SUPREME COURT OF NOVA SCOTIA

Citation: *Proost v. Ferncroft Equities Ltd.*, 2014 NSSC 99

Date: 20140313
Docket: Halifax No. 416894
Registry: Halifax

Between:

Michaela Amalie Elizabeth Zoe′ Mauricia Molhant Proost

Applicant

v.

Ferncroft Equities Limited, Giuseppe Costantino, Brunello Donati, Zeus Holding SA and Dominic Anthony Max Dolph Claude Gregory Edward Bunford

Respondents

Judge:	The Honourable Justice Allan P. Boudreau
Heard:	November 12, 2013, in Halifax, Nova Scotia
Counsel:	John A. Keith, for the Applicant Matthew Williams for the Respondents, Constantino, Donati and Zeus J. Andrew Fraser for the Respondent, Bunford Douglas Tupper, Q.C. for the Respondent, Ferncroft

By the Court:

Introduction:

[1] This case involves a family feud over the ownership of a "Domaine" ("the property") in the south of France, said to be valued at approximately 50,000,000 € (fifty million euros). The mother, her son, and her daughter had inherited the property upon the death of the husband. Each initially owned one third of the property. The mother has attempted to transfer her one third share to her daughter. The son has objected and litigation has ensued. There have been several proceedings commenced by various parties; however, I am only to decide one of several motions.

[2] Title to the property rests with Ferncroft Equities Limited ("Ferncroft"), a company incorporated in Nova Scotia, although, to my knowledge, the parties are Belgian nationals. The mother and her son and daughter originally each owned one third of the shares in Ferncroft. The mother had at one point signed a revocable trust arrangement whereby her shares were held in trust for her son.

[3] In early 2013, the mother attempted to revoke the trust and transfer her shares to her daughter by filing commensurate documentation with Ferncroft. The

directors of Ferncroft have so far refused to accept the mother's revocation of the trust and they have refused to transfer the mother's shares to the daughter.

[4] The daughter, with the approval of the mother, filed a Notice of Application in Chambers requesting an order declaring that she is the sole legal and beneficial owner of the mother's shares and ordering the directors of Ferncroft to effect the transfer on the books of the company and issue a new share certificate accordingly. That application has since been converted to an Application in Court. The daughter has now filed a Notice of Motion requesting an order requiring the directors of Ferncroft to amend the share register and issue a new certificate to the daughter. This, in effect is a motion for partial summary judgment of the daughter's original application.

Background:

[5] The company incorporated in Nova Scotia, Ferncroft, is the title holder of a "Domaine" ("the Domaine") located in the south of France and said to be valued at approximately 50,000,000€ (fifty million euros). There are three equal shareholders in Ferncroft, Marie-Claude Bunford ("Madame Bunford"), the mother, Amalie Molhant Proost ("Ms. Proost"), a daughter, and Dominic Bunford ("Mr. Bunford"), a son. They each own 1,667 shares in Ferncroft.

[6] In 2007, Madame Bunford signed a "revocable" trust agreement (the "MCB Trust") whereby she was holding her shares in Ferncroft in trust for her son, Mr. Bunford. His children were the alternate beneficiaries. The Respondent, Zeus Holding SA ("Zeus"), is the trustee for the MCB Trust. The Respondents, Guiseppe Constantino and Brunello Donati, are the directors of Ferncroft (collectively, "the Directors") and they are also the principals of Zeus, the trustee of the MCB Trust.

[7] The above mentioned trust arrangement was in effect from 2007 until January 5, 2013, when Madame Bunford took certain steps to revoke the MCB Trust. Madame Bunford was in the hospital at that time awaiting hip surgery. On January 5, 2013, Madame Bunford executed a Deed of Revocation (the "Deed") of the MCB Trust. She underwent her surgery on January 7, 2013. A letter was prepared enclosing the Deed and it was sent to Zeus on January 11, 2013; however, the letter enclosing the Deed was signed by Ms. Proost on behalf of her mother. The principals of Zeus, being also the Directors of Ferncroft, would all have been aware of the Deed.

[8] On February 5, 2013, Madame Bunford executed a transfer of her shares to her daughter, Ms. Proost, as a gift. By letter dated February 6, 2013, Madame

Bunford requested that the Directors register the transfer in Ferncroft's records and issue a new share certificate to Ms. Proost.

[9] On April 26, 2013, the Directors communicated their refusal to register the transfer of shares, citing the fact that Madame Bunford's covering letter enclosing the Deed of revocation of the MCB Trust had not been signed by her and that Mr. Bunford had indicated that litigation was being undertaken. For the above mentioned and various other explanations, the Directors have consistently refused to give effect to the Deed of revocation or to transfer the shares to Ms. Proost.

[10] On May 3, 2013, Madame Bunford signed a letter cancelling her January 5, 2013 Deed of Revocation of the MCB Trust and making the original trust irrevocable. A short time later, she recanted her May 3, 2013 letter and reinstated her January 5 revocation. She claimed that she had been "pressured" by Mr. Bunford into signing the May 3, 2013 letter while he was visiting her at the Domaine. In her affidavit, Madame Bunford claims she felt that she had no choice but to sign the letter of May 3, 2013 because Mr. Bunford refused to leave until she did sign.

[11] Since Mr. Bunford's Notice of Contest of the present motion, there have been additional legal proceedings by Mr. Bunford also alleging undue influence,

duress and *non est factum* regarding Madame Bunford *vis a vis* her dealings with Ms. Proost. He has now also commenced a separate Action alleging shareholder oppression and apparently requesting injunctive relief pending the disposition of the matter. Ms. Proost, contends that there has not been any real evidence of undue influence, duress or *non est factum* presented by Mr. Bunford. It appears from the affidavits filed on the present motion that the allegations are based primarily on the various actions of Madame Bunford. Madame Bunford, in her affidavits, refutes such allegations. Ms. Proost has also filed an affidavit from Madame Bunford's doctor which appears to refute any lack of mental capacity before, during and after Madame Bunfords' hospitalization for hip surgery.

[12] While the claim of shareholder oppression may not technically be a defence to the present motion, the Court is not aware of the status of the separate proceedings in that regard.

[13] The position of the Applicant, Ms. Proost, is basically that the Directors have no legal right, at this stage, to refuse to give effect to Madame Bunford's revocation and share transfer documentation. That their delay in effecting such transfer is unjustified and unreasonable and in violation of the *Companies Act* and the *Securities Transfer Act of Nova Scotia*.

[14] The position of the Respondent, Mr. Bunford, is firstly, that there are material facts in issue which require that the matter proceed to a full hearing; and secondly, that the partial summary judgement sought by the Applicant is so closely intertwined with or connected to the ultimate remedy sought, being a declaration of sole legal and beneficial ownership, that this motion should not be granted. Mr. Bunford contends that this motion, if granted will have the effect, at least partially, of deciding the question of ownership of the shares in question, which is the ultimate issue in the full application.

History of the present Motion:

[15] This being a motion for partial summary judgement, I will begin with the applicable Civil Procedure Rules dealing with Summary Judgement, but first, I will outline the history of the present motion.

[16] This proceeding was first commenced by Ms. Proost as an Application in Chambers on June 24, 2013. On July 30, 2013 Mr. Bunford filed his Notice of Contest in which he opposed the matter proceeding in chambers rather than in Court. In that document he also alleged "Shareholder Oppression". On August 6, 2013, Ms. Proost filed the present Motion for partial summary judgement. On September 5, 2013, Ms. Proost amended her Motion for partial summary judgment

adding a request that the allegation of shareholder oppression he be struck from Mr. Bunford's Notice of Contest. By the Order dated November 5, 2013, Justice Scanlan, as he then was, continued the present proceedings as an Application in Court. By letter dated November 28, 2013, counsel for Mr. Bunford advised me that Mr. Bunford was no longer pursuing his allegation of shareholder oppression in the present motion. He advised that this could be disregarded because Mr. Bunford had commenced a separate Action regarding the shareholder oppression allegation. Therefore, it is only necessary for me to consider the Amended Motion for partial summary judgement with regard to the Directors and Ferncroft, on the evidence.

Legal Principles and Authorities:

[17] Civil Procedure Rules 13.04 and 13.06 provide the following:

> Summary Judgment on evidence
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> 13.04 (1) A judge who is satisfied that evidence, or the lack of evidence, shows that a statement of claim or defence fails to raise a genuine issue for trial must grant summary judgment.
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> (2) The judge may grant judgment for the plaintiff, dismiss the proceeding, allow a claim, dismiss a claim or dismiss a defence.

> (3) On a motion for summary judgment on evidence, the pleadings serve only to indicate the laws and facts in issue, and the question of a genuine issue for trial depends on the evidence presented.
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> (4) A party who wishes to contest 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.
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> (5) A judge hearing a motion for summary judgment on evidence may determine a question of law, if the only genuine issue for trial is a question of law.
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> (6) The motion may be made after pleadings close.
>
> Order for summary judgment
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> 13.06 (1) An order for summary judgment judgement may provide any remedy the court provides on the trial or hearing of a proceeding.
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> (2) The judge may stay an order for summary judgment until a related proceeding is determined.

[18] Both parties rely in part or on the provisions of the *Companies Act* and the *Securities Transfer Act of Nova Scotia*. Ms. Proost cites Sections 39 and 40 of the *Companies Act.* Section 39 requires a company to advise the transferee within one week if it refuses to register a transfer of shares. Section 40 requires a company to complete and have ready for delivery new share certificates which are required to complete the transfer within one week of receipt, unless a notice of refusal is sent.

[19] Both parties also rely in part on Section 86 of the *Securities Transfer Act*, the pertinent clauses of which provide the following:

> 86 (1) Where a certificated security in registered form is presented to an issuer with a request to register a transfer of the certified security or an instruction is presented to an issuer with a request to register a transfer of an uncertificated security, the issuer shall register the transfer as requested if
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> (a) under the terms of the security, the proposed transferee is eligible to have the security registered in that person's name;
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> (b) the endorsement of instruction is made by the appropriate person or by an agent who has actual authority to act on behalf of the appropriate person;
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> (c) reasonable assurance is given that the endorsement or instruction is genuine and authorized;
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> (d) an applicable law relating to the collection of taxes had been complied with;
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> …
>
> (g) the transfer is rightful or is to a protected purchaser.
>
> …

[20] Ms. Proost contends that all of the requirements of the above sections of the *Securities Transfer Act* have been clearly met and that there is no real evidence which indicates otherwise.

[21] Mr. Bunford contends that the transfer by Madame Bunford is not "rightful", as required by Section 86(1)(g) above. He also says Ferncroft was within its right to refuse the transfer if it was not satisfied with regard to Sections 86(1)(b) and (c) of that *Act*. He contends Ferncroft's position was that it was not satisified with regard to these latter two subsections and rightfully declined to give effect to the transfer until the matter was resolved, either by agreement or by a court of competent jurisdiction.

[22] Justice Saunders, in *Coady v. Burton Canada Co.*, 2013 NSCA 95, summarized the guiding principles for summary judgement motions at para 87:

> [87] Before turning to the final issue raised on appeal, I wish to provide a quick summary of the law as it presently stands in Nova Scotia concerning summary judgment litigation. From the jurisprudence to which I have referred as well as the case law cited therein, a series of well-established legal principles have emerged. I will list these principles in the hope that their enumeration will serve as a helpful checklist or template to guide counsel and judges in their application. In Nova Scotia:
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> 1. Summary judgment engages a two-stage analysis.
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> 2. The first stage is only concerned with the facts. The judge decides whether the moving party has satisfied its evidentiary burden of proving that there are no material facts in dispute. If there are, the moving party fails, and the motion for summary judgment is dismissed.
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> 3. If the moving party satisfies the first stage of the inquiry, then the responding party has the evidentiary burden of proving that its claim (or defence) has a real chance of success. This second stage of the inquiry engages a somewhat limited assessment of the merits of the each party's respective positions.
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> 4. The judge's assessment is based on all of the evidence whatever the source. There is no proprietary interest or ownership in "evidence".

5. If the responding party satisfies its burden by proving that its claim (or defence) has a real chance of success, the motion for summary judgment is dismissed. If, however, the responding party fails to meet its evidentiary burden and cannot manage to prove that its claim (or defence) has a real chance of success, the judge must grant summary judgment.

6. Proof at either stage one or stage two of the inquiry requires evidence. The parties cannot rely on mere allegations or the pleadings. Each side must "put its best foot forward" by offering evidence with respect to the existence or non-existence of material facts in dispute, or whether the claim (or defence) has a real chance of success.

7. If the responding party reasonably requires disclosure, production or discovery, or the opportunity to present expert or other evidence in order to "put his best foot forward", then the motions judge should adjourn the motion for summary judgment, either without day, or to a fixed day, or with conditions or a schedule of events to be completed, as the judge considers appropriate, to achieve that end.

8. In the context of motions for summary judgment the words "genuine", "material", and "real chance of success" take on their plain, ordinary meanings. A "material" fact is a fact that is essential to the claim or defence. A "genuine issue" is an issue that arises from or is relevant to the allegations associated with the cause of action, or the defences pleaded. A "real chance of success" is a prospect that is reasonable in the sense that it is an arguable and realistic position that finds support in the record, and not something that is based on hunch, hope or speculation.

9. In Nova Scotia, CPR 13.04, as presently worded, does not create or retain any kind of residual inherent jurisdiction which might enable a judge to refuse to grant summary judgment on the basis that the motion is premature or that some other juridical reason ought to defeat its being granted. The Justices of the Nova Scotia Supreme Court have seen fit to relinquish such an inherent jurisdiction by adopting the Rule as written. If those Justices were to conclude that they ought to re-acquire such a broad discretion, their Rule should be rewritten to provide for it explicitly.

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.

12. Where, however, there are no material facts in dispute, and the only question to be decided is a matter of law, then neither complexity, novelty, nor disagreement surrounding the interpretation and application of the law will exclude a case from summary judgment.

[23] The present motion is one for partial summary judgment only. That being the case it is useful to consider the jurisprudence on such a motion. The courts appear to have consistently ruled that we must be particularly vigilant when faced with motions for partial summary judgment. I start with the statement of Justice Murphy of the P.E.I. Court of Appeal in *M. C. v R.P.*, 2009 PECA 15 at para 16:

> [16] There is no question that partial summary judgment can be granted in matters where the claims are separate and distinct and where part of the claim is severable from the rest and liability for the balance of the claim is not affected.

[24] The basic principle quoted above becomes more refined when one looks at other cases dealing with this issue. Courts have established criteria on this question quite some time ago. Southey J. in *M. Schmitt Painting Ltd. v. Marvo Construction Co.* 1977 Carswell Ont 287 had this caution at para 10:

> [10] In my view, the Court should not give judgment for part of a claim on a motion under Rule 63, unless it is perfectly clear that such part is severable. The Court should not give judgment in circumstances where one of the parties may reasonably contend that the judgment affects liability for the balance of the claim. In those circumstances a successful application would not result in a saving of time and would probably make the remaining proceedings more complicated. Such result is the direct opposite of what Rule 63 was intended to achieve.
>
> [Emphasis added]

And in *Gold Chance International Ltd. v. Daigle and Hancock*, 2001 Carswell Ont 899 Justice C. Campbell stated the following at para 78:

> [78] …partial summary judgement in such a complex commercial case could be granted in only the clearest of cases, where the issue on which the judgment is sought is clearly severable from the rest of the case and is supported by a self-contained and self-supporting set of uncontroverted evidence and/or admissions that are entirely dispositive of the issue and do not require the motions judge to engage in the type of factual adjudication that should be left to a trial judge.
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> [Emphasis added]

Also in *Corchis v. KPMG Peat Marwick Thorne*, 2002 Carswell Ont 1064, Justice Gillese said the following at para 3:

> …partial summary judgment ought only to be granted in the clearest of cases where the issue on which judgment is sought is clearly severable from the balance of the case. If this principle is not followed, there is a very real possibility of a trial result that is inconsistent with the result of the summary judgment motion on essentially the same claim. Permitting this possibility in proceedings where there are common facts, issues and parties does not advance the administration of justice…
>
> [Emphasis added]

[25] Recently, the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7, spoke on the subject of summary judgment applications generally. Justice Karakatsanis, writing for the unanimous Court., said the following at paras 2 and 3:

> [2] Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.
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> [3] Summary judgment motions provide one such opportunity…

And further at paras 4 and 5 dealing with the interpretation of the Ontario Rules of Civil Procedure, which are similar to our own;

> [4] In interpreting these provisions, the Ontario Court of Appeal placed too high a premium on the "full appreciation" of evidence that can be gained at a conventional trial, given that such a trial is not a realistic alternative for most litigants. In my view, a trial is not required if a summary judgment motion can achieve a fair and just adjudication, if it provides a process that allows the judge to make the necessary findings of fact, apply the law to those facts, and is a proportionate, more expeditious and less expensive means to achieve a just result than going to trial.
>
> [5] To that end, I conclude that summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims.
>
> [Emphasis added]

And at para 28:

> [28] This requires a shift in culture. The principal goal remains the same: a fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found…

And finally at para 23:

> [23] …Our civil justice system is premised upon the value that the process of adjudication must be fair and just. This cannot be compromised.

Analysis:

[26] This Court is being asked to consider a motion for a partial summary judgment on an Application in Court, which is a proceeding somewhere between an Application in Chambers and an Action. Thus, the Application in Court which

forms the basis for the present motion is a lesser proceeding, if I may use that term, than a full trial. Nevertheless, that does not preclude a motion as the present, because our Civil Procedure Rules expressly provide for such a procedure in an application. (See definition of Statement of Claim and Statement of Defence).

[27] This, being a motion for partial summary judgment only, it seems to me that one should first decide whether the issue or issues sought to be decided are separate and can be clearly severed from the rest of the case. It must be an issue which is "supported by … a set of uncontroverted evidence…entirely dispositive of the issue." When one considers the three remedies sought in Ms. Proost's initiating Notice of Application filed on June 24, 2003, which are the following:

> 1. a declaration that Michaela Amalie Elizabeth Zoe′ Mauricia Molhant Proost ("Ms. Molhant Proost") is the sole legal and beneficial owner of the 1,667 common shares in Ferncroft Equities Limited ("Ferncroft"). Which shares were previously owned by Marie-Claude Bunford as reflected in Ferncroft's Share Certificiate No. 9 (the "Former MC Bunford Shares");
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> 2. an order requiring the directors of Ferncroft to update the shareholder register and identify Ms. Molhant Proost as the sole legal and beneficial owner of the Former MC Bunford Shares; and
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> 3. an order requiring the directors of Ferncroft to issue a new share certificate to Ms. Molhant Proost confirming her sole ownership of the Former MC Bunford Shares.

and then compares them to remedies 1. and 2. sought in the present Amended Notice of Motion filed September 5, 2013, which are the following:

> 1. requiring the directors of Ferncroft Equities Limited ("Ferncroft") to update the shareholder register and identify the Applicant as the sole owner of 1,667 common shares in Ferncroft, which shares were previously owned by Marie-Claude Bunford as reflected in Ferncroft's Share Certificate No. 9 (the "Former MC Bunford Shares");
>
> 2. requiring the directors of Ferncroft to issue Share Certificate No. 12 (previously created but never formally issued) to the Applicant; …

it is difficult to see how the latter can be separated from the former. While remedy No. 1 in the present motion does not request a declaration from the Court "that Ms. Proost is the sole legal and beneficial owner" of the shares (as requested in the full application), it still requests that the Court order the Directors to update Ferncroft's "shareholder register and identify the Applicant as the sole owner" of the shares. It is difficult to see how "sole owner" differs significantly from "sole legal and beneficial owner".

[28] Also, remedy No. 2 requested in the present motion is almost identical to remedy No. 3 requested in the full application, except that it omits "confirming her sole ownership". However, it is clear that the intended effect is the same. The decision on the full application will do one of two things, it will either order the

remedies requested by Ms. Proost in the full application, or it will not. If it does not order those remedies, and this Court, on this motion, granted partial summary judgment, the court on the full application would have to undo a previous order.

[29] I conclude that, on the question of the severability of the issues on this motion and on the full application, the two cannot be clearly separated or severed. They are so closely intertwined that it is not feasible nor practical to do. While I am mindful of the Supreme Court's comment in *Hryniak, Supra*, regarding the direction to give summary judgment rules liberal interpretation in order to provide an efficient and economical avenue to resolve disputes, this is not such a case. This motion for partial summary judgment will solve nothing. On the contrary, it could complicate matters for the hearing of the full application, which it appears will proceed regardless of the outcome of the present motion. For this preliminary reason, I would dismiss the motion.

[30] Even if I had not dismissed the motion for this preliminary reason, I would have dismissed it applying the tests outlined by Justice Saunders in *Coady Supra*.

[31] It is not contested that the Directors did not act in accordance with the time requirements of the *Companies Act* in communicating their refusal of the share transfer; however, Ms. Proost or Madame Bunford did not act promptly either.

What we are left with is the ongoing refusal of the Directors to act until the contest regarding the legal and beneficial ownership of the shares is decided. They have exercised what they believe to be their right under section 39 of the *Companies Act*.

[32] The remedies requested by Ms. Proost on this motion are not simply administrative matters, as she would have the Court accept. They are ones which can have a significant impact on the dispute between the parties. Applying the first stage test set out by Justice Saunders, I find that there are material facts in issue regarding the "rightfulness" of the intended revocation and transfer. While the affidavit evidence of undue influence, duress and *non est factum* is "thin" at this time, we have the clear evidence of Madame Bunford apparently changing her mind on this matter, not once, but three times, at least once allegedly under undue influence or pressure. This is not a matter which can be decided on the conflicting affidavit evidence presented on this motion. The order providing directions in the matter has set deadlines for further disclosure and for discoveries for the full application which is set to be heard in October of this year

Conclusion:

[33] I dismiss Ms. Proost's motion for partial summary judgment. It does not appear necessary to give directions pursuant to Civil Procedure Rule 13.07 because an extensive order to that effect is already in place.

Costs:

[34] My initial view is that costs on this motion should be "in the cause" because most of the materials produced for this motion will most likely be useful for the full application; however, if the parties do not agree, I am open to hearing the parties in Chambers at a mutually convenient time.

I will grant an order accordingly prepared by counsel for Ms. Proost and consented as to form on behalf of all parties.

Boudreau, J.