether there are genuine issues of material fact in dispute.

[116] Clearly here there are. I therefore dismiss the plaintiffs’ summary judgement application in relation to Edward's membership in Soil and Sea.

Summary Judgment motions (defendant)

[117] The defendants have brought further summary judgment motions. I will address them in turn:

1) Edward’s membership

[118] First, the defendants seek dismissal of the plaintiffs’ claim that Edward remains a member on the basis that his share was properly withdrawn/recalled in 2006. That is, as I previously noted, essentially the inverse of the plaintiffs’ position. I repeat the comments I made about the plaintiffs’ motion relating to

Edward in the preceding section. In my view, summary judgment should not issue on this point for those same reasons.

2) Edward's membership (laches / estoppel / limitation of actions)

[119] Second, the defendants submit that the claim relating to Edward's membership is barred by the doctrines of laches, and/or estoppel by convention, and/or the limitation of actions statute. They seek summary judgment of the claim of Edward's membership for those reasons.

[120] The defendants note that the motion recalling Edward's share occurred in 2006 (over 17 years ago). Edward was sent a registered mail letter to that effect at that time. Since then, Edward has done nothing either to participate in Soil and Sea, or to seek enforcement of his rights as a continued member of Soil and Sea (at least until he filed the present litigation in 2021).

[121] Edward has acknowledged that after 2006/2007 he did not participate in Soil and Sea business given that he had been told he was not a member and that he could not participate. Having said that, Edward noted that it is (and has always been) his position that his share was withdrawn inappropriately, and that the process used to purportedly do so was invalid. Edward noted that he would periodically raise the issue with his siblings and mother over the years. He even hired a lawyer to look into the matter at one point, but in the end did not bring forward any lawsuit or formal action.

[122] The doctrine of laches was described in *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14 as follows:

> [145] The equitable doctrine of laches requires a claimant in equity to prosecute his claim without undue delay. It does not fix a specific limit, but considers the circumstances of each case. In determining whether there has been delay amounting to laches, the main considerations are (1) acquiescence on the claimants part; and (2) any change of position that has occurred on the defendant's part that arose from reasonable reliance on the claimant's acceptance of the *status quo*: *M.(K.) v. M.(H)*, [1992] 3 S.C.R. 6, at pp. 76-80.

[123] In *BNSF Railway Company v. Teck Metals Ltd.*, 2020 BCSC 1133:

> [277] In *M.(K.)* at para. 18 it was emphasized by LaForest J. that: a) there are two distinct branches to the doctrine of laches; and b) either branch is sufficient as a defence to a claim in equity. Addressing the two branches, he said:

> What is immediately obvious from all the authorities is that mere delay is insufficient to trigger laches under either of its two branches. Rather, the doctrine considers whether the delay of the plaintiff constitutes acquiescence or results in circumstances that make the prosecution of the action unreasonable. Ultimately, laches must be resolved as a matter of justice as between the parties, as is the case with any equitable doctrine.
>
> [278] The first branch, delays that result from acquiescence, is a stand-alone branch of laches that does not require a finding of prejudice for laches to apply.
> …

[124] The concept of acquiescence was discussed by the Supreme Court of Canada in *M.(K.) v. M.(H.)*, [1992] 3 SCR 6:

> [100] Acquiescence is a fluid term, susceptible to various meanings depending upon the context in which it is used. Meagher, Gummow and Lehane, supra, at pp. 765-766, identify three different senses, the first being a synonym for estoppel, wherein the plaintiff stands by and watches the deprivation of her rights and yet does nothing. This has been referred to as the primary meaning of acquiescence. Its secondary sense is as an element of laches - after the deprivation of her rights and in the full knowledge of their existence, the plaintiff delays. This leads to an inference that her rights have been waived. This, of course, is the meaning of acquiescence relevant to this appeal. The final usage is a confusing one, as it is sometimes associated with the second branch of the laches rule in the context of an alteration of the defendant's position in reliance on the plaintiff's inaction.
>
> [101] As the primary and secondary definitions of acquiescence suggest, an important aspect of the concept is the plaintiff's *knowledge* of her rights. It is not enough that the plaintiff knows of the facts that support a claim in equity; she must also know that the facts give rise to that claim: *Re Howlett*, [1949] Ch. 767. However, this court has held that knowledge of one's claim is to be measured by an objective standard; see *Taylor v. Wallbridge* (1879), 2 S.C.R. 616, at p. 670. In other words, the question is whether it is reasonable for a plaintiff to be ignorant of her legal rights given her knowledge of the underlying facts relevant to a possible legal claim.

[125] The defendants submit that in the present case, Edward was well aware throughout the entire relevant period (2006-2021) of the facts underlying his possible claim.

[126] The plaintiffs have responded with their submissions as to why, in their view, the actions purporting to recall Edward's membership were invalid. They further note that Edward did object to the recall of his membership since 2006 (although he did not file an appeal or initiate any formal process), and that he has

(in a sense) "objected" ever since. The plaintiffs further note that Soil and Sea has suffered no prejudice as a result of any "delay" in having the issue of Edward's share dealt with, nor has Soil and Sea altered its position on any point based on the factual representation that Edward was not a member.

[127] It does appear that some of the elements of laches are met here. Clearly, Edward was told in 2006 that his membership had been revoked. The leadership of Soil and Sea has always taken the position that such was done validly. Also, it cannot be denied that Edward's claim to be recognized as (or "re-become") a member of Soil and Sea was not brought forward in a timely fashion (given that the triggering event occurred in 2006).

[128] In my view, Edward has known from the beginning most or all of the facts he needed to know in order to bring forward his claim had he wished to. He knew he had purportedly been "revoked" in 2006. The plaintiffs suggest that Edward did not know that Peter and David had remained as members in 2006, and that such was a material fact; I disagree. Any claim that Edward might have had to the retaining/returning of his share would be entirely independent of what happened with David and/or Peter, and would have no bearing on whether Edward's share was validly recalled.

[129] The defendants also submit that Edward's claim to be a member of Soil and Sea is estopped by the doctrine of estoppel by convention.

[130] In *Ryan v. Moore*, 2005 SCC 38:

> [59] ... I am of the view that the following criteria form the basis of the doctrine of estoppel by convention:
>
> 1) The parties' dealings must have been based on a shared assumption of fact or law: estoppel requires manifest representation by statement or conduct creating a mutual assumption. Nevertheless, estoppel can arise out of <u>silence</u> (impliedly).
>
> 2) A party must have conducted itself, i.e. acted, in reliance on such shared assumption, its actions resulting in a change of its legal position.
>
> 3) It must also be unjust or unfair to allow one of the parties to resile or depart from the common assumption. The party seeking to establish estoppel therefore has to prove that detriment will be suffered if the other party is allowed to resile from the assumption since there has been a change from the presumed position.

[131] The respondents submit that the present case meets these criteria. They note that even though Edward may have occasionally voiced complaints about the

situation, he always understood that he was not a member of Soil and Sea. In fact, that was a mutual understanding accepted by all parties involved. Edward took no steps to assert any legal claims he might have had. The defendants argue that it would be unfair/unjust now to allow Edward to resile from that position given the amount of time and changes to Soil and Sea over the intervening years.

[132] The plaintiffs, for their part, submit that the defendants have not shown Edward's "acquiescence" to the situation. They submit that Edward has not "done nothing" since 2006.

[133] The plaintiffs point out that Edward retained legal counsel in 2008 to try and reach a solution, although he did not commence litigation or formal proceedings at that time. Edward also communicated with Dorothy, David, and Peter on occasion over the years since 2006 insisting he was still a member and proposing various solutions.

[134] In response, the defendants note that, according to the caselaw, "acquiescence" is effectively made out where a claimant does not "prosecute its claim" in a timely fashion; which, as they note, Edward did not do (*BNSF Railway Company*, *supra*; *M.(K.)*, *supra*). The fact that Edward complained to various people over the years, or that he looked for information over the years, does not defeat the argument that he acquiesced to the situation, say the defendants.

[135] There can be no doubt that through the years 2006-2008 until 2021, Soil and Sea was acting on an assumption of fact: that Edward was no longer a member. While Edward may not have been happy about this state of affairs, it also appears, based on the information I have before me, that he also understood that he was no longer considered to be a member. As he acknowledged in his evidence, that was why he no longer participated in meetings or decisions relating to the company. It is also true that Edward did nothing, at least from a formal perspective, by way of seeking redress.

[136] On the other hand, I am not convinced that Soil and Sea has been prejudiced by this state of affairs or that it has relied upon this shared assumption to its detriment. Soil and Sea has continued to operate with its other members and directors. I have not been directed to any prejudice to Soil and Sea by the fact that Edward has been "off its books" since 2006. Arguably, the only entity prejudiced by the state of affairs since 2006 is Edward himself. If his share was invalidly revoked, he has been unfairly precluded from participation and decision making since then.

[137] In any event, and in the final analysis, I find that I do not need to make any final pronouncements in relation to either laches and/or estoppel by convention. That is because, in my view, the matter of Edward's claim is statute barred.

[138] The act purporting to revoke Edward's share occurred on June 7, 2006. Edward was so advised on that same date. He did not bring forward a claim seeking redress for that act until July 30, 2021.

[139] The *Limitation of Actions Act*, SNS 2014, c. 35, provides that claims are to be brought within two years from the day on which the claim is discovered, or reasonably ought to have been discovered (s. 8(1)(a)). Section 8(1)(b) provides that a claim may not be brought after 15 years from the day on which the act or omission on which the claim is based occurred.

[140] Section 8(2) of that same *Act* provides that a claim is discovered when a plaintiff knows or reasonably ought to have known:

> a) that the injury, loss or damage had occurred;
>
> b) that the injury, loss or damage was caused by or contributed to by an act or omission;
>
> c) that the act or omission was that of the defendant; and
>
> d) that the injury, loss or damage is sufficiently serious to warrant a proceeding.

[141] Our Court of Appeal in *Nova Scotia Home for Colored Children v. Milbury*, 2007 NSCA 52 noted:

> [23] When the defendant pleads a limitation period and proves the facts supporting the expiry of the time period, the plaintiff has the burden of proving that the time has not expired as a result, for example, of the discoverability rule: **Soper v. Southcott**, [1998] O.J. No. 2799 (C.A.) at ¶ 14; **Gray Condominium Corp. No. 27 v. Blue Mountain Resorts**, [2005] O.J. No. 793 (S.C.J.) at ¶ 18.
>
> [24] In the context of a summary judgment application where a limitation defence is pleaded, the defendant applicant must first establish that there is no genuine issue of fact for trial. In this case the defendants have established that the statutory limitation period has long expired. Unless the discoverability principle applies, the defendants satisfied the first part of the summary judgment test on the facts alleged by the plaintiff, that is, that the wrongs were committed at the latest in 1947, and that the longest limitation period, six years, expired in 1972, six years after the plaintiff reached the age of majority in 1966. Since the defendants have met the initial threshold, the plaintiff has to demonstrate that there is a real

> chance of success by presenting evidence that the limitation period has not expired, because of the discoverability principle.

[142] Returning to the motion before the Court (i.e., summary judgment) therefore, the first question is: Does the challenged pleading disclose a "genuine issue of material fact", either pure or mixed with a question of law?

[143] As was the case in *Milbury, supra*, in the present case the statutory limitation period has passed. In fact, by the time of the filing of the action a full 15 years had passed, raising not only the limitation period but also the prohibition at section 8(1)(b). There is no genuine issue of material fact in relation to the expiry of the limitation period. On its face, the claim is statute barred.

[144] The plaintiffs have suggested that the *Act* does not apply to a claim for "non-remedial declaratory relief". No authority was provided for that suggestion.

[145] I disagree. The definition of "claim" in the *Act* is not so limited, although there are types of claims that are specifically excluded from the *Act*. The present situation is not one of those. Obviously if the legislator wished to exclude declaratory relief from the *Act* it could and would have done so.

[146] The plaintiffs further submit that, in their view, the 2006 process for revoking Edward's share was invalid. If they are correct about that, they note, then Edward (in point of fact) was never revoked and remains a member to this day. This means, according to the plaintiffs, that any declaration from the Court to that effect would merely recognize the true state of affairs that has existed throughout. In the logic of the plaintiffs, then, limitation periods do not apply to this claim.

[147] In my view, that argument is unpersuasive. Edward is seeking a *change* to the current state of affairs, which is that he is not a member of Soil and Sea (or is, at least, not recognized as such). If a court were to find that the process revoking his membership was invalid, that court would presumably give Edward the relief he seeks, i.e., declare that he is a member (or alternatively, that he has always been a member).

[148] This is no different than any claim made to a court; in order to obtain relief from a court, a claim must be made. That claim must be made within an appropriate and legislated amount of time.

[149] Edward has known since June 2006 that a process had taken place which purported to revoke his share in Soil and Sea. In my view, that is the date that

meets the criteria of section 8(2) of the *Act*. It should also be noted that this act occurred more than 15 years before the filing of the claim (from June 7, 2006, to July 30, 2021). By application of section 8(1)(b) of the *Act*, such would bar the claim in any event.

[150] Using the process suggested in *Milbury*, *supra*, I find that the defendants have easily met the initial threshold in that the statutory limitation period for Edward's claim has expired, and that no genuine issue of material fact or law exists in regard to that question. I must then consider whether the plaintiff has shown that they retain a real chance of success by "presenting evidence that the limitation period has not expired, because of the discoverability principle".

[151] The plaintiffs argue that Edward's claim was not "discoverable" until much later than 2006. In particular, they note that Edward requested documentation from Soil and Sea in 2008 which he was never provided; and further, that Edward was unaware that David and Edward remained as members in the period following 2006, for a number of years. (Pre-hearing brief, April 14, 2023, para. 446)

[152] As to discoverability, I note the following statements of the law:

> [A] cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence. (*Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147 at p. 224)

[153] And further in *Stanford International Bank Ltd. v. Toronto-Dominion Bank*, 2015 ONSC 6900:

> 33 Discoverability does not require perfect knowledge of a potential claim. Rather, discovery of "sufficient facts" or *prima facie* grounds giving rise to a claim will commence the limitation period: see *Kowal v. Shyiak*, 2012 ONCA 512 (Ont. C.A.) at para. 18; *Coutanche v. Napoleon Delicatessen* (2004), 72 O.R. (3d) 122 (Ont. C.A.), at para, 26. When a defendant raises a limitations issue, the onus is on the plaintiff to prove that the claim was commenced in a timely manner: *McSween v. Louis*, [2000] O.J. No. 2076 (Ont. C.A.), at para. 37.

[154] As I have noted numerous times, Edward was told by email on June 7, 2006, that his share had been officially "withdrawn" at a directors' meeting. Edward then received a letter stating that his membership in Soil and Sea was concluded, and that he had 30 days to appeal. Edward disputed this at the time and throughout; he

has maintained from the very beginning that the act purporting to revoke his membership was unlawful and illegitimate.

[155] It is clear to me that whatever claim Edward might have had, it was "discoverable" then and there. While he may not have known each and every minute detail of the facts at that time, he clearly knew of sufficient facts to raise a claim seeking return or re-instatement of his membership had he wished to.

[156] I find it difficult to understand the plaintiffs' suggestion that Edward's request for additional documents in 2008 somehow caused his claim to be "undiscoverable" until then. I also fail to see the link between David and Peter having stayed on as members of Soil and Sea after 2006, and Edward's claim being "undiscoverable" until he found that out. There is simply no connection between that fact and Edward's claim. Edward's membership was either validly revoked, or it was not. More importantly, David and Peter's status had no impact on the "discoverability" of any claim by Edward to membership.

[157] Having said that, and in any event, this email from Dorothy to Edward was dated 2007:

> I have restructured the Co-op and have appointed Peter Peill and David Peill as Directors.

[158] In my view, given all that I have already said, the plaintiffs do not have a real chance of success on the "discoverability" issue. It seems abundantly clear to me that the claim was discoverable when Edward was told he had been "voted out" as a member and his share was being "concluded". That occurred in June 2006. I have been provided no credible argument upon which a contrary decision could be reached.

[159] I find that summary judgment should issue as to Edward's claim for a declaration that he "is a member of Soil and Sea", due to it being statute (limitation period) barred. That claim is quashed.

3) Whether Soil and Sea has ever been a trust or trustee

[160] This is the third motion for summary judgment brought by the defendants.

[161] The plaintiffs have brought forward a claim that Soil and Sea is in fact a trust, or trustee, and that the plaintiffs are the beneficiaries of that trust. Their pleadings claim that Dorothy created Soil and Sea with the intention that it be a

trust, holding assets in trust for the siblings. The claim references various documents authored or signed by Dorothy wherein she discusses various "benefits" to be gained from the co-op. In the alternative, the plaintiffs claim that Soil and Sea created the trust when it adopted the wording of its mission statement in 2007:

> Soil and Sea Co-op Ltd. is an entity which holds a parcel of land on the South Shore of Nova Scotia. The intent of this co-operative is to maintain the property and ensure the property is available and enjoyed by successive generations of the Peill family.

[162] The defendants seek summary judgment and say that that claim should be struck.

[163] The defendants reference *MacGregor's Custom Machining Limited v. Sanikiluaq Development Corporation*, 2021 NSSC 139, where the Court cited the "three certainties" which must exist for a trust to be found (at para. 24): (1) certainty of intention, communicated by imperative language; (2) certainty of the subject-matter; and (3) certainty of the objects of the trust. The defendants submit that, in their view, none of the certainties are met. They note, in particular, that clear communication of intention was never effected. Furthermore, they say, the object of the trust (i.e., the persons who are to benefit) is not ascertainable by use of the expression "successive generations of the Peill family". They note the case of *The Estate of Joseph Michael Fleming v. Isobel Fleming*, 2008 NLTD 123, where the Court found that the expression "the Fishing License is to stay in the family" did not provide sufficiently certain objects of the trust.

[164] The defendants further point to Dorothy’s affidavit wherein she confirms that it was not her intention that Soil and Sea be a trust.

[165] The plaintiffs respond that, in their view, none of the issues raised by the defendants in this motion represents a bar to a finding that Soil and Sea is, or was meant to be, a trust. They note the following passage from *Oosterhoff on Trusts, 9th ed* (Toronto: Thompson Reuters, 2019, p. 179):

> Certainty of intention is a question of construction. That intention may be express or implied, it may arise from words or acts. Technical language need not be used. A settlor may create a trust without using the word "trust" and, indeed, without fully understanding the concept of trusteeship. A court need merely be satisfied that the person possessed of the property is obliged to hold it for another's benefit.

[166] In the view of the plaintiffs, the mission statement noted above is a key part of the evidence showing intention. It is further noted that the minutes of the meeting where this mission statement was adopted explicitly mention that Soil and Sea is "more a trust than a co-operative".

[167] The plaintiffs state that there is a genuine factual dispute about whether Soil and Sea was actually an income generating business, or, in the alternative, an entity holding land for the benefit of the Peill family. The plaintiffs further state that in that latter event, there are further questions to be answered as to whether any other Soil and Sea assets would also form part of the trust (e.g., the “windfall” money).

[168] The plaintiffs distinguish the *Fleming* case by noting that the expressions "family" and "successive generations of the Peill family" are very different; they argue that the latter expression references direct descendants, an easily identifiable group. This, in combination with the context of Dorothy's over-arching intention to benefit her children, makes the objects of the trust clear in the view of the plaintiffs.

[169] Once again, this is a summary judgment motion. The first question I must ask myself is: Does the challenged pleading disclose a “genuine issue of material fact”, either pure or mixed with a question of law?

[170] The defendants, in their arguments, have identified perceived weaknesses in the plaintiffs’ case on this issue. But weaknesses in a case, even if they exist, do not always mean that there is nothing to debate. As I have said numerous times now, my role in deciding a summary judgment motion is limited. I cannot weigh evidence or assess the strengths and weaknesses of cases. In *Hatch Ltd. v. Atlantic Sub-Sea Construction and Consulting Inc.*, 2017 NSCA 61:

> [23] The role of the motions judge on a summary judgment motion is to determine whether the challenged claim discloses a genuine issue of material fact (either pure or mixed with a question of law). The onus is on the moving party to show there is no genuine issue of material fact. If it fails to do so the motion is dismissed. A material fact being one that would affect the result.
>
> [24] The motions judge must determine whether the evidence is sufficient to support the pleading, but he/she cannot draw inferences from the available evidence to resolve disputed facts.
>
> [25] This prohibition on weighing evidence was addressed by Saunders, J.A. in *Coady*. After discussing the law of summary judgment in Nova Scotia, he provides a list of principles, including:

> [87] ...
>
> 10. Summary judgment applications are not the appropriate forum to resolve disputed questions of fact, or mixed law and fact, **or the appropriate inferences to be drawn from disputed facts.**
>
> 11. **Neither is a summary judgment application the appropriate forum to weigh the evidence or evaluate credibility.**
>
> [Emphasis added]

[171] In my view, the plaintiffs have raised a genuine issue of material fact as to whether the creation of Soil and Sea, in fact, created a trust for future generations of Peill descendants. Having decided that, summary judgment should not issue. It is my considered opinion that this question, and all questions flowing from it, should be dealt with at a trial.

[172] Summary judgment is denied.

4) Whether Edward and Kathi have standing to bring forward their claims

[173] Having decided the previous issue as I have, this motion is easily dealt with. Both Edward and Kathi are children (and therefore descendants) of Dorothy and Jock Peill. If a trust is found to exist for that group, as they allege, they are beneficiaries of that trust. Again, the questions are to be left for trial. Summary judgment is denied.

Interlocutory Injunction

[174] The plaintiffs seek an interlocutory injunction against the defendants. More specifically, the Amended Notice of Motion notes that the plaintiffs seek "that the terms of the Consent Order for Interim Injunction issued by this Court on September 7, 2021, be extended until this litigation is concluded by an Order of this Court and extended to apply to 3324949 Nova Scotia Limited."

[175] However, in their post-hearing brief (p. 59) the plaintiffs have provided a list of terms they would seek to be contained in an injunction moving forward. That list provides extra terms which are not presently found in the consent order.

[176] The order they seek would contain the following provisions (the extra provisions I have bolded):

(a) preventing any steps to remove David Peill as a director and member of Soil and Sea;

(b) setting a quorum for a Soil and Sea directors' meeting and members' meeting at three members, respectively;

(c) preventing any steps, directly or indirectly, to add additional members to Soil and Sea;

(d) requiring best efforts to schedule meetings of the defendant Soil and Sea at times when David Peill is available to attend;

(e) preventing any meetings of members or directors without providing ten days prior written notice of the time and place of the meeting as required by the by-laws;

(f) prohibiting the respondents from taking any steps to alter the lands held by Soil and Sea by tree cutting, excavation, construction, or by removing rocks or other natural materials;

(g) preventing the disposal of any assets or funds of Soil and Sea, except in the ordinary course of business;

(h) preventing the declaration of further dividend income to Peter Peill;

(i) preventing the payment of consulting fees to Peter Peill, Lyndhurst Farms, Minas Seed, or Rachel Aalders or any other individual or corporation directly or indirectly affiliated with Peter Peill or any of the foregoing entities;

(j) adding David Peill or the litigation receiver as a required signatory on all bank and investment accounts held by Soil and Sea;

(k) preventing the movement, investment or use of any money, investments or assets of Soil and Sea until after David Peill is made a co-signer and the accounts are changed to require two signatures for the movement of any funds;

(l) preventing Soil and Sea from enforcing its purported rental policies against Kathi Peill or Joey Schnare, or from passing additional policies affecting Kathi Peill or Joey Schnare's rental site, or from otherwise taking steps to terminate or alter its rental arrangement with Kathi Peill or Joey Schnare.

[177] The three-part test to be applied by the Court when faced with a motion for interlocutory injunction comes from the well-known case of *RJR-MacDonald v. Canada (Attorney General)*, [1994] 1 SCR 311: (1) is there a serious issue to be tried; (2) will there be irreparable harm to the applicant if the injunction is denied; and (3) an assessment of the balance of convenience to the parties.

1. Is there a serious issue to be tried?

[178] The parties have noted that this part of test requires, first, a determination of whether the order sought is mandatory versus restraining. In other words, does the order require that something be done (mandatory); or does it require that something is not to be done (restraining).

[179] The test of whether there is a "serious issue to be tried" is applicable where the order sought is restraining. Where the order sought is mandatory, however, courts have recognized that a different test is to be applied. The moving party must show that there is a strong *prima facie* case to their underlying claim (*R. v. CBC*, 2018 SCC 5).

[180] In the case at bar, proposed items (a) to (i) are, quite clearly, restraining. They could fairly be characterized as provisions meant to keep the current situation stable until such time as the case can be heard on its merits.

[181] On the other hand, proposed item (j) is in the nature of the mandatory order. Item (k), although appearing to be restraining on its face, is entirely related to item (j); it would not be ordered unless item (j) was ordered. Both of these items are new and not contained in the previous interim consent order.

[182] The first part of the *RJR-MacDonald* test, whether there is a "serious issue to be tried", is a reasonably low threshold to meet. The claim must be neither "vexatious nor frivolous" (*RJR-MacDonald* at paras. 54-55).

[183] A strong "*prima facie*" case is a different matter. I note the following from *R. v. CBC, supra*:

> [17] This brings me to just what is entailed by showing a "strong *prima facie* case". Courts have employed various formulations, requiring the applicant to establish a "strong and clear chance of success"; a "strong and clear" or "unusually strong and clear" case; that he or she is "clearly right" or "clearly in the right"; that he or she enjoys a "high probability" or "great likelihood of success"; a "high degree of assurance" of success; a "significant prospect" of success; or "almost certain" success. Common to all these formulations is a burden on the applicant to show a case of such merit that it is very likely to succeed at trial. Meaning, that upon a preliminary review of the case, the application judge must be satisfied that there is a *strong likelihood* on the law and

> the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice.

[184] There are many claims that have been made by the plaintiffs within the present litigation. Broadly described, they are:

1. That Peter has breached his fiduciary duties to Soil and Sea as a Director of that corporation, notably:

- his duty of obedience to the *Act* (in particular, the requirement of "one member, one vote"; the requirements relating to agreements with other entities; the requirements relating to investment of money);
- his duty of obedience to the articles of incorporation, and the by-laws (in particular, the requirements relating to annual general meetings / directors' meetings / special members meetings);
- his duty to carry out the legitimate and resolved wishes of the Board (in particular its resolution to convert from a co-operative to a trust);
- his duty of loyalty to the company and good faith (in particular, the duty not to profit; to avoid conflicts of interest; and not to act for his own interest without informed consent).

2. That Peter has committed breach of contract by agreeing with Dale Kelly and David to convert Soil and Sea to a trust (and, to that end, making Numberco a member of Soil and Sea on a temporary basis), and thereafter breaching that agreement/contract.
3. A Declaration as to the Membership of Edward/David/Numberco.
4. A Declaration of a trust having been formed for their benefit.
5. A remedy in oppression. (The plaintiffs acknowledge that as a co-operative, Soil and Sea is not subject to the statutory oppression provisions/remedy found in the *Companies Act*, RSNS 1989 c. 81. It is their position that the Court should recognize a common-law oppression remedy, and that it should find such a remedy to be appropriate in the present case.)

[185] Some of those claims raise questions of new law. Some of those claims will also, I expect, be met with reasonably strong evidence and/or arguments against them; for example, the contractual claim, the trust claim.

[186] For the purposes of this decision, I do not consider any of the plaintiffs' claims to be vexatious or frivolous.

[187] The defendants have called this dispute a mere "family squabble". While that may be true, this dispute also involves control over a company which is of enormous value. Peter's actions in relation to that company, particularly in latter years, have caused the plaintiffs many concerns; and while Peter strongly defends his actions, it cannot be said that the plaintiffs' concerns are without merit. I have no difficulty in saying that there are serious issues to be tried.

[188] As noted, showing a "*prima facie*" case is another matter. The plaintiff has put forward lengthy submissions as to each of its claims providing argument as to why, in their view, each of their claims is strong. It is not my intention to assess each of the plaintiffs' claims in detail at this stage of the matter; I am merely to determine whether the first step of the *RJR-MacDonald* test has been met.

[189] According to the *CBC, supra*, case, a "*prima facie*" case (in the context of an application for injunctive relief) means that the plaintiffs' claims have reached the standard of "almost certainly successful", or that the plaintiffs are "clearly in the right". I am unconvinced that the plaintiffs have reached that standard.

[190] I therefore find that where the proposed injunction terms are prohibitive, the first part of the *RJR-MacDonald* test is met. Where the proposed injunction terms are mandatory, it is not. That would include proposed terms (j) and (k).

[191] As to proposed term (l), I see no specific claim made by the plaintiffs in relation to the rental agreement between Kathi and Soil and Sea. On its face, therefore, it is unclear to me whether such a term should be included. I seek further submissions from counsel as to whether such would be appropriate.

2. Will there be irreparable harm to the applicant if the injunction is denied?

[192] In *RJR-MacDonald, supra*, at page 341:

> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other.

> Examples of the former include instances where one party will be put out of business by the court's decision (*R.L. Crain Inc. v. Hendry* (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation (*American Cyanamid*, *supra*); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (*MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 W.W.R. 577 (B.C.C.A.)). …

[193] The plaintiffs note that Peter, in particular, has a history of attempting (or actually making) unilateral changes to the Soil and Sea membership and governance. Without an injunction in place, say the plaintiffs, Peter may make (or attempt to make) further changes or undertake other such actions (in an effort to eliminate any resistance to his wishes).

[194] For example, Peter has made efforts to remove David as a director/member of Soil and Sea in the past; he very well might attempt to do so again. Without David as a director, say the plaintiffs, Peter would essentially have free reign to do as he pleases with Soil and Sea. For example, he might choose to indebt Soil and Sea to himself, or to one of his companies. The plaintiffs note that this type or possibility of prejudice has been noted by courts in other cases (*Hong v. Lavy*, 2017 NSSC 329; *Civelli v. Pacific Hunt Energy*, 2015 BCSC 1051). In addition to possible financial loss, the plaintiffs are concerned that such a situation would result in a sale of Soil and Sea lands.

[195] The plaintiffs have raised the issue of Kathi, who (as I noted) has built a small cottage on Soil and Sea property and has a long-term rental agreement with Soil and Sea. Should Peter decide to terminate that arrangement, or change its terms, the loss of that cottage could not be compensated in monetary terms. (Again, I note that there is no specific claim made by the plaintiffs in respect of that matter.)

[196] The defendants submit that the plaintiffs' concerns are speculative and that, in any event, any possible loss they have raised could be compensated in damages and therefore does not constitute "irreparable" loss.

[197] This part of the test has been described as a "risk balancing "exercise (see Robert Sharpe, *Injunctions and Specific Performance*, CLB 2017 at para. 64).

[198] I accept that there is a significant risk that without an injunction in place, Peter may continue with the process he commenced during the fall of 2021, i.e., of

removing David as a director of Soil and Sea. Should he do so, I am also satisfied that the harm caused to the plaintiffs would not necessarily be compensable (or entirely compensable) by way of damages.

3. Balance of convenience

[199] Again, from *RJR-MacDonald, supra*, at page 342:

> The third test to be applied in an application for interlocutory relief was described by Beetz J. in Metropolitan Stores at p. 129 as: "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits". In light of the relatively low threshold of the first test and the difficulties in applying the test of irreparable harm in *Charter* cases, many interlocutory proceedings will be determined at this stage.
>
> The factors which must be considered in assessing the "balance of inconvenience" are numerous and will vary in each individual case. …

[200] The plaintiffs submit that the point of the interim injunction, as well as the injunction they presently seek, is/was to keep Soil and Sea in a position of “status quo” until the Court can hear and decide the issues. They note that the defendants will suffer no harm with the granting of this injunction.

[201] The defendants respond that, in their view, Soil and Sea is the party who will suffer harm, as they suggest that the company’s business operations would be significantly impacted by the proposed terms of such an order. For example, the defendants note in their pre-hearing brief at paragraph 76, the proposed terms would mean that "the management of the cooperative will be saddled with David, a proven obstructionist director ...".

[202] I have not been directed to any possible prejudice to the other defendants should an injunction be granted.

[203] Notably, counsel for the receiver for Soil and Sea is of the view that "the balance of convenience favours some form of interlocutory injunction" (letter of Ian Dunbar, July 14, 2023).

[204] I agree. In my view, the balance of convenience strongly favours a “holding” of the status quo for Soil and Sea until such time as a final determination can be made.

[205] The defendants have suggested that the plaintiffs' request for interlocutory injunction should be denied on the basis that they have not come to court with "clean hands". They suggest, for example, that the plaintiffs' claims about Peter are wholly untrue, scandalous, and were made only to negatively affect the reputation of Peter; that David has, in fact, breached his duties to Soil and Sea by engaging in litigation against it; and that David has made claims against Peter for actions which David himself agreed to, or also performed.

[206] I do not accept that as a valid objection to the granting of this injunction. The plaintiffs have brought an action and have made certain allegations; the defendants deny those allegations. That is the nature of litigation. I do not see this particular situation as markedly different from most or all other claims made to this Court; certainly not to the extent that it would preclude the seeking or granting of injunctive relief.

[207] This particular litigation will rise and fall, in large measure, on the trial judge's findings of facts. The allegations made by the plaintiffs may be found to be true, or not. At this stage I cannot say who is right or wrong, nor is it my place as a motions judge.

[208] In the interests of keeping Soil and Sea stable until this litigation is dealt with, I am prepared to grant an interlocutory injunction, with suggested terms (a) through (e), as well as (g) and (h), to be included.

[209] As to suggested terms (f) and (i), I seek additional submissions from counsel. Term (f) may need re-wording to allow for day-to-day maintenance on the lands; term (i) may require exceptions to be provided for. I note that I have already been provided with submissions from counsel for the receiver expressing concerns about those terms. I would seek submissions from counsel for both the applicants and respondents as to those particular terms, as to their appropriateness and wording (if deemed appropriate).

[210] As to the suggested term (l) relating to Kathi/Joey, as I already indicated, I also seek submissions from counsel.

[211] Lastly, and as I noted earlier, I consider proposed terms (j) and (k) to be mandatory in nature, and subject to a legal test which has not been met. I also consider that the order I am prepared to make is meant to hold the status quo until the matter can be dealt with. Proposed terms (j) and (k) are not in that nature. I will not be including those terms in this order.

Contempt (civil)

[212] The plaintiffs argue that Peter has committed a number of actions which amount to contempt of the September 7, 2021, interim injunction.

[213] The specific terms in question are as follows:

> 4. Until as this litigation is concluded by an order of the Court, or until such time as this injunction may be varied by a future order of the Court, the Defendant Peter Peill is hereby ordered:
>
> ...
>
> (f) not to take any steps to alter, or to cause others to alter, the lands held by Soil and Sea by tree cutting, excavation, construction, or by removing rocks or other natural materials;
>
> (g) not to dispose of any assets or funds of Soil and Sea, except in the ordinary course of business;
>
> …

[214] The plaintiffs point out the following actions which, in their view, constitute breaches of these sections of the interim order:

1. The sale of "rocks" from Soil and Sea to Peter (noted and documented in the November 30, 2021, general ledger).

2. The excavation of a trench on Soil and Sea property since the time of the order.

3. The removal of rocks from Soil and Sea property, coinciding with the building of a rock wall constructed on Peter's property and, the plaintiffs claim, also on Soil and Sea property.

[215] Peter has responded as follows:

1. The "rocks" noted by the plaintiff were, according to Peter, harvested by him before the interim order was made; he was simply invoiced for them and moved them at a later time. Furthermore, says Peter, there is nothing in Soil and Sea's incorporation documents that prevents the selling of rocks in the ordinary course of business.
2. The "trench" referenced by the plaintiffs is called a "French drain" by Peter. He says that he had noticed that a path used by guests of the property needed irrigation as it would get very muddy; therefore, and within his ordinary duties as property manager of the lands, he determined that a drain would be an appropriate improvement to the path. While he acknowledges that this did technically require some excavation of earth, it did nothing to "alter" the lands as is prohibited by the order and represented an improvement to the property.
3. In relation to the rock wall, Peter acknowledges that he has built such a wall on his property. He denies that this wall extends onto Soil and Sea property. He points out that while the plaintiffs have suspicions that this rock wall extends onto Soil and Sea's land, there is, in fact, no evidence before the Court as to where the property line is.

[216] In *Soper v Gaudet*, 2011 NSCA 11, the Court outlined the elements of civil contempt:

> [23] In **Brown v. Bezanson**, 2002 SKQB 148, Justice Ryan-Froslie stated the fundamentals of a contempt proceeding at ¶ 12-14:
>
> > 12 A proceeding for civil contempt is available to redress a private wrong by forcing compliance with an order for the benefit of the party in whose favour the order was made. Sanctions for civil contempt are thus mainly coercive in nature. Their aim is to force compliance with the order. They may also be punitive where the circumstances warrant it.
> >
> > 13 The burden of proof in contempt applications is beyond a reasonable doubt and rests with the party alleging the contempt.
> >
> > 14 In a civil contempt proceeding the following elements must be proven beyond a reasonable doubt:
> >
> > 1. The terms of the Order must be clear and unambiguous;
> >
> > 2. Proper notice must be given to the contemnor of the terms of the order;

> 3. Clear proof must exist that the terms of the order have been broken by the contemnor;
>
> 4. The appropriate *mens rea* must be present.

[217] A finding of contempt is a serious matter, and such a finding should not be arrived at lightly. Courts have often referenced that contempt proceedings are to be used with restraint, and that other options should be considered if appropriate in the circumstances.

[218] I find as follows:

1. I agree that there is no definitive evidence that Peter's rock wall extends onto Soil and Sea property. The statements from Edward and David relating to the property line, which read "I believe that …" or "as I understand it …" are not evidence of the location of the property line, and certainly are not enough to provide a foundation for a positive finding of contempt.
2. I accept that the trench (or "French drain") was built for reasons of maintenance, which did not "alter" the lands as prohibited by the words and spirit of the order.
3. I cannot find any reason to reject the evidence of Peter in that the transaction for the sale of the rocks was entered into before the order; and further that, in any event, the ordinary course of business of Soil and Sea would not exclude such a possible sale.

[219] In the context of a motion seeking a finding of contempt, the Court must receive clear and cogent evidence of an intentional breach of a court order. In my view, I do not have such evidence before me. I cannot find that the interim order has been breached intentionally by Peter as suggested by the plaintiffs.

[220] It is my intention that the interlocutory injunction, as will result from this decision, will be carefully drafted. I refer to the earlier part of my decision seeking input from counsel and I ask that they consider their proposals carefully.

[221] I dismiss the motion seeking a finding of contempt as against Peter.

Striking the jury notice

[222] Lastly, the plaintiffs seek the striking of the defendants' jury election.

[223] The *Civil Procedure Rules* note:

> **CPR 52.02 Jury election**
>
> (1) For the purpose of Section 34 of the *Judicature Act*, the provisions in that Section respecting jury trials and procedure are modified by this Rule 52.02.
>
> .....
>
> (3) Parties to an action, to which Part 12 does not apply, must elect trial by judge or trial by jury in the request for a date assignment conference or the memorandum for the date assignment conference judge.
>
> (4) An action must be tried by a judge without a jury, unless a party elects trial by jury in accordance with this Rule 52.02.
>
> (5) An action in which a party elects trial by jury must be tried by a jury, unless another party makes a motion for an order that the action be tried by a judge and satisfies the judge hearing the motion on either of the following:
>
> (a) under a Rule, under legislation, or by operation of other law, the action cannot be tried by a jury;
>
> (b) the action is not for a cause referred to in subclause 34 (a)(i) of the *Judicature Act*, and justice requires trial by a judge rather than by a jury.

[224] In the present case, the plaintiffs argue that 52.02(5)(b) applies, and that justice requires trial by a judge alone rather than by a judge and jury.

[225] In *Anderson v. Cyr*, 2014 NSCA 51, our Court of Appeal noted:

> [41] In summary, **MacIntyre** and **Quinn Estate** suggest that a jury notice may be struck where:
>
> i) the substantive issue is one of law not fact,
>
> ii) the issues of law and fact are so entwined with one another as to be virtually inseparable,
>
> iii) where the case involves scientific or technical issues that cannot be conveniently presented to the jury, or
>
> iv) where the evidence is extensive and complex.

> [42] The case law since 1972 reveals that at least one of these four reasons is usually present when a judge determines that there are cogent reasons for striking a jury notice or that justice requires trial by judge alone. This should not be taken as suggesting that these reasons are exhaustive, nor that these factors are mutually exclusive. … As almost every judge notes on a motion to strike a jury notice, each case turns on its specific facts and issues to be determined.

[226] The Court goes on to a review of various Nova Scotia cases dealing with such applications, to then arrive at the following:

> [96] What can we take from this discussion? I suggest the following:
>
> 1. Parties have a *prima facie,* substantive right to a jury trial in Nova Scotia.
>
> 2. In determining whether justice requires a jury notice to be struck a court must identify situations and provide cogent reasons for why the issues are too complex to be decided by a jury.
>
> 3. Assessment of complexity involves a consideration of the legal, factual and evidentiary issues in each case.
>
> 4. Factual complexity, by itself, will rarely be sufficient to strike a jury. For example, cases calling for medical, scientific or other specialized knowledge on the factual issues with conflicting and contradictory opinions from experts should not, save in the rarest of cases, be taken from a jury.
>
> 5. In cases where there are issues of fact and issues of law and the issues of law can be isolated from the issues of fact, it would, again, be rare to strike the jury notice.
>
> 6. The fact that judicial instruction on the law may be difficult is not itself a ground for striking a jury.
>
> 7. If the issues of fact are difficult to isolate and are clearly interwoven with the issues of law, the motions judge must decide if the issue has risen to a level that it ought to be taken from the jury, always keeping in mind that it is a *prima facie* and substantive right that a party is entitled to have a trial by jury.
>
> 8. An inordinately long trial involving voluminous documentation and complex legal issues, for practical reasons, may simply make a jury trial unworkable and the jury notice should be struck.
>
> 9. The length of the trial is not, itself, a reason to strike the jury notice.

> 10. The time for rendering a decision is not a determining factor in striking a jury notice.
>
> [97] This is not an exhaustive list of the considerations to be taken into account by a motions judge in determining whether to strike a jury notice. However, it is intended to provide some guidelines within which judges can operate.

[227] Obviously, any such motion must assess the particularities of the specific case before it. In the present case, I take into account the following factors:

1. It is unclear to me whether this trial would involve "voluminous" documentation. Certainly, as I have already noted, the present motions did involve voluminous documentation in the form of lengthy and multiple affidavits. However, the trial would presumably not involve affidavits, but rather *viva voce* evidence.

   Having said that, there would almost certainly be some documentary evidence introduced at trial. There might be, for example, the introduction of minutes from members' or directors' meetings; incorporation documents; or emails. As far as the evidence I know of at this point, I would not necessarily characterize that documentation as "voluminous".

2. There is no question, however, that the trial would be lengthy. The *viva voce* evidence would be extensive, from multiple witnesses, from multiple points of view, and going back many years. I accept that all of it will be reasonably challenging to keep track of. There have been a multitude of occurrences, discussions, and disagreements that have arisen since the incorporation of this co-operative in 1989.

3. I do not expect that there would be expert evidence.

4. I do expect the facts and law involved in this case to be reasonably complex for a lay person. The intricacies of corporate structuring, share purchases, and the differences between corporations, co-operatives, and trusts (in particular) are not within the day-to-day knowledge of the average person.

5. The plaintiffs have put forward a claim in common law for an oppressive remedy; such a claim seeks the making of new law. Should a court find that such a claim is available to the plaintiff, one

> presumes that a complicated question of mixed fact and law would need to be put to the jury. Again, these are difficult concepts, both factually and legally.
>
> The defendants have noted that it is their intention to bring forward another motion, at some point in the future (but prior to trial) seeking summary judgement as to the "oppressive remedy" claim. While that may be so, this Court can only act on the record before it; that claim, at present, remains. That issue adds to the complications that exist here.

[228] The plaintiffs note that, in particular, the various issues relating to trusts and the law of trusts in this case make it both factually complex, and raises issues interwoven with fact and law. They note that this applies to the question as to whether there was a contract to complete the trust transaction; the claim that Soil and Sea is in fact and law a trust or trustee; and the issues surrounding Peter's alleged breaches of fiduciary duty.

[229] The plaintiffs have referred me to the case of *Xu v. Hu*, 2021 BCCA 2. In that case the British Columbia Court of Appeal held that in trust law, "certainty of intention" is a question of fact, but "certainty of subject matter" and "certainty of object" are questions of mixed fact and law.

[230] Further noted is the case of *Big X Holdings v. Royal Bank*, 2014 NSSC 368, where a case involving questions of fiduciary duties, and implied terms of contracts, was deemed inappropriate for a jury:

> [35] … The discussion shows that factual complexity is "rarely sufficient to take away the right to a trial by jury" (para. 54), but a case dominated by questions of law (para. 52) and a case in which fact-finding and legal determinations are virtually inseparable is usually more suited to trial by judge (para. 53).
>
> …
>
> [49] Where implication of a contractual term is arguable, the determination will usually be too nuanced for a clear division of facts, extricable for the jury, and law. In this case, the court needs to determine the facts in all of their detail when determining the ultimately legal question of an implied term. In other words, the facts and the law will be too intertwined for anyone to decide the facts without an eye on the law and *vice versa*.
>
> …

> [52] Like an arguable case for or against an implied term, a serious argument for a *per se* fiduciary relationship involves a nuanced and highly circumstantial inquiry. Law is not easily severed from fact.
>
> [53] The content of a resulting fiduciary duty also entwines fact and law to such a degree that the questions may be inextricable.
>
> [54] Overarching all that, is Justice Warner's conclusion in *Geophysical*, which I follow, that fact-finding on an equitable claim is not for a jury. …

[231] I find that this case is similar to *Big X*. The case at bar would involve a lengthy trial with a great deal of evidence presented. It would also (and more importantly for my purposes here) require an analysis of some very complicated concepts of mixed fact and law, including but not limited to:

> (a) the claimed existence of a trust (as opposed to an incorporated co-operative) and the "three certainties" required for the finding of a valid trust;
>
> (b) the claimed existence of a contract (relating to that same trust) and breach of that contract;
>
> (c) claimed breaches of the fiduciary duties of Peter as a director of a co-operative; however, and in the alternative, if Soil and Sea is found to be a "trust" then I would assume there would need to be consideration of Peter's duties in relation to that trust, what they are, and whether they were breached;
>
> (d) claimed "oppressive remedies" in the case of a co-operative (a new claim in common law).

[232] All of these claims would require, as noted by the Court in *Big X*, an intimately "intertwined" assessment of both fact and law. In my view, such would be entirely ill-suited for a jury.

[233] I recognize and fully acknowledge that litigants have a *prima facie*, substantive right to a jury trial. However, for the reasons I have described, in my view, the present matter is simply not a case to heard by a jury. I find that the interests of justice require that this trial take place before a judge alone. The plaintiffs' motion to strike the jury notice is allowed.

[234] This concludes my decisions in relation to all motions that were before me.

[235] I ask that counsel discuss and determine if agreement on costs can be reached. If not, counsel please provide me with submissions as to costs within 30 days of the present decision.

Boudreau, J.