SUPREME COURT OF NOVA SCOTIA

Citation: *Conrad, Merzetti v. Arichat Metals et al*, 2024 NSSC 120

Date: 20240229
Docket: 496393
Registry: Halifax

Between:

Arichat Metal Fabrication Ltd. and John Boudreau

Moving Parties on Motion
(Respondents in Proceeding)

v.

Leslie J. Conrad, Edwin Conrad, Dan Merzetti and Sherry Merzetti

Respondents on Motion
(Applicants in Proceeding)

and

Gregory Boucher

Watching Brief on Motion
(Respondent in Proceeding)

and

1766134 Nova Scotia Limited

Watching Brief on Motion
(Third Party in Proceeding)

DECISION
Motion for Summary Judgment on Evidence

Judge: The Honourable Jeffrey R. Hunt

Heard: October 16, 2023 at Halifax, Nova Scotia

Decision: February 29, 2024

Counsel: Matthew J.D. Moir and Micaela Sheppard, counsel for the Moving Parties on Motion (Respondents in Proceeding)
Michelle Kelly, K.C., and Lisa Delaney, counsel for the Respondents on Motion (Applicants in Proceeding)
Adam Harris, counsel for Gregory Boucher and 1766134 Nova Scotia Limited (Watching Brief on Motion)

By the Court:

Introduction

[1] The matter before the Court is a summary judgment motion based in an alleged limitations defence. The parties advancing this motion, Arichat Metal Fabrication Ltd. and John Boudreau, are the respondents in the underlying proceeding. They are seeking dismissal of the claim filed against them on February 7, 2020. They say the applicable limitation period had expired prior to the filing of the claim.

[2] The respondents on this motion, and applicants in the underlying proceeding, are Leslie and Edwin Conrad and Dan and Sherri Merzetti. They argue their application was filed within two years of the cause of action becoming known or knowable to them.

[3] The claim filed by them on February 7, 2020 alleges that the parties now seeking summary judgment, together with another individual, Gregory Boucher, engaged in a series of sham corporate transactions characterized by asset stripping and the swapping of corporate identities. They say these actions were carried out in furtherance of a plan to defeat recovery on a different claim then being pursued by the Conrads and Merzettis.

[4] The responding parties point to the contents of certain emails which they say confirm that the corporate restructuring moves were motivated by an intention to strip the corporate entity and leave a shell that could not be recovered against.

[5] They seek a piercing of the corporate veil so as to permit recovery against Gregory Boucher, John Boudreau and any of their corporate entities which benefitted from the wrongful acts.

[6] Arichat Metal Fabrication Ltd. and John Boudreau acknowledge that certain corporate reorganization steps were undertaken. They deny any nefarious intent behind any of these moves. Further, they argue that the facts being pointed to by the other side, as the basis for their claim, should have been either known or discoverable prior to February 2018.

[7] If this were to be the case, then the limitation period would have expired by the time the claim was filed and the proceeding would be statute barred by operation of the *Limitation of Actions Act*, R.S.N.S. 1989, c. 258.

Issue

> **Considering s. 8 of the *Limitation of Actions Act,* including the operation of the discoverability principle, are the moving parties entitled to an order, pursuant to Rule 13.04, granting summary dismissal of the claim advanced by the respondents?**

Record on the Motion

[8] The evidentiary record before the court is as follows:

Advanced by Moving Parties

1. Affidavit of Lindsay Corey, sworn April 1, 2021.
2. Affidavit of Brittney Durnford, sworn July 10, 2023.

Advanced by Respondents

1. Affidavit of Scott Johnson, sworn May 20, 2021.

[9] The moving party opted to cross examine Scott Johnson on his affidavit. I will make reference in these reasons to a number of the points canvassed in that questioning.

[10] Two of the parties in the underlying proceeding did not actively participate in this summary judgment motion. These were Gregory Boucher (Respondent) and 1766134 Nova Scotia Ltd. (Third Party). Through counsel they indicated their support for the position advanced by the moving parties, but otherwise largely adopted a watching brief.

[11] I should also note that I am aware there is some potential for confusion around identification of parties in these reasons. The names of various corporate entities changed over time. Sometimes more than once. Additionally, since 2010 the parties have variously been plaintiffs, defendants, applicants, respondents and moving parties in a number of different proceedings and motions.

[12] In an effort to limit confusion, I will refer throughout the balance of these reasons to Arichat Metal Fabrication Ltd and John Boudreau as the Moving Parties, and to the Conrads and Merzettis as the Respondents.

Context of the Motion and Evidence

[13] It is something of a challenge to offer a distillation of the history of this matter.

[14] The current dispute has its roots in a prior litigation, commenced in 2010, which alleged negligent manufacture of residential oil tanks. These tanks were built by an entity originally known as Arichat Fisheries Limited which changed its name in July 1997 to AFL Tank Manufacturing Limited ("AFL"). This company was registered with the Nova Scotia Registry of Joint Stocks and bore corporate registration number 1766134. The Director and President was Gregory Boucher, and the company had a registered office at 328 Robins Road, Arichat, Nova Scotia.

[15] AFL manufactured residential oil tanks that were installed on the properties of the Respondents. These tanks suffered failures. In June 2010 the Respondents became named plaintiffs in an action (SH No. 331744) against AFL. Although the style of cause in the action erroneously omitted the word "Tank" from the

corporate name of the defendant, the full name was correctly stated in the body of the Statement of Claim.

[16] The 2010 proceeding was advanced by the insurer for the Respondents and was based in a right of subrogation. Shelley Wood acted as counsel of record on the matter. Scott Johnson, who filed a detailed affidavit in this motion on behalf of the Respondents, was the senior responsible claims manager.

[17] The allegations included negligent manufacture of the tanks resulting in the escape of fuel oil. This led to a claim based in allegations of significant contamination with consequential loss and damage.

[18] A defence was filed in August 2010. Ivo Winter was counsel of record for AFL. The Statement of Defence admitted the correctness of the portion of the Statement of Claim which identified AFL Tank Manufacturing Ltd. as the legal entity being sued.

[19] Shortly after these events, and effective December 20, 2010, a new corporate entity known as 3250450 Nova Scotia Limited (“325 NSL”) was incorporated by John Boudreau. There followed, in rapid succession, a number of events involving AFL and 325 NSL that will require further discussion and consideration.

[20] On December 31, 2010, AFL filed a name change request with the Nova Scotia Registry of Joint Stocks. As a result of this change, AFL Tank Manufacturing Limited became known as 1766134 Nova Scotia Limited ("176 NSL"). This was done by Special Resolution of AFL and became effective January 1, 2011. The pleadings in the 2010 matter were never amended to reflect this change.

[21] Also effective on January 1, 2011, the newly created entity known as 325 NSL changed its corporate name to AFL Tank Manufacturing Limited. These changes resulted from an asset purchase and sale agreement between the companies, together with a further limited company owned by John Boudreau. The existence of this agreement of purchase and sale was not known to the Respondents until many years later.

[22] The Respondents submit that, while this was not appreciated at the time, this series of corporate moves was accompanied by a simultaneous draining of assets that was concealed. Their claim seeks to pierce the corporate veil and permit recovery against those, including the Moving Parties, who they say benefitted from the illegitimate components of the transactions.

[23] The Moving Parties argue none of these reorganization steps were carried out surreptitiously. They say all these measures were part and parcel of a normal

asset purchase and sale. All required public registrations were carried out with the Registry of Joint Stock Companies. These documents form part of the record on this motion. They further submit that these transactions were arms length and at fair market value. They argue that assets were left in 176 NSL to address any potential liability in the 2010 proceeding.

[24] Following the corporate reorganization steps in late 2010 and early 2011 the litigation continued to advance. Document disclosure took place and discovery examinations were scheduled. Gregory Boucher continued to be presented as representative of the defendant in that proceeding.

[25] On September 9, 2011, counsel for AFL provided its Affidavit Disclosing Documents (Corporation). The signatory on the affidavit was Gregory Boucher who identified himself as "Secretary of AFL Tank Manufacturing Limited, the Defendant in this matter" and stated that "the Defendant, AFL Tank Manufacturing Limited was a Limited Company incorporated under the laws of the Province of Nova Scotia".

[26] Gregory Boucher was discovered on April 9, 2013. During questioning he testified that he was no longer president of "AFL", with this position now being filled by his business partner, John Boudreau.

[27] While the Moving Parties argue that this information alone should have begun to alert the Respondents to the altered corporate landscape, it is the next development that they point to as being a true watershed moment.

[28] On October 22, 2015, Ralph Ripley, who was then co-counsel to 325 NSL, wrote to then counsel for the Respondents, as follows:

> I have been retained by the Company which currently is named AFL Tank Manufacturing Limited (Nova Scotia Registrar of Joint Stocks Companies No. 3250450 – please see attached). You will notice from the attached that Company was incorporated on December 20, 2010.
>
> At the time this action was commenced and when the defence was filed there was a body corporate that bore the name AFL Tank Manufacturing Limited (also please see attached). However, as you will see from the attached, since December 20, 2010 that Company bears the name 1766134 Nova Scotia Limited. I assume that the Company served with this action, and on whose behalf a defence was filed (given the name of the Company at the time Defence was filed).
>
> On behalf of AFL Tank Manufacturing Limited however I have been instructed to advise you of this information.

[29] As noted in the letter, the correspondence attached copies of the then current corporate profiles for 325 NSL and 176 NSL. A review of the printout for 325 NSL indicates that both Boucher and Boudreau were then officers and directors of the company.

[30] The following month a further corporate name change occurred. By Special Resolution AFL Tank Manufacturing Limited changed its name to Arichat Metal Fabrication Ltd. (“Arichat Metal”). This request was put to the Registry of

Joint Stocks in late November 2015 and became effective December 2, 2015. At the same time, John Boudreau became the sole officer and director of the newly re-named entity.

[31] It is acknowledged by the Respondents that on December 16, 2016 they or their counsel obtained the corporate profile of Arichat Metal from the Registry of Joint Stocks website.

[32] This document confirmed the following. The company previously known as 3250450 Nova Scotia Limited had changed its name a second time from AFL Tank Manufacturing Limited to Arichat Metal Fabrication Limited. Also on December 5, 2015 Gregory Boucher had been removed as an officer or director, leaving John Boudreau as the sole person named in the profile.

[33] Four days later, on December 20, 2016 Ms. Wood wrote to Scott Johnson discussing, in part, this issue of corporate structure:

> "…It's clear from the information on the NS Registry of Joint Stocks that AFL is not operating as AMF and that Greg Boucher does not appear to be involved. He did reference this at the discovery that he was now involved with a partner Mr. John Boudreau. Because these are private companies, we have no visibility into the ownership structure, assets or liabilities. We are searching the public registries for any information we can find about AFL's assets and liabilities. Boucher and AFL being judgment proof would certainly explain his very cavalier attitude to this litigation and staunch refusal to participate in any ADR including a judicial settlement conference."

[34] It was accepted by the parties that the line in the first sentence of this correspondence "…AFL is not operating as AMF…" contained a typographical error. The line ought to have read "…AFL is now operating as AMF…".

[35] The Moving Parties argue that the reference in this letter to the potential judgment proof status of Boucher and AFL is highly significant. They submit that this knowledge, coupled with what the Respondents had learned in 2015, meant they either knew, or ought to have known through the exercise of reasonable diligence, that a potential claim had arisen.

[36] The Respondents disagree with this assertion. They argue that in 2015-2016 they had very little insight into the finances of the company. While they were beginning to have suspicions as to what might have taken place, this alone was not enough. Mr. Johnson testified that while the Respondents were now aware of the changed corporate structure this was entirely different from an appreciation that this had been accompanied by a surreptitious draining of assets. The Respondents say had no insight into that point, and no means of gaining such insight, until they held a judgment. While they knew certain (potentially legitimate) corporate moves had taken place, their awareness of the alleged intentional asset draining came later.

[37] The Respondents point out that the Moving Parties have asserted throughout this matter that these corporate transactions were designed to unfold over a number of years. While certain agreements were signed in 2011, various of the steps (such as certain transfers) were only to take place years later in 2015 and 2016. The Respondents say the very nature of this as a slow developing and multi-year process served to obscure the true nature of what was taking place.

[38] The 2010 litigation continued to unfold through 2017 and into 2018. In February 2018, as the 2010 proceeding appeared to be getting closer to a possible trial, AFL withdrew its defence and consented to judgment. It was agreed that damages were to be assessed. In January 2019 the damages figure was settled at the sum of $754,262.00.

[39] In his affidavit evidence Scott Johnson stated that he was advised by Shelley Wood on April 18, 2018 that she had recently learned that a company called Arichat Metal Fabrication Limited had purchased the assets of AFL Tank Manufacturing Ltd.

[40] In cross examination Mr. Johnson confirmed that in the April 18, 2018 discussion he did learn new information and this included confirmation that corporate assets had been purchased. This, he testified, was new information and the first time he possessed this knowledge.

[41] On December 5, 2019 Gregory Boucher was discovered in aid of execution. He was questioned based on his stated role as Secretary and Recognized Agent of AFL. During his evidence he stated that AFL had ceased operations in 2010 and had no assets to respond to the 2018 judgment.

[42] The Respondents submit this December 2019 discovery was the point where their present claim was discoverable by them. They formed the belief at this time that the corporate reorganization had not only reorganized the structure and officers but also had purposely and secretly denuded the company of assets. Believing they would never be able to recover on their judgment, they acted approximately two months later to file the February 2020 claim which is the subject of this summary judgment motion.

[43] The Respondents say that, since the filing of the 2020 proceeding, they have obtained further evidence which points to the corporate transactions carried out by the Moving Parties as being improper in nature. These include emails between the principals of the companies, Gregory Boucher and John Boudreau. I will return to a discussion of these points later in these reasons.

Civil Procedure Rule and Caselaw

[44] Civil Procedure Rule 13.04 provides the framework for considering summary judgment on evidence:

> **13.04 Summary judgment on evidence in an action**
>
> (1) A judge who is satisfied on both of the following must grant summary judgment on a claim or a defence in an action:
>
> (a) there is no genuine issue of material fact, whether on its own or mixed with a question of law, for trial of the claim or defence;
>
> (b) the claim or defence does not require determination of a question of law, whether on its own or mixed with a question of fact, or the claim or defence requires determination only of a question of law and the judge exercises the discretion provided in this Rule 13.04 to determine the question.
>
> (2) When the absence of a genuine issue of material fact for trial and the absence of a question of law requiring determination are established, summary judgment must be granted without distinction between a claim and a defence and without further inquiry into chances of success.
>
> (3) The judge may grant judgment, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.

[45] The motion turns on the evidence, and "the pleadings serve only to indicate the issues": Rule 13.04(4). A party contesting the motion must "provide evidence in favour of the party's claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross-examination, or other means permitted by a judge": Rule 13.04(5). The judge has the discretion to determine a question of law on the motion, in the absence of a genuine issue of material fact for trial, and to adjourn the hearing "for any just purpose": Rule 13.04(6). The court may order

"any remedy the court provides on the trial or hearing of a proceeding": Rule 13.07.

[46] The law with respect to summary judgment on evidence in this province cannot reasonably be the subject of disagreement. The Court of Appeal has recently delivered a complete summary of the relevant legal principles. This discussion is found in *Arguson Projects Inc v. Gil-Son Construction Limited*, 2023 NSCA 71 at paragraphs 31 through 42. I incorporate here by reference the entirety of this discussion which provides a synthesis of the law, including most importantly the leading case of *Shannex v. Dora Construction Ltd*, 2016 NSCA 89 together with a number of other authorities which guide the application of the *Shannex* principles.

[47] In *Shannex*, at paragraphs 34 through 42, Justice Fichaud set out five sequential questions to be asked when summary judgment is sought pursuant to Rule 13.04:

> 1. Does the challenged pleading disclose a genuine issue of material fact, either pure or mixed with a question of law?
> 2. If the answer to above is No, then: does the challenged pleading require the determination of a question of law, either pure, or mixed with a question of fact?
> 3. If the answers to the above are No and Yes respectively, does the challenged pleading have a real chance of success?
> 4. If there is a real chance of success, should the judge exercise the discretion to finally determine the issue of law?

> 5. If the motion for summary judgment is dismissed, should the action be converted to an application, and if not, what directions should govern the conduct of the action?

[48] As to the meaning of a "real chance of success", Saunders JA said, for the majority in *Burton*:

> [43] In the context of summary judgment motions the words "real chance" do not mean proof to a civil standard. That is the burden to be met when the case is ultimately tried on its merits. If that were to be the approach on a summary judgment motion, one would never need a trial.
>
> [44] The phrase "real chance" should be given its ordinary meaning – that is, a chance, a possibility that is reasonable in the sense that it is an arguable and realistic position that finds support in the record. In other words, it is a prospect that is rooted in the evidence, and not based on hunch, hope or speculation. A claim or a defence with a "real chance of success" is the kind of prospect that if the judge were to ask himself/herself the question:
>
> *Is there a reasonable prospect for success on the undisputed facts?*

[49] This analysis was implicitly approved by the majority of the Supreme Court of Canada in *Annapolis Group Inc v Halifax Regional Municipality*, 2022 SCC 36, at paras 62-63.

[50] The Nova Scotia summary judgment rule does not permit the motion judge to weigh evidence and make findings of fact. By contrast, the Ontario summary judgment rule permits a judge determining whether there is a genuine issue requiring a trial to weigh the evidence, evaluate the credibility of a deponent, and draw reasonable inferences from the evidence: *Rules of Civil Procedure*, RRO 1990, Reg 194, Rule 20.04(2.1).

[51] In *Hatch Ltd v Atlantic Sub-Sea Construction and Consulting Inc*, 2017 NSCA 61, Farrar JA described the boundaries of the motions judge's power under Rule 13.04:

> [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 in *Hatch*]

[52] Justice Bourgeois made a number of other observations in *Arguson Properties v. Gil-Son* that are helpful in the determination of summary judgment motions. Some of these points are touched on later in these reasons.

Summary Judgment and Limitation Periods

[53] In the present matter we are dealing with a specialized aspect of summary judgment, this being a motion based in a limitation defence. When a summary judgment motion is advanced on this basis, the moving party must demonstrate there is no genuine issue of material fact requiring trial. At its core, the question is whether any material dispute exists as to whether the limitation period expired prior to the filing of the claim at issue.

[54] The relevant portion of the Nova Scotia *Limitation of Actions Act*, provides as follows:

> **General Limitation Periods**
>
> 8(1) Unless otherwise provided in this Act, a claim may not be brought after the earlier of
>
> (a) two years from the day on which the claim is discovered; and
>
> (b) fifteen years from the day on which the act or omission on which the claim is based occurred.
>
> (2) A claim is discovered on the day on which the claimant first knew or ought reasonably 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.

[55] The leading authors on Canadian limitations law, Graeme Mew and Daniel Zacks, summarized the law respecting summary dismissal of proceedings on the grounds of a limitations defence, in *Halsbury's Laws of Canada – Limitation of Actions* (2021 Reissue at HML-52):

> Rather than determine the issue of expiry of a limitation period at trial, litigants often seek summary disposition of the issue, thus saving time and expense of a full trial of an action that is time-barred. While the test for summary dismissal differs depending on the rules of procedure in a given jurisdiction, the question to be determined is whether there is a genuine issue requiring a trial. There is no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment, which is the case when the process allows the judge to make the necessary findings of fact and apply the law to the facts, and when the process is a proportionate, more expeditious and less expensive means to achieve a just result.

[56] Mew and Zack go on to discuss the onus on summary judgment:

> **Onus.** A defendant moving for summary judgment in relation to a statutory limitation period has the onus to satisfy the court there are no issues of fact required to be tried before the limitation defence can be determined. As a result, to avoid summary judgment, the plaintiff has the onus to satisfy the court that there are material facts to be tried as to when the cause of action arose and that there is a real chance of success at a trial of the issue. If the issue of discoverability of the cause of action is raised, it does not automatically follow that there is a genuine issue requiring a trial. Courts are permitted on a summary judgment motion to inquire whether there are facts supporting negligence that might have been discovered at a point in time outside the limitation period.

[57] The Nova Scotia courts have fashioned an analytical framework for determining limitations issues on summary judgment. It finds its foundation in a Court of Appeal decision that pre-dates both the 2009 *Civil Procedure Rules* and the 2014 *Limitation of Actions Act*.

[58] In *Nova Scotia Home for Coloured Children v Milbury*, 2007 NSCA 52, Roscoe JA considered the point in the context of the appellant's argument that the chambers judge erred in law in not granting summary judgment on claims in negligence, breach of contract and vicarious liability on the basis of expired limitation periods. The respondent alleged that she had been abused in the Home as a young child, about 59 years earlier. The appellants claimed, *inter alia*, that the action was statute-barred. On a summary judgment application, the chambers judge held that there was an arguable issue as to discoverability.

[59] The summary judgment application in *Milbury* was brought under Rule 13.01(a) of the *Civil Procedure Rules* (1972), which allowed a party to apply for judgment on the ground that there was "no arguable issue to be tried with respect to the claim or any part thereof...". The test was drawn from a line of appellate decisions that included *Hercules Managements Ltd v Ernst & Young*, [1997] 2 SCR 165, and *Guarantee Co of North America v Gordon Capital Corp*, [1999] 3 SCR 423. The two-step test had been summarized in *Selig v Cooks Oil Company Ltd*, 2005 NSCA 36: "First the applicant, must show that there is no genuine issue of fact to be determined at trial. If the applicant passes that hurdle, then the respondent must establish, on the facts that are not in dispute, that his claim has a real chance of success" (para 18).

Discoverability and Limitations

[60] In considering the summary judgment analysis in the context of discoverability of a cause of action, Roscoe JA stated, in *Milbury*:

> [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...
>
> [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. [Emphasis added.]

[61] The Supreme Court of Canada has recently restated the discoverability principle in *Grant Thornton LLP v New Brunswick*, 2021 SCC 31:

> [42] In my respectful view, neither approach accurately describes the degree of knowledge required under s. 5(2) to discover a claim and trigger the limitation period in s. 5(1)(a). I propose the following approach instead: a claim is discovered when a plaintiff has knowledge, actual or constructive, of the material facts upon which a plausible inference of liability on the defendant's part can be drawn. This approach, in my view, remains faithful to the common law rule of discoverability set out in *Rafuse* and accords with s. 5 of the *LAA*.
>
> [43] By way of explanation, the material facts that must be actually or constructively known are generally set out in the limitation statute. Here, they are listed in s. 5(2)(a) to (c). Pursuant to s. 5(2), a claim is discovered when the plaintiff has actual or constructive knowledge that: (a) the injury, loss or damage occurred; (b) the injury loss or damage was caused by or contributed to by an act or omission; and (c) the act or omission was that of

the defendant. This list is cumulative, not disjunctive. For instance, knowledge of a loss, without more, is insufficient to trigger the limitation period.

[44] In assessing the plaintiff's state of knowledge, both direct and circumstantial evidence can be used. Moreover, a plaintiff will have constructive knowledge when the evidence shows that the plaintiff ought to have discovered the material facts by exercising reasonable diligence. Suspicion may trigger that exercise (*Crombie Property Holdings Ltd. v. McColl-Frontenac Inc.*, 2017 ONCA 16, 406 D.L.R. (4th) 252, at para. 42).

[45] Finally, the governing standard requires the plaintiff to be able to draw a plausible inference of liability on the part of the defendant from the material facts that are actually or constructively known. In this particular context, determining whether a plausible inference of liability can be drawn from the material facts that are known is the same assessment as determining whether a plaintiff "had all of the material facts necessary to determine that [it] had *prima facie* grounds for inferring [liability on the part of the defendant]" (*Brown v. Wahl*, 2015 ONCA 778, 128 O.R. (3d) 583, at para. 7; see also para. 8, quoting *Lawless v. Anderson*, 2011 ONCA 102, 276 O.A.C. 75, at para. 30). Although the question in both circumstances is whether the plaintiff's knowledge of the material facts gives rise to an inference that the defendant is liable, I prefer to use the term plausible inference because in civil litigation, there does not appear to be a universal definition of what qualifies as *prima facie* grounds. As the British Columbia Court of Appeal observed in *Insurance Corporation of British Columbia v. Mehat*, 2018 BCCA 242, 11 B.C.L.R. (6th) 217, at para. 77:

> As noted in *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, some cases equate *prima facie* proof to a situation where the evidence gives rise to a permissible fact inference; others equate *prima facie* proof to a case where the evidence gives rise to a compelled fact determination, absent evidence to the contrary. [Citation omitted.]
>
> Since the term *prima facie* can carry different meanings, using plausible inference in the present context ensures consistency. A plausible inference is one which gives rise to a "permissible fact inference".

[46] The plausible inference of liability requirement ensures that the degree of knowledge needed to discover a claim is more than mere suspicion or speculation. This accords with the principles underlying the discoverability rule, which recognize that it is unfair to deprive a plaintiff from bringing a claim before it can reasonably be expected to know the claim exists. At the same time, requiring a plausible inference of liability ensures the standard does not rise so high as to require certainty of liability (*Kowal v. Shyiak*, 2012 ONCA 512, 296 O.A.C. 352) or "perfect

> knowledge" (*De Shazo*, at para. 31; see also the concept of "perfect certainty" in *Hill v. South Alberta Land Registration District* (1993), 1993 ABCA 75 (CanLII), 8 Alta. L.R. (3d) 379, at para. 8). Indeed, it is well established that a plaintiff does not need to know the exact extent or type of harm it has suffered, or the precise cause of its injury, in order for a limitation period to run (*HOOPP Realty Inc. v. Emery Jamieson LLP*, 2018 ABQB 276, 27 C.P.C. (8th) 83, at para. 213, citing *Peixeiro*, at para. 18).

[62] Justice Chipman has recently discussed and commented on the proper application of the *Shannex* principles in cases involving limitation defences. In *Thompson v. Scotia Capital Inc*., 2023 NSSC 409 he carried out a survey of helpful caselaw on the point decided since the delivery of the Supreme Court of Canada decision in *Grant Thornton*. These cases included *Wright v. Ratcliffe*, 2023 NSSC 287, *Rudolph v. Nova Scotia (Attorney General)*, 2021 NSSC 279, *Install-A-Floor Limited v. The Roy Building Limited*, 2022 NSSC 67 and *Hardit Corp. v. Holloway Investments Inc*, 2022 NSSC 328.

[63] Drawing on the authorities, Justice Chipman commented as follows:

> 22 Based on the foregoing, Scotia must establish that there is no genuine issue of fact for trial on the question of whether the limitation period for Thompson's claim had expired. Once Scotia does that, the burden shifts to Thompson to demonstrate that there is a real chance of success by presenting evidence that the limitation period has not expired by operation of the discoverability principle.
>
> …
>
> 28 Given the authorities, I am of the view that the discoverability issue is one of mixed fact and law. If there is any factual dispute that is material to the discoverability issue, summary judgment should not be granted.

[64] I adopt the conclusions expressed in *Thompson* with respect to the state of the law pertaining to limitation periods and discoverability. On the facts in

Thompson, Justice Chipman dismissed the motion for summary judgment on the basis that material factual issues existed with respect to discoverability. These, he concluded, could not be resolved on summary judgment.

Claim to Pierce the Corporate Veil

[65] The February 7, 2020 proceeding filed by the Respondents seeks, in part, the following:

> 49. … [A] declaratory order piercing the corporate veil such that the Applicants' judgment against 1766134 Nova Scotia Limited, formerly carrying on business as AFL Tank Manufacturing Limited, shall be entered and enforceable against the Respondents.
>
> 50. The Applicants state there was no and is no legitimate distinction between the Respondent AMF and AFL Tank Manufacturing with respect to its dealing with or obligations to the Applicants.
>
> 51. The Applicants state that any attempted distinction between the Respondent AMF and AFL Tank Manufacturing Limited constitutes a sham, with the Respondent AMF being, in respect of all matters pleaded, an agent, mere "puppet", or "alter ago" of AFL Tank Manufacturing, such that the Respondent AMF is jointly and severally liable to the Applicants for the judgment debt of AFL Tank Manufacturing.

[66] For the limitation clock on these claims to have been triggered the Respondents must have possessed a plausible inference of liability, as opposed to mere suspicion or a growing sense of apprehension.

[67] However, they are not permitted to wait until they possess a complete or perfect knowledge of the claim and how it may ultimately be proved.

[68] There are a number of helpful cases which shed light on the relationship between mere suspicion and the crystallization of the plausible inference.

[69] On the role of suspicion in the analysis, the Supreme Court of Canada in *Grant Thornton* referred to the judgment in *Crombie Property Holdings Limited v McColl-Frontenac Inc (Texaco Canada Limited)*, 2017 ONCA 16, leave to appeal refused, [2017] SCCA No 85.

[70] In this case the appellant had commenced an action for damages for soil contamination due to hydrocarbon leakage. The defendant had obtained summary judgment based on the expiry of the applicable limitation period. In granting summary dismissal, the motions judge noted that the plaintiff had been aware of the existence of a Phase 1 environmental site assessment that had identified potential contamination and seepage originating on an adjacent historic gas station.

[71] Noting that the plaintiff had knowledge of the contents of the report for some time, the motions judge determined that the plaintiff had been in a position to connect the dots and appreciate their loss earlier. Accordingly, the limitation period had expired by the time the claim was ultimately advanced.

[72] The Ontario Court of Appeal disagreed and concluded that the motions judge erred in equating the appellant's knowledge of the contents of the Phase 1

assessment and its contents with knowledge of the loss sufficient to trigger the limitations clock:

> [42] That the motion judge equated Crombie's knowledge of possible contamination with knowledge of actual contamination is apparent from her statement that "[a]ll the testing that followed simply confirmed [Crombie's] suspicions about what had already been reported on" (at para. 31). It was not sufficient that Crombie had suspicions or that there was possible contamination. The issue under s. 5(1)(a) of the *Limitations Act*, 2002 for when a claim is discovered, is the plaintiff's "actual" knowledge. The suspicion of certain facts or knowledge of a potential claim may be enough to put a plaintiff on inquiry and trigger a due diligence obligation, in which case the issue is whether a reasonable person with the abilities and in the circumstances of the plaintiff ought reasonably to have discovered the claim, under s. 5(1)(b). Here, while the suspicion of contamination was sufficient to give rise to a duty of inquiry, it was not sufficient to meet the requirement for actual knowledge. The subsurface testing, while confirmatory of the appellant's suspicions, was the mechanism by which the appellant acquired actual knowledge of the contamination.
>
> [43] Finally, I note that the motion judge stated that the appellant's claims were "available and discoverable" well before April 28, 2012. While not determinative, this suggests that the motion judge adopted too low a threshold for discoverability and did not focus on what was necessary to her analysis: she was required to determine when the appellant had actual knowledge of the elements of its claim, and in particular that the property was contaminated by hydrocarbons, and when a reasonable person with the appellant's abilities and in its circumstances, ought to have known of the contamination. The fact that contamination was there to be discovered was of course not sufficient to start the limitations clock.
>
> [44] For these reasons, I conclude that it was a palpable and overriding error for the motion judge to equate knowledge of potential contamination with knowledge of actual contamination.

[73] The responding parties have argued that they are essentially in the same position as the plaintiff in *Crombie Property.* They had knowledge of the corporate reorganization but did not yet possess an appreciation that these steps

had been taken for the purpose of defeating their potential claim. Further they did not learn that the company was judgment proof until the 2019 discovery.

[74] The Respondents point out that it has consistently been the position of the Moving Parties that the corporate reorganization steps were a normal commercial transaction. They have argued that the transactions were legitimate and not driven by any nefarious intent to judgment proof the corporation against potential liability in the 2010 claim.

[75] In their Notice of Contest, filed in answer to the February 7. 2020 proceeding, the Moving Parties put it this way:

> 10. The transaction for the purchase and sale of the assets of 176 (the "Transaction") was a legitimate, fair market value transaction for which 176 received full and fair compensation.
>
> 11. The assignment of the business name, AFL Tank Manufacturing Limited and consequential name change (the "Business Name Assignment") was a natural and legitimate part of this Transaction.
>
> ….
>
> 13. The change of 325's name from AFL Tank Manufacturing Limited to Arichat Metal Fabrication Limited (the "Corporate Name Change") was made for legitimate business reasons.
>
> 14. The Transaction, Business Name Assignment, Corporate Structure or Corporate Name Change were not intended to defeat any creditors of 176.

[76] This continues to be the position of the Moving Parties and this submission was reconfirmed and expanded upon during the hearing of this motion.

[77] While this issue is not being determined in this motion, the point being advanced by the Respondents is that corporate restructuring and realignment can obviously take place for legitimate reasons and without being accompanied by surreptitious asset draining. We must take care not to automatically equate awareness of restructuring with an awareness of asset stripping. One can exist in the absence of the other.

[78] Among other case authority reviewed on this motion was *Sawah v. Strategy Insurance Ltd*., 2014 ONSC 1109. The court there dealt with a factual scenario with similarities to what is being alleged in this case. The plaintiff had obtained a judgment in a prior action for debt. This turned out to be unrecoverable. Subsequently the plaintiff sought to advance a claim that two corporate entities had been created, and a series of corporate steps carried out, in furtherance of a fraud to defeat the prior debt. The plaintiff sought to pierce the corporate veil.

[79] After citing a number of authorities touching on the high standard and specific elements of proof necessary to pierce the corporate veil, the court went on to comment:

> 64 While at the examination in aid of execution, counsel for the plaintiff obtained some evidence in regards to SIL and the business it did or did not do in Canada or elsewhere. At that stage I do not believe a reasonable person would form the opinion that SIL may have been incorporated to perpetrate an illegal act or was used in a wrongful manner to the extent that the corporate veil ought to be

> pierced. I find that the information obtained on the initial examination at best may have stirred a suspicion, but that it was not until the examination for discoveries that sufficient information was gleaned to give rise to the reasonable possibility of such a claim. While absolute certainty is not required to start the running of a limitation period, I think more than a mere suspicion is required.

[80] On the basis that suspicion needed to be supplemented with greater evidence of actual wrongdoing, the court in *Sawah* concluded the limitation period had not expired as alleged.

[81] In *Rona Inc. v. Rockhard Construction Ltd*., 2020 NSSC 374, Chief Justice Smith dealt with a request to pierce the corporate veil in a situation where the plaintiff applied to add two new parties to a litigation. The defendants opposed this on the basis the limitation period had expired. Chief Justice Smith concluded that the plaintiff had not discovered that the limited companies may not have been acting at arms length until the discovery of one of the parties. She concluded:

> 45 I am satisfied from the evidence that has been presented that it was not until the discoveries of Navid and Saeid Saberi in 2018 that the Plaintiffs discovered or ought to have discovered the evidence that gave rise to this claim for unjust enrichment (see s. 8(2) of the *Act*). In other words, it was not until these discovery examinations that the Plaintiff learned that the various companies, while separate corporate entities, may not have been acting at arms length from one another and that there may be evidence that would support a claim to pierce the corporate veils of these corporations.

[82] The Respondents in the present case are pointing to a similar dynamic in that they assert the information learned at the December 2019 discovery moved their level of knowledge from suspicion to a plausible inference of liability that could be

articulated in a legal claim. I am aware there are a number of procedural differences between the situation in *Rona Inc*. and the present circumstance.

[83] The Respondents point to the following excerpt from *Holloway Investments Inc. v. Hardit Corporation*, 2020 NSSC 132 to support the proposition that lifting the corporate veil is an extraordinary remedy requiring proof of specific improper intention:

> 38 The British Columbia Court of Appeal in *311165 BC Ltd. v. Derewenko*, 2019 BCCA 217 (B.C. C.A.), recently affirmed this principle saying that to strip away the protection of incorporation, a court would have to find that the directing mind acting behind the corporation was fraudulent, dishonest, or guilty of improper conduct. Put another way, for there to be a "basis to pierce the corporate veil", there must be evidence that a company "was being used as a shield for fraudulent or improper conduct..." (para. 26).
>
> 39 It has been stated on multiple occasions that the corporate veil may only be pierced when a corporation is created or employed for illegal, fraudulent, or improper purposes, or when the directing mind of the entity directs or engineers such activity. See for eg: *642947 Ontario Ltd. v. Fleischer*, [2001] O.J. No. 4771 (Ont. C.A.).
>
> 40 Nova Scotia courts have weighed these issues as well. In *Lockharts Ltd. v. Excalibur Holdings Ltd*., [1987] N.S.J. No. 450 (N.S. T.D.), the court stated that piercing the corporate veil is only done in exceptional circumstances:
>
> > 36 What can be drawn from the foregoing authorities? In my assessment, the fundamental principle enunciated in the Salomon case remains good law in Canada and "One Man Corporations" should be considered as separate entities from their major shareholder save for certain exceptional cases. A Judge should not "lift the veil" simply because he believes it would be in the interest of "fairness" or of "justice". If that was the test the veil in the Solomon case would have been lifted. On the other hand, the Courts have the power, indeed the duty, to look behind the corporate structure and to ignore it if it is being used for fraudulent or improper purposes or as a "puppet" to the detriment of a third party.
>
> 41 In *Haggan v. Mad Dash Transport Ltd. et al*., 2019 ONSC 3654 (Ont. S.C.J.), the Ontario Superior Court of Justice concluded that for personal liability

> to attach to a corporate directing mind, that individual must engage in some sort of action which effectively takes him or her outside his or her role as a representative of the company:
>
> > 34 A corporation is an inanimate legal entity. It can only operate through the actions of its directors, officers and employees. They take steps on behalf of the corporation by entering into negotiations, signing and terminating contracts. The corporation's legal actions can only be assessed through the conduct of its officers, directors and employees, in order to find those individuals personally liable for actions taken on behalf of the corporation, there must be some activity that takes them out of their role as directing minds of the corporation: *Normart,* at para. 18.
>
> 42 Courts in this context have weighed whether a company is a mere agent, alter ego, or puppet of the directing mind or used as a shield to loot the assets.
>
> 43 In *White v. E.B.F. Manufacturing Ltd*., 2005 NSCA 167 (N.S. C.A.) the Nova Scotia Court of Appeal stated that in considering whether a corporation is being used as an alter ego for wrongdoing, the question will essentially be if the corporation has "no independent functioning of its own." The Ontario Court of Appeal in *Gregorio v. Intrans-Corp*., [1994] O.J. No. 1063 (Ont. C.A.), found that the alter ego question focuses on whether a company has been used by someone simply to improperly avoid liability:
>
> > 28 ... Generally, a subsidiary, even a wholly owned subsidiary, will not be found to be the alter ego of its parent unless the subsidiary is under the complete control of the parent and is nothing more than a conduit used by the parent to avoid liability. The alter ego principle is applied to prevent conduct akin to fraud that would otherwise unjustly deprive claimants of their rights.

[84] Caselaw is clear that the remedy of lifting the corporate veil will be granted only in exceptional circumstances. The Respondents argue that establishing the basis for this extraordinary remedy required knowledge beyond base awareness of the corporate reorganization steps that were known to them before 2018-19.

[85] The Respondents in the present case point to certain email correspondence between Gregory Boucher and John Boudreau which they say is additional

evidence of the provable intent behind the corporate moves. This was evidence they were not aware of at the time and only came into possession of later.

[86] The emails date to 2015 and include the following:

> **October 14, 2015 – John Boudreau to Gregory Boucher:**
>
> Morning Greg
>
> When we had the meeting with Joey at the beginning of June you agreed to give me until January 2016 complete buyout, Joey was a witness to that Statement of Agreement on your part… You asked Joey in August if the transactions could be complete in September and I told Joey that if everything went as planned it could be done – then you decided to not take responsibility for events created by YOUR company leading to a lawsuit against YOUR company NOT THE NEW COMPANY WE FORMED TO AVOID THIS …
>
> ….
>
> I agreed to come in with you for 4 years then take over for a price equal to the value of the assets and receivables at that time, and we would start a new company to avoid the LIABILITIES of the old company. Your part of the deal was to leave money in the new company to operate for 50% shares, my part was to do the work and run the daily operations of the company UNTIL the time YOU wanted out or I wished to buy out your portion for 50% shares…
>
> [emphasis from original]
>
> **October 16, 2015 – Gregory Boucher to John Boudreau:**
>
> … I discuss the situation with lawyers and even if I was to defend these lawsuits next year some else coukd come up with another one the problem is that jeff blucher did not do his job wright i can defend the two in halifax after that no more and the only way to solve is afl as no assets just a shell comp. you can close afl start a new on and transfer the ulc file which I did when I bought Moncton Foundry and tony what it would cost once you do this there will be no more problems check this out
>
> [errors in original]

[87] After discovered evidence does not otherwise delay the commencement of a limitation period, and this is not why these excerpts were produced. The Respondent pointed to these exchanges as the sort of evidence they believe will ultimately be required to meet the high burden to pierce the corporate veil.

Scott Johnson

[88] I have assessed the affidavit evidence of Scott Johnson together with his answers in cross examination. He has advanced a foundation for the argument that discoverability of critical elements of the claim was delayed into the period following February 2018.

[89] I appreciate the primary position advanced by the Respondents is that the operative date for discoverability was the December 2019 discovery in aid of execution.

[90] It is arguable that the April 2018 discussion between Shelley Wood and Scott Johnson is the point at which actual or constructive knowledge existed from which a plausible inference could have been derived. This date falls within the critical two-year window prior to the filing. This is also the same month the Moving Parties referenced (in their brief respecting assessment of damages) the possibility of seeking recovery of any judgment against Arichat Metal.

[91] It is elements such as these which the Respondents say will require the drawing of inferences which will necessarily involve the weighing of evidence and assessment of credibility.

[92] A critical point to appreciate is that knowledge of the corporate reorganization steps must not be immediately equated with knowledge that the corporation was stripped of assets. It would be a mistake to use perfect hindsight and equate awareness of the former point with automatic appreciation of the latter.

[93] In *1332721 Alberta Inc. v. Jenkins & Associates*, 2020 ABQB 8, the plaintiff was a landlord who leased commercial office space to the defendant tenant. The defendant stopped paying rent and abandoned the property in a "midnight move" to a new location. The same business continued at the new location but under a new, and very similar, legal name. The landlord sued the tenant and after six years of litigation received judgment by consent. Only then did the landlord discover that in addition to the midnight move six years earlier, the tenant also transferred away virtually all of its assets to another company — with a very similar name, related owners, and operating in the same line of business.

[94] The landlord brought a new action against the successor entity and all other parties they believed had benefitted from the corporate maneuvers. The defendant

argued the claim was out of time given the existence of badges of fraud, such as name changes, that ought to have prompted a duty to enquire.

[95] There was evidence that, at various points during the first litigation, the landlord had received disclosure materials pointing to the existence of a new corporate entity. The motion for summary judgment was denied. The motions judge commented in part on the fact that during the first litigation the landlord was focused on proving that claim and would never have expected to have to turn its focus to considering the conveyance of all assets.

[96] The court also pointed to instances during the first litigation where the tenant could have been fully open about what had occurred, but instead chose to provide "under-inclusive responses". The Respondents in the present case argue they can point to similar instances as, for example, 176 NSL being presented as a going concern business, up to the point the opposite was acknowledged in 2019.

[97] I have been required to assess whether there exists a live issue as to whether the knowledge possessed by the Respondents prior to April 2018 was a growing suspicion that the defendant in the 2010 proceeding was judgment proof, but not as of that point knowledge, actual or constructive, that any judgment proof status had come about as the result of deliberate asset draining.

[98] Many parties to litigation ultimately learn they hold an unrecoverable, or largely unrecoverable, paper judgment. Only rarely is it the case that such was the product of actual misfeasance, as opposed to the countless alternative causes of business hardship or failure.

[99] Ultimately a limitation period is not triggered by mere suspicion or a speculation of liability. Something more is required to reach a plausible inference of liability.

[100] The issue I must resolve on this motion is whether, pursuant to Civil Procedure Rule 13.04, the Moving Parties have met their burden of showing there is no genuine issue of material fact for trial, either alone or mixed with a question of law.

[101] The Rule is clear that I must grant summary judgment in the absence of a genuine issue of material fact for trial and when there is an absence of a question of law, either on its own, or mixed with fact, requiring determination.

[102] I have weighed the entirety of the evidence presented in this matter, even where I have not made specific reference to every single element here. No affidavit evidence was advanced from John Boudreau or Gregory Boucher.

[103] When a limitation period is in issue, the first question of the *Shannex* analysis requires the motions judge to decide whether the moving party has put forward evidence to support the expiry of the limitation period.

[104] If this can be demonstrated, and if the motion is opposed on the ground of discoverability, the burden shifts to respondents to "put their best foot forward" by adducing evidence that demonstrates the existence of a genuine issue as to when the claim ought to have been discovered.

[105] Justice Brothers, writing in *Hardit Corporation v. Holloway Inc.*, 2022 NSSC 328, expressed the task in these terms:

> 52 Before the court can conclude that the defendants have established that there are no genuine issues of material fact, however, it must consider the plaintiff's evidence on discoverability. Has Hardit demonstrated a real chance of success by presenting evidence that the limitation period has not expired?

[106] *Hardit* was a situation where a defendant was seeking summary judgment on the basis that the plaintiff should have realized much earlier that the corporate debt it sought to pursue was never going to be paid. The defendant alleged the limitation period had expired.

[107] Justice Brothers dismissed the motion for summary judgment, commenting in part:

> 66 The defendants encouraged the court to draw inferences as to when Hardit knew or ought to have known of the liability and when the loans were in default. I will not do so on this motion. The defendants argue in their brief:
>
> > 33. There is no reasonable interpretation of this conversation that could or should have given any reasonable person, particularly someone involved in the business of lending money, any real assurance that payment was forthcoming. To the contrary, all indications from the conversation were that the prospect of Hardit being paid were dubious at best.
>
> 67 I do not accept that my role on summary judgment is to engage in this interpretive and inference drawing exercise. There is enough evidence to demonstrate a genuine issue of material fact mixed with a question of law, and a question of mixed law and fact for this issue to move to a trial. Inferences need to be drawn. A judge on a summary judgment motion can make inferences of fact based on undisputed facts as long as the inferences are strongly supported by the facts (Canada (A.G.) v. Lameman, 2008 SCC 14, at para. 11), but the inferences the defendants have asked me to draw are not so strongly supported in this motion.

[108] In the case of *Thompson v. Scotia Capital*, *supra*, Justice Chipman put the issue in these terms:

> 49 …[T]he evidence led on this motion convinces me that it will be a "live issue" as to whether there was a plausible inference of liability to trigger Thompson making a claim or even retaining an expert any sooner than he did.
>
> 50 I am alive to the competing arguments which are all rooted in the pleadings and affidavit (with the appended discovery excerpts and other exhibits) evidence. Having said this, it is not the role of the Court on a Rule 13 summary judgment motion to weigh the evidence or make credibility findings. This must be left for a future day…

[109] On the facts of the present case, I find myself in the same place as the judges in *Hardit* and *Thompson*.

[110] I must grant summary judgment where there is an absence of a genuine issue of material fact for trial and when there is an absence of a question of law either on its own or mixed with factual matters requiring determination.

[111] Given that the Moving Parties did advance a case that had to be met on the issue of the limitation period, the Respondents were required to demonstrate a real chance of success by advancing evidence that the limitation period had not expired by virtue of live issues of discoverability.

[112] I have determined that summary judgment ought not be granted. The Respondents have led evidence that the claim was not discoverable until a point within the limitation period. As was the case in *Hardit*, there is an issue of mixed fact and law as to discoverability that will require the drawing of inferences from evidence that cannot be said to be uncontested.

[113] Our Court of Appeal has commented that summary judgment is designed to weed out those proceedings which are doomed to fail. This matter does not fall into that category.

Summary and Disposition

[114] The motion for summary judgment is dismissed. The Respondents will produce the order. If the parties are unable to agree on costs, written submissions can be made within 30 days.

[115] Pursuant to Civil Procedure Rule 13.08(1)(a), having dismissed this motion, I am required to convene an appearance for the purpose of considering whether further directions for the conduct of the proceeding may be required.

[116] I ask that the parties contact scheduling to arrange an appearance in accordance with the Rule.

[117] Finally, I want to acknowledge the extremely able work of counsel from both sides. The quality of the written and oral submissions was notable and appreciated.

Hunt, J.