



Exhibit 21

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

- - -

UNITED STATES OF AMERICA, . Case No. 1:09-cr-147
 .
Plaintiff, .
 . **Arraignment and Plea**
- v - .
 . Tuesday, October 13, 2009
FRANK G. LARSON, . 10:00 AM
 .
Defendant. . Cincinnati, Ohio

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE HERMAN J. WEBER, SENIOR JUDGE

For the Plaintiff: KEVIN C. CULUM, ESQ.
MACHELLE L. JINDRA, ESQ.
United States Department of Justice
Antitrust Division
Carl B. Stokes U.S. Court House
801 West Superior Avenue, 14th Floor
Cleveland, Ohio 44113-1857

For the Defendant: WILLIAM MICHAEL, JR., ESQ.
Dorsey & Whitney LLP
50 South Sixth Street
Suite 1500
Minneapolis, Minnesota 55402-1498

Also present: Laurie Cooke, Pretrial Services
Laura S. Jensen, Probation Officer

Law Clerk: Amy Peters Thomas, Esq.

Courtroom Deputy: Darlene Maury

Court Reporter: Luke T. Lavin, RDR, CRR
838 Potter Stewart U.S. Courthouse
100 East Fifth Street
Cincinnati, Ohio 45202

*Proceedings recorded in stenotype;
transcript prepared by computer.*

P R O C E E D I N G S

(In open court at 10:00 AM.)

THE COURT: Proceed, Ms. Maury.

COURTROOM DEPUTY: Judge, on the docket this morning is Criminal Action 09-147, United States of America versus Frank G. Larson. Appearing on behalf of the government is Kevin Culum and Machel Jindra. Appearing on behalf of the defense is William Michael, and the defendant is present in the courtroom.

THE COURT: Mr. Michael, will you introduce yourself to the Court and explain your presence.

MR. MICHAEL: Yes, Judge.

Thank you, Your Honor. Good morning. My name is William Michael. I represent Mr. Larson. Your Honor, first I would just point out that I have not yet been able to file the pro hac vice papers. We're waiting on the certificates of good standing from the states of Florida and Minnesota. I would represent to the Court that I am in good standing in both of those states.

Mr. Larson is present and has read through the paperwork and is ready to proceed, Your Honor.

THE COURT: Let's see. Are you admitted to a district court somewhere?

MR. MICHAEL: I am, Judge. I'm admitted to the District Court of Minnesota. I've also appeared in the

1 Southern District of New York, the Eastern District of New
2 York, the Southern District of Florida, the District of North
3 Dakota, the District of Utah, the Northern District of
4 California, and several states and perhaps other districts.

5 THE COURT: Well, I appreciate that. That gives me a
6 little solace.

7 MR. MICHAEL: All right.

8 THE COURT: Thank you.

9 MR. MICHAEL: And I apologize, Judge, for the
10 paperwork not being in on time.

11 THE COURT: All right.

12 Let's see. Are you Frank G. Larson, sir?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: Are you the defendant in this case?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: Are you represented by a lawyer?

17 THE DEFENDANT: Yes, I am.

18 THE COURT: And what's your lawyer's name?

19 THE WITNESS: Bill Michael.

20 THE COURT: Mr. Michael, have you explained to Mr.
21 Larson his rights to have this matter considered by the grand
22 jury?

23 MR. MICHAEL: I have, Judge.

24 THE COURT: And do you have any advice for him in that
25 regard?

1 MR. MICHAEL: I do, Judge. We have agreed to waive
2 the indictment. We have the forms here ready to be signed to
3 waive indictment by a grand jury and to allow the United States
4 Department of Justice to proceed by way of Information on this
5 count.

6 THE COURT: And do you feel the client's acting in his
7 best interest in proceeding in this manner?

8 MR. MICHAEL: I do, Judge.

9 THE COURT: Thank you.

10 Mr. Larson, I want you to please understand that by waiving
11 your right to have the matter considered by the grand jury,
12 you're not giving up any of your other constitutional rights.
13 You have a right to plead not guilty, be tried by a jury, be
14 represented by a lawyer throughout the proceedings, face the
15 prosecution witnesses, compel witnesses to attend and testify
16 in your behalf, and the United States must prove to a jury of
17 12 individuals beyond a reasonable doubt certain things that
18 you are guilty of this crime. And you can't be put on trial
19 here in this court unless you decide to waive your right to
20 have a grand jury consider the case.

21 Now, in order so that I can be assured that you know what
22 is charged, it's necessary that, I believe, at this time that
23 we read together the Information.

24 And in that regard, Mr. Culum, do you have a motion to
25 make?

1 MR. CULUM: Yes, Your Honor. I would like to file a
2 motion to unseal the Information and all papers along with it.

3 And any other motion I need to file?

4 THE COURT: That's the magic motion.

5 MR. CULUM: Okay. I earlier gave it to Darlene.

6 THE COURT: I had it in front of me. I just wanted to
7 see what you were up to.

8 The Court has ordered the unsealing of the documents, and
9 they're all a matter now of public record as we go through this
10 matter.

11 MR. CULUM: Thank you, Your Honor.

12 THE COURT: And if you would please present to the
13 record the Information at this time.

14 MR. CULUM: Thank you, Your Honor.

15 THE COURT: And, Mr. Larson, please listen as he does
16 so. I may ask some questions about it. And if you have any
17 questions during this proceedings, please ask them; ask them
18 directly of me. And if you're concerned about addressing me
19 directly, ask Mr. Michael, and he'll be glad to address me on
20 your behalf.

21 THE DEFENDANT: Okay.

22 THE COURT: Because it's most important that you and I
23 understand what's going on here, and that's why it's necessary
24 that I be assured that you do understand.

25 THE DEFENDANT: Okay.

1 THE COURT: Proceed, sir.

2 MR. CULUM: Thank you, Your Honor.

3 May I sit while I read?

4 THE COURT: Go ahead.

5 MR. CULUM: Okay.

6 The Information is entitled "United States of America v.
7 Frank Larson." It is entitled also a "Conspiracy To Restrain
8 Trade," in violation of 15 U.S.C. Section 1.

9 The United States of America, acting through its attorney,
10 charges:

11 Paragraph 1. Frank G. Larson is hereby made a defendant on
12 the charge stated below.

13 Paragraph 2. Beginning at least as early as March 1st,
14 2005, and continuing until at least July 17th, 2007, the exact
15 dates being unknown to the United States, the defendant and
16 co-conspirators entered into and engaged in a conspiracy to
17 suppress and eliminate competition by allocating packaged-ice
18 customers in southeastern Michigan and the Detroit, Michigan,
19 metropolitan area. The charged conspiracy unreasonably
20 restrained interstate trade and commerce, in violation of
21 Section 1 of the Sherman Act, 15 U.S.C. Section 1.

22 Paragraph 3. The charged conspiracy consisted of a
23 continuing agreement, understanding and concert of action among
24 the defendant and co-conspirators, the substantial terms of
25 which were to allocate packaged-ice customers in southeastern

1 Michigan and the Detroit, Michigan, metropolitan area.

2 Subheading II, the Means And Methods Of The Conspiracy.

3 Paragraph 4. For the purposes of forming and carrying out
4 the charged conspiracy, the defendant and co-conspirators did
5 the following things, among others:

6 (a) participated in conversations to discuss packaged-ice
7 customers in southeastern Michigan and the Detroit, Michigan,
8 metropolitan area;

9 (b) agreed during those conversations to allocate packaged-
10 ice customers in southeastern Michigan and the Detroit,
11 Michigan, metropolitan area;

12 (c) exchanged information during those conversations for
13 the purpose of monitoring and enforcing adherence to the
14 agreements to allocate customers in southeastern Michigan and
15 the Detroit, Michigan, metropolitan area; and

16 (d) refrained from competing for packaged-ice customers
17 that were so allocated.

18 III. Defendant And Co-Conspirators.

19 Paragraph 5. During the period covered by this
20 information, the defendant was employed by Artic Glacier
21 International Inc., which will be referred to as Artic Glacier,
22 a corporation organized and existing under the laws of the
23 state of Delaware, which does business in multiple states, with
24 its principal place of business in St. Paul, Minnesota. During
25 the period, the defendant was most recently employed by Artic

1 Glacier as its executive vice president of operations.

2 Paragraph 6. Various individuals and corporations, not
3 made defendants in this Information, participated as
4 co-conspirators in the offense charged and performed acts and
5 made statements in furtherance of it.

6 Paragraph -- or subpoint IV, Trade And Commerce.

7 Paragraph 7. During the period covered by this
8 Information, the defendant's employer and its co-conspirators:
9 (1) manufactured packaged ice; (2) distributed packaged ice to
10 retailers in southeastern Michigan and the Detroit, Michigan,
11 metropolitan area; and (3) caused packaged ice to be purchased
12 from, sold to, or distributed from or to individuals or
13 companies located inside and outside of southeastern Michigan
14 and the Detroit, Michigan, metropolitan area.

15 Paragraph 8. During the period covered by this
16 Information, substantial quantities of packaged ice
17 manufactured and sold by the defendant was shipped across state
18 lines in a continuous and uninterrupted flow of interstate
19 trade and commerce.

20 9. The business activities of the defendant and
21 co-conspirators that are subject of this Information were
22 within the flow of, and substantially affected, interstate
23 trade and commerce.

24 Venue.

25 Paragraph 10. The conspiracy charged in this Information

1 was formed and carried out within the Southern District of
2 Ohio, Western Division. At least one of the conspiratorial
3 discussions described above took place in Cincinnati, Ohio,
4 which is located within the Southern District of Ohio. Acts in
5 furtherance of this conspiracy were carried out within the five
6 years preceding the filing of this Information.

7 All in violation of Title 15, United States Code, Section
8 1.

9 And the Information is signed by the assistant attorney
10 general, the deputy assistant attorney general, the director of
11 criminal enforcement, the chief of our office, and myself.

12 THE COURT: Mr. Michael, have you explained to your
13 client this Information and the charge contained therein?

14 MR. MICHAEL: I have, Judge.

15 THE COURT: Do you have any questions about this
16 proceeding at this time? And all we're talking about now is
17 whether you will present your case to a grand jury.

18 THE DEFENDANT: I don't have any questions.

19 THE COURT: All right. If it is your desire -- and do
20 you have any questions about the Information?

21 THE DEFENDANT: No.

22 THE COURT: If it's your desire to give up your right
23 to have the matter go immediately before this Court and give up
24 your right to waive the consideration by the grand jury, you
25 may sign the written waiver that's there before you.

1 And please explain it to him, Mr. Michael.

2 MR. MICHAEL: Yes, Judge. We have previously.

3 THE COURT: Let the record show the trial judge
4 observes the defendant signing the document here in open court.

5 MR. MICHAEL: Judge, for the record, I've signed it as
6 well.

7 THE COURT: Any questions, Mr. Larson?

8 THE DEFENDANT: No, sir.

9 THE COURT: And this is what you wish to do?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: I'll accept the waiver. And this is your
12 signature on the document?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: I'll accept the waiver and will order the
15 information filed as the charging document in this case.

16 Mr. Michael, how do you plead to the charge in this case?

17 Or I'm sorry. Mr. Larson.

18 MR. MICHAEL: Not guilty.

19 THE COURT: Mr. Larson, how do you plead to the charge
20 in this case?

21 THE DEFENDANT: I plead guilty, sir.

22 THE COURT: Before I can accept your plea of guilty, I
23 must determine that it is made voluntarily, with an
24 understanding of the nature of the charge and the consequences
25 of your plea. By offering to plead guilty, you do give up some

1 of your constitutional rights, and that giving up must be an
2 intentional giving up of rights and privileges that you now
3 have.

4 Please understand that I need not accept your plea of
5 guilty unless satisfied of your guilt and that you fully
6 understand your rights. In order to do this, I must ask you
7 some questions.

8 THE DEFENDANT: Yes, sir.

9 THE COURT: Before I do, it's necessary that you
10 obligate yourself to tell the truth. Once having been sworn,
11 your answers to my questions will be subject to the penalties
12 of perjury, of making a false statement, or possibly contempt
13 of court if you do not answer truthfully.

14 Are you willing to accept the obligation to tell the truth?

15 THE DEFENDANT: Yes, sir, I am.

16 THE COURT: Swear the witness.

17 COURTROOM DEPUTY: Mr. Larson, raise your right hand.

18 (The defendant was duly sworn by the courtroom deputy.)

19 COURTROOM DEPUTY: Thank you. Be seated.

20 THE COURT: Mr. Larson, how old are you, sir?

21 THE DEFENDANT: 48.

22 THE COURT: And how much education do you have?

23 THE DEFENDANT: I went to Gustavus Adolphus College.

24 I finished four years. I'm one degree short of my bachelor's.

25 THE COURT: We're conversing in the English language?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: Can you understand me?

3 THE DEFENDANT: Yes, sir, I can.

4 THE COURT: I can understand you.

5 THE DEFENDANT: (Nods head up and down.)

6 THE COURT: Have you taken any narcotic drugs,
7 medicine or pills, or drunk any alcoholic beverages in the past
8 24 hours?

9 THE DEFENDANT: No, sir.

10 THE COURT: Mr. Michael, do you have any question or
11 any doubt as to the defendant's competency to plead at this
12 time?

13 MR. MICHAEL: I do not, Judge.

14 THE COURT: Mr. Larson, just a few minutes ago we read
15 together the charge in this case, the Information. Do you
16 understand the nature and meaning of this charge?

17 THE DEFENDANT: Yes, I do, sir.

18 THE COURT: Have you told your lawyer everything you
19 know about this case?

20 THE DEFENDANT: Yes, I have.

21 THE COURT: Do you believe your lawyer is fully
22 informed about the facts and circumstances on which this charge
23 is based?

24 THE DEFENDANT: Yes, I do.

25 THE COURT: Has your lawyer fully informed counsel and

1 advised you on the nature and meaning of this charge?

2 THE DEFENDANT: Yes, he has.

3 THE COURT: Now, before you can be found guilty of
4 this charge, the United States must prove certain things or
5 elements, as we call them, and they must prove them beyond a
6 reasonable doubt to a jury of 12 individuals that we'll pick at
7 random. You and I will help select them, and then they must be
8 convinced beyond a reasonable doubt of your guilt and that you
9 committed these elements.

10 The elements for conspiracy to restrain trade, in violation
11 of Section 1 of the Sherman Act, are -- and they must be
12 proved, as I said, beyond a reasonable doubt -- one, that the
13 conspiracy, that is, the agreement or understanding described
14 in the Information was knowingly formed and was existing at or
15 about the time alleged, which was, as we recall, March 1, 2005,
16 until and at least July 17th, 2007, and that one of the
17 agreements or meetings or one of the incidents occurred here in
18 the Southern District of Ohio.

19 And the Southern District of Ohio is the southern half of
20 Ohio. If you would draw a line from the east to the west
21 corner just north of Columbus, and the land south of that would
22 be the Southern District of Ohio, to the Ohio River. Now,
23 Cincinnati, Hamilton County, Butler County, Hamilton city,
24 Lebanon city are all in the Southern District of Ohio, for your
25 information.

1 Further, the next one is that you knowingly became a member
2 of the conspiracy, agreement or understanding as charged and
3 that the conspiracy constituted an unreasonable restraint of
4 interstate commerce and that the offense was carried out in
5 part in the Southern District of Ohio within the five years
6 preceding the filing of the Information.

7 Now, do you understand that, if you plead guilty, you will
8 admit beyond a reasonable doubt that you did these elements or
9 things?

10 THE DEFENDANT: Yes, sir, I do.

11 THE COURT: And that you committed the facts that were
12 alleged and actions that were alleged in the Information?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: Now, do you know what the maximum possible
15 penalty for this offense is?

16 THE DEFENDANT: I recall, I believe, 12 to 18 months.
17 Is that --

18 THE COURT: Well, you evidently have discussed the
19 matter with your attorney and you have jumped to the Guideline
20 determination.

21 THE DEFENDANT: I apologize.

22 THE COURT: That's all right. No, I'm glad to know
23 that you've got some target in your mind.

24 But so we understand each other, and since the Guidelines
25 are advisory only --

1 THE DEFENDANT: Yes, sir.

2 THE COURT: -- it's well you understand what the
3 maximum penalty is. And the maximum penalty is up to ten years
4 in prison; up to a million dollar fine, or two times the gross
5 pecuniary loss or gain; three years of supervised release; a
6 hundred dollar special assessment; and restitution.

7 Now, the importance of supervised release is this, that at
8 the time of sentencing, if you're sentenced to the
9 penitentiary, you will also be assigned a period of supervised
10 release. At the time of sentencing, conditions will be placed
11 on your conduct during the term of that supervised release. If
12 you should violate the terms of your supervised release, those
13 conditions, you could be returned to the penitentiary for a
14 period of time, which it could be as much as two years and,
15 under certain circumstances, even maybe longer. So that when
16 you're talking or thinking about what we're doing here today,
17 under the worst set of circumstances you might spend at
18 least -- or could spend 12 years in the penitentiary.

19 Do you understand?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: Now, do you understand that, if I would so
22 choose, that after I accept your plea of guilty I could
23 sentence you to that maximum penalty?

24 THE DEFENDANT: Yes, I do.

25 THE COURT: Now, you are, from what you've told me,

1 aware that the Sentencing Guidelines apply to your case, and
2 they are a very important consideration that we must discuss
3 fully at the time of sentencing. However -- and I need to make
4 you aware that there is no provision for parole under the
5 Sentencing Reform Act. Do you understand?

6 THE DEFENDANT: I'm not sure I --

7 MR. MICHAEL: Could I have a moment, Your Honor?

8 THE COURT: Yes.

9 (Mr. Michael and the defendant confer privately.)

10 THE DEFENDANT: Mr. Michael explained it to me. I do
11 understand.

12 THE COURT: In other words, what happens now under the
13 law, that the sentence I impose is the sentence that you'll
14 serve, and the only respite would be time off for what good
15 behavior the Bureau of Prisons might give you.

16 THE DEFENDANT: Okay.

17 THE COURT: That you would earn.

18 And do you understand that, despite the Sentencing
19 Guidelines, that the Court can impose a sentence that is more
20 severe or less severe than the Guidelines?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: And do you understand that, under certain
23 circumstances, either you or the United States may appeal the
24 sentence imposed?

25 THE DEFENDANT: Yes.

1 THE COURT: And there are other collateral
2 consequences, some of which are you might lose your right to
3 vote. You will lose the right to possess a firearm. You may
4 lose your obligation to serve on a jury duty or hold public
5 office.

6 Are you an American citizen?

7 THE DEFENDANT: Yes, sir, I am.

8 THE COURT: Please understand that, after you are
9 sentenced, you will have no right to withdraw your guilty plea.

10 THE DEFENDANT: I understand.

11 THE COURT: Now, the obligation that we have under the
12 instructions from Congress, which are set forth in Title 18,
13 United States Code, Section 3553 are these, or is this,
14 really: that it's our duty, or my duty with your help, to
15 determine a sentence that is sufficient but not greater than
16 necessary to vindicate the desires of Congress in the
17 sentencing which are set forth in this section.

18 One of those items is the Sentencing Guidelines, which are
19 advisory. The other considerations that we must discuss and
20 determine are the nature and circumstances of the offense, your
21 history and characteristics, the need for the sentence imposed
22 to reflect the seriousness of the offense, to promote respect
23 for the law, and to provide just punishment for the offense, to
24 afford adequate deterrence to criminal conduct generally, to
25 protect the public from further crimes you may commit, to

1 provide you with any needed educational or vocational training,
2 medical care, or other correctional treatment, in the most
3 effective manner, the kinds of sentences available and the
4 kinds of sentences that are provided by the applicability of
5 the Sentencing Guidelines.

6 Now, do you understand that we will consider all those
7 elements at the time of sentencing and that your sentence, the
8 bottom line, that it must be sufficient but not greater than
9 necessary to accomplish the purpose Congress has set forth for
10 us to follow and to achieve?

11 THE DEFENDANT: (Nods head up and down.)

12 THE COURT: Now, since you know the maximum penalty
13 for the offense, the considerations that will be deciding
14 factors in the sentence, do you still wish to plead guilty?

15 THE DEFENDANT: Yes, sir, I do.

16 THE COURT: Now, do you understand that if I accept
17 your plea of guilty, I may or may not place you on probation?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: I advise you that, under the Constitution
20 and laws of the United States, you have the right to plead not
21 guilty. You have the right to be tried by a jury, and at such
22 a speedy and public trial you would have the right to the
23 assistance of a lawyer, the right to confront and cross-examine
24 witnesses against you, and the right not to be compelled to
25 incriminate yourself.

1 At such trial you would be presumed innocent until such
2 time, if ever, as the government established your guilt by
3 legal evidence beyond a reasonable doubt. At such trial you
4 would be entitled to compulsory process, to call witnesses on
5 your behalf.

6 Do you understand --

7 THE DEFENDANT: Yes, I do.

8 THE COURT: -- that if you plead guilty, you give up
9 all these rights that I have mentioned?

10 THE DEFENDANT: Yes, I do.

11 THE COURT: Do you understand that if you plead
12 guilty, there will not be a further trial of any kind in your
13 case, so that by pleading guilty you are giving up the right to
14 a trial?

15 THE DEFENDANT: Yes, I do.

16 THE COURT: Do you understand that if your plea of
17 guilty is accepted, the judge can impose the same penalty as
18 though you pled not guilty, stood trial, and had been convicted
19 by a jury?

20 THE DEFENDANT: Yes, I do.

21 THE COURT: If you plead guilty, do you understand
22 that there will also have to -- you will also have to give up
23 your right not to incriminate yourself since I will have to ask
24 questions about what you did in order to satisfy me that you
25 are guilty as charged and you will have to acknowledge your

1 guilt?

2 THE DEFENDANT: Yes.

3 THE COURT: Are you willing to give up your right to a
4 trial and the other rights I have just discussed?

5 THE DEFENDANT: Yes, sir, I am.

6 THE COURT: Proper plea agreements are permissible.
7 However, you and the lawyers have a duty to state into the
8 record the terms of any plea agreement and any agreement that
9 you may have.

10 It's my understanding that you have entered into a plea
11 agreement in this case; is that correct?

12 THE DEFENDANT: That's correct, sir.

13 THE COURT: I'm going to ask Mr. Culum to put the plea
14 agreement into the record. Please follow along as he does so,
15 because after he has completed his presentation, I will ask you
16 some questions about the plea agreement.

17 THE DEFENDANT: Okay.

18 THE COURT: Proceed, sir.

19 MR. CULUM: Thank you, Your Honor.

20 The plea agreement is entitled "United States of America v.
21 Frank G. Larson." Preliminary words: The United States of
22 America and Frank G. Larson, the defendant, hereby enter into
23 the following plea agreement pursuant to Rule 11(c)(1)(B) of
24 the Federal Rules of Criminal Procedure:

25 Paragraph 1, the Rights Of Defendant. The defendant

1 understands his rights:

2 (a) to be represented by an attorney;

3 (b) to be charged by Indictment;

4 (c) to plead not guilty to any criminal charge brought
5 against him;

6 (d) to have a trial by jury, at which he would be presumed
7 not guilty of the charge and the United States would have to
8 prove every essential element of the charged offense beyond a
9 reasonable doubt for him to be found guilty;

10 (e) to confront and cross-examine witnesses against him and
11 to subpoena witnesses in his defense at trial;

12 (f) not to be compelled to incriminate himself;

13 (g) to appeal his conviction, if he is found guilty; and

14 (h) to appeal the imposition of sentence against him.

15 Agreement To Plead Guilty And Waive Certain Rights.

16 Paragraph 2. The defendant knowingly and voluntarily
17 waives the rights set out in paragraph 1(b) through (h) above.
18 The defendant also knowingly and voluntarily waives the right
19 to file any appeal, any collateral attack, or any other writ or
20 motion including, but not limited to, an appeal under 18 U.S.C.
21 Section 3742, or a motion under 28 U.S.C. Section 2241 or 2255,
22 that challenges the sentence imposed by the Court if that
23 sentence is consistent with the Guideline calculations
24 described in paragraph 8 of this plea agreement. This
25 agreement does not affect the rights or obligations of the

1 United States as set forth in 18 U.S.C. Section 3742 (b).
2 Nothing in this paragraph, however, shall act as a bar to the
3 defendant perfecting any legal remedies he may otherwise have
4 on appeal or collateral attack respecting the claims of
5 ineffective assistance of counsel or prosecu-- prosecutorial
6 misconduct.

7 I have difficulty saying that.

8 Pursuant to Federal Rule of Criminal Procedure 7(b), the
9 defendant will waive indictment and plead guilty at an
10 arraignment to a one-count Information to be filed in the
11 United States District Court for the Southern District of Ohio.
12 The Information will charge the defendant with participating in
13 a conspiracy to suppress and eliminate competition by agreeing
14 with other packaged-ice manufacturers to allocate customers in
15 southeastern Michigan and the Detroit, Michigan, metropolitan
16 area, beginning at least as early as March 1st, 2005, and
17 continuing until at least July 17, 2007, in violation of the
18 Sherman Antitrust Act, 15 U.S.C. Section 1.

19 Paragraph 3. The defendant, pursuant to the terms of this
20 plea agreement, will plead guilty to the criminal charge
21 described in paragraph 2 above and will make a factual
22 admission of guilt to this Court, in accordance with Federal
23 Rules of Criminal Procedure 11, as set forth in paragraph 4
24 below. The United States agrees that, at the arraignment, it
25 will stipulate to the release of the defendant on his personal

1 recognizance, pursuant to 18 U.S.C. Section 3142, pending the
2 sentencing hearing in this case.

3 Factual Basis For The Offense Charged.

4 Paragraph 4. Had this case gone to trial, the United
5 States would have presented evidence sufficient to prove the
6 following facts:

7 (a) For purposes of this plea agreement, the relevant
8 period is that period beginning at least as early as March 1st,
9 2005, and continuing until at least July 17th, 2007. During
10 the relevant period, the defendant was employed by Artic
11 Glacier International Inc., "Artic Glacier," a corporation
12 organized and existing under the laws of the state of Delaware,
13 which does business in multiple states, with its principal
14 place of business in St. Paul, Minnesota. During the relevant
15 period, the defendant was most recently employed by Artic
16 Glacier as its executive vice president of operations. During
17 the relevant period, Artic Glacier was a producer of packaged
18 ice in multiple states and was engaged in the sale of packaged
19 ice. Packaged ice is marketed as a high-grade ice for human
20 consumption and is sold in varying sizes, blocks, big bags, and
21 small bags.

22 (b) During the relevant period, the defendant participated
23 in a conspiracy to allocate customers of packaged ice sold in
24 southeastern Michigan and the Detroit, Michigan, metropolitan
25 area. In furtherance of the conspiratorial activity, the

1 defendant or his subordinates engaged in discussions with
2 representatives of other packaged-ice producers. During these
3 discussions, agreements were reached to allocate customers of
4 packaged ice to be sold in southeastern Michigan and the
5 Detroit, Michigan, metropolitan area.

6 (c) During the relevant period, Arctic Glacier's sales of
7 packaged ice affecting customers totaled over \$10 million.

8 (d) During the relevant period, packaged ice sold by one or
9 more of the conspirator firms, and equipment and supplies
10 necessary to the production and distribution of packaged ice,
11 as well as payments for packaged ice, traveled in interstate
12 commerce. The business activities of the defendant's employer
13 and its co-conspirators in connection with the production and
14 sale of packaged ice affected by this conspiracy were within
15 the flow of, and substantially affected, interstate trade and
16 commerce.

17 (e) Acts in furtherance of this conspiracy were carried out
18 within the Southern District of Ohio, Western Division. At
19 least one of the conspiratorial discussions described above
20 took place in Cincinnati, Ohio, which is located within the
21 Southern District of Ohio.

22 Possible Maximum Sentence.

23 Paragraph 5. The defendant understands that the statutory
24 maximum penalty which may be imposed against him upon
25 conviction for a violation of Section 1 of the Sherman Act is:

1 (a) a term of imprisonment for ten years, 15 U.S.C. Section
2 1;

3 (b) a fine in an amount equal to the greatest of (1) 1
4 million, (2) twice the gross pecuniary gain the conspirators
5 derived from the crime, or (3) twice the pecuniary loss caused
6 to the victims of the crime by the conspirators, 15 U.S.C.
7 Section 1, 18 U.S.C. Section 3571(b) and (d); and

8 (c) a term of supervised release of three years following
9 any term of imprisonment. If the defendant violates any
10 condition of supervised release, the defendant could be
11 required to serve up to two years in prison, 18 U.S.C. Section
12 3559(a)(3), 18 U.S.C. Section 3583(b)(2) and (e)(3), and the
13 United States Sentencing Guidelines Section 5D1.2(a)(2).

14 Paragraph 6. In addition, the defendant understands that:

15 (a) pursuant to U.S.S.G. 5E1.1 or 18 U.S.C. Section
16 3663(a)(3) or 3583(d), the Court may order him to pay
17 restitution to the victims of the offense; and

18 (b) pursuant to 18 U.S.C. Section 3013(a)(2)(A), the Court
19 is required to order the defendant to pay a \$100 special
20 assessment upon conviction for the charged crime.

21 The Sentencing Guidelines.

22 Paragraph 7. The defendant understands that the Sentencing
23 Guidelines are advisory, not mandatory, but that the Court must
24 consider the Guidelines in effect on the day of sentencing,
25 along with other factors set forth in 18 U.S.C. Section

1 3553(a), in determining and imposing sentence. The defendant
2 understands that the Guidelines determination will be made by
3 the Court by a preponderance of the evidence standard. The
4 defendant understands that although the Court is not ultimately
5 bound to impose a sentence within the applicable Guidelines
6 range, its sentence must be reasonable based upon consideration
7 of all relevant sentencing factors set forth in 18 U.S.C.
8 Section --

9 THE COURT: I want to just interrupt then. The duty
10 of the District Court, which is me, is to impose a sentence
11 that is sufficient but not greater than necessary to effect the
12 terms of the statute. It's up to the Sixth Circuit Court of
13 Appeals to determine whether that sentence is reasonable.

14 THE DEFENDANT: Okay.

15 THE COURT: So I point that out now so that you'll
16 understand the purpose that you and I have at the time of
17 sentencing.

18 THE DEFENDANT: Okay.

19 THE COURT: Proceed.

20 MR. CULUM: Thank you, Your Honor.

21 Pursuant to United States Sentencing Guideline Section
22 1B1.8, the United States agrees that self-incriminating
23 information that the defendant provides to the United States
24 pursuant to this plea agreement will not be used to increase
25 the volume of affected commerce attributable to the defendant

1 or in determining the defendant's applicable Guideline range,
2 except to the extent provided in United States Sentencing
3 Guideline Section 1B1.8(b).

4 Paragraph 8. Pursuant to United States Sentencing
5 Guideline Section 6B1.4, the United States and the defendant
6 enter into the following stipulations:

7 (a) The base offense level for the offense to which the
8 defendant is pleading guilty, as established by the United
9 States Sentencing Guidelines Section 2R1.1(a), is 12.

10 (b) The volume of commerce attributable to the defendant
11 within the meaning of the United States Sentencing Guideline
12 Section 2R1.1(b)(2) is more than 10 million but less than 40
13 million, which increases the offense level by four.

14 (c) For purposes of United States Sentencing Guidelines
15 Section 3E1.1, a three-level reduction of the offense level for
16 the defendant's acceptance of responsibility is appropriate.
17 However, should the United States obtain or receive additional
18 evidence or information prior to sentencing that, in its sole
19 discretion, it determines to be credible and materially in
20 conflict with this stipulation, then the United States shall no
21 longer be bound by this stipulation.

22 (d) Based on the foregoing, defendant's adjusted offense
23 level for the offense to which he is pleading guilty is 13.
24 The Guidelines incarceration range for offense level 13 is 12
25 to 18 months' imprisonment. The defendant's appropriate

1 Guidelines fine range is governed by 2R1.1(c)(1).

2 THE COURT: I think that is really (c)(1); it's not
3 1(c)(1).

4 MR. CULUM: You may be correct, Your Honor.

5 THE COURT: I am.

6 MR. CULUM: You are correct, Your Honor. Excuse me.
7 I am incorrect; you are correct. I apologize for the mistake.

8 Okay. Paragraph 9. Sentencing Agreement. The defendant
9 understands that the sentence to be imposed on him is within
10 the sole discretion of the sentencing judge. The United States
11 cannot and does not make any promises or representations as to
12 what sentence he will receive and is free to recommend any
13 specific sentence to the Court. However, the United States
14 will inform the probation office and the Court of (a) this
15 agreement; (b) the nature and extent of the defendant's
16 activities with respect to this case and all other activities
17 of the defendant which the United States deems relevant to
18 sentencing; and (c) the nature and extent of the defendant's
19 cooperation with the United States. In so doing, the United
20 States may use any information it deems relevant, including
21 information provided by the defendant both prior and subsequent
22 to the signing of this agreement. The United States reserves
23 the right to make any statement to the Court or the probation
24 office concerning the nature of the criminal violation charged
25 in the Information, the participation of the defendant therein,

1 and any other facts or circumstances that it deems relevant.
2 The United States also reserves the right to comment on or to
3 correct any representation made by or on behalf of the
4 defendant, and to supply any other information that the Court
5 may require.

6 10. If the United States determines that the defendant has
7 provided substantial assistance in any investigation or
8 prosecution in the packaged-ice industry, and has otherwise
9 fully complied with all the terms of this plea agreement, it
10 will file a motion, pursuant to United States Sentencing
11 Guideline 5K1.1, advising the sentencing judge of all relevant
12 facts pertaining to that determination and requesting the Court
13 to sentence the defendant in light of the factors set forth in
14 United States Sentencing Guideline Section 5K1.1(a)(1) through
15 (5). The defendant acknowledges that the decision whether he
16 has provided substantial assistance in any investigation or
17 prosecution of the packaged-ice industry and has otherwise
18 complied with the terms of this plea agreement is within the
19 sole discretion of the United States. It is understood that,
20 should the United States determine that the defendant has not
21 provided substantial assistance in any investigation or
22 prosecution of the packaged-ice industry, or should the United
23 States determine that the defendant has violated any provision
24 of this plea agreement, such a determination will release the
25 United States from any obligation to file a motion pursuant to

1 United States Section 5K1.1, but will not entitle the defendant
2 to withdraw his guilty plea once it has been entered. The
3 defendant further understands that, whether or not the United
4 States files a motion pursuant to United States Sentencing
5 Guideline 5K1.1, the sentence to be imposed on him remains
6 within the sole discretion of the sentencing judge. To enable
7 the Court to have the benefit of all the relevant sentencing
8 information, the United States may request that sentencing be
9 postponed until his cooperation is complete.

10 Paragraph 11. The parties agree that they are not aware at
11 this time of any aggravating or mitigating circumstances of a
12 kind, or to a degree, not adequately taken into consideration
13 by the United States Sentencing Commission in formulating the
14 Sentencing Guidelines justifying a departure pursuant to United
15 States Sentencing Guideline Section 5K2.0.

16 Paragraph 12. In light of the availability of civil causes
17 of actions available pursuant to 15, United States Code,
18 Section 15, the United States agrees it will not seek a
19 restitution order for the offense charged in the Information.

20 Paragraph 13. The defendant understands that the Court
21 will order him to pay a \$100 special assessment pursuant to 18
22 U.S.C. Section 3013(a)(2)(A) in addition to any fine imposed.

23 Paragraph 14. The defendant understands that, as provided
24 in Federal Rules of Criminal Procedure 11(c)(3)(B), if the
25 Court does not impose a sentence consistent with either party's

1 sentencing recommendation, he nevertheless has no right to
2 withdraw his plea of guilty.

3 The Defendant's Cooperation.

4 Paragraph 15. The defendant will cooperate fully and
5 truthfully with the United States in the prosecution of this
6 case, the conduct of the current federal investigation of
7 violations of federal antitrust and related criminal laws
8 involving the sale of packaged ice in the United States, and
9 any other federal investigation resulting therefrom, and any
10 litigation or other proceeding arising or resulting from any
11 such investigation to which the United States is a party. The
12 ongoing, full, and truthful cooperation of the defendant shall
13 include, but not be limited to:

14 (a) producing all non-privileged documents, including
15 claimed personal documents, and other materials, wherever
16 located, in the possession, custody, or control of the
17 defendant, requested by attorneys and agents of the United
18 States;

19 (b) making himself available for interviews, not at the
20 expense of the United States, upon the request of attorneys and
21 agents of the United States;

22 (c) responding fully and truthfully to all inquiries of the
23 United States in connection with any federal proceeding,
24 without falsely implicating any person or intentionally
25 withholding any information, subject to the penalties of making

1 false statement, 18 U.S.C. Section 1001, and obstruction of
2 justice, 18 U.S.C. Section 1503, et sequentes;

3 (d) otherwise voluntarily providing the United States with
4 any non-privileged material or information not requested in (a)
5 through (c) of this paragraph, that he may have that is related
6 to any federal proceeding; and

7 (e) when called upon to do so by the United States in
8 connection with any federal proceeding, testifying in grand
9 jury, trial, and other judicial proceedings, fully, truthfully,
10 and under oath, subject to the penalties of perjury, making
11 false statements or declarations in grand jury or court
12 proceedings, contempt, and obstruction of justice.

13 The Government's Agreement.

14 Section 16. Subject to the full, truthful, and continuing
15 cooperation of the defendant, as described in paragraph 15 of
16 this plea agreement, and upon the Court's acceptance of the
17 guilty plea called for by this plea agreement and imposition of
18 this sentence as provided by the Court, the United States will
19 not bring further criminal charges against the defendant for
20 any act or offense committed before the date of this plea
21 agreement that was undertaken in furtherance of an attempted or
22 completed antitrust conspiracy involving the sale of packaged
23 ice or undertaken in connection with any investigation of such
24 a conspiracy, the "relevant offense." The non-prosecution
25 terms of this paragraph do not apply to civil matters of any

1 kind, to any violation of federal tax or security laws, or to
2 any crime of violence.

3 Paragraph 17. The defendant understands that he may be
4 subject to administrative action by federal or state agencies
5 other than the United States Department of Justice, Antitrust
6 Division, based upon the conviction resulting from this plea
7 agreement, and that this plea agreement in no way controls
8 whatever action, if any, other agencies may take. However, the
9 United States agrees that, if requested, it will advise the
10 appropriate officials of any governmental agency considering
11 such administrative action of the fact, manner, and extent of
12 cooperation of the defendant as a matter for that agency to
13 consider before determining what administrative action, if any,
14 to take.

15 Representation By Counsel.

16 Paragraph 18. The defendant has reviewed all legal and
17 factual aspects of this case with his attorney and is fully
18 satisfied with his attorney's legal representation. The
19 defendant has thoroughly reviewed this plea agreement with his
20 attorney and has received satisfactory explanations from his
21 attorney concerning each paragraph of this plea agreement and
22 alternatives available to defendant other than entering into
23 this plea agreement. After conferring with his attorney and
24 considering all available alternatives, the defendant has made
25 a knowing and voluntary decision to enter into this plea

1 agreement.

2 Voluntary Plea.

3 The defendant's decision to enter into this plea agreement
4 and to tender a plea of guilty is freely and voluntarily made,
5 is not the result of force, threats, assurances, promises or
6 representations other than the representations contained in
7 this plea agreement. The United States has made no promises or
8 representations to the defendant as to whether the Court will
9 accept or reject the representations contained within this plea
10 agreement.

11 Violation Of Plea Agreement.

12 Paragraph 20. The defendant agrees that, should the United
13 States determine in good faith, during the period that any
14 federal proceeding is pending, that the defendant has failed to
15 provide full and truthful cooperation, as described in
16 paragraph 15 of this plea agreement, or has otherwise violated
17 any provision of this plea agreement, the United States will
18 notify the defendant or his counsel in writing by personal or
19 overnight delivery or facsimile transmission and may also
20 notify his counsel by telephone of its intention to void any of
21 its obligations under this plea agreement, except its
22 obligations under this paragraph, and the defendant shall be
23 subject to prosecution for any federal crime of which the
24 United States has knowledge including, but not limited to, the
25 substantive offenses related to the investigations resulting in

1 the plea agreement. The defendant agrees that, in the event
2 that the United States is released from its obligations under
3 this plea agreement and brings criminal charges against the
4 defendant for any relevant offense, the statute of limitations
5 period for such offense shall be tolled for the period between
6 the date of the signing of this plea agreement and six months
7 after the date the United States gave notice of its intent to
8 void its obligations under this plea agreement.

9 Paragraph 21. The defendant understands and agrees that in
10 any further prosecution of him resulting from the release of
11 the United States from its obligations under this plea
12 agreement based on defendant's violation of this plea
13 agreement, any documents, statements, information, testimony,
14 or evidence provided by him to attorneys or agents of the
15 United States, federal grand juries, or courts, and any leads
16 derived therefrom, may be used against him in any such further
17 prosecution. In addition, the defendant unconditionally waives
18 his right to challenge the use of such evidence in any such
19 further prosecution, notwithstanding the protections of Federal
20 Rule of Evidence 410.

21 The Entirety Of The Agreement.

22 Paragraph 22. This plea agreement constitutes the entire
23 agreement between the United States and the defendant
24 concerning the disposition of the criminal charge in this case.
25 This plea agreement cannot be modified except in writing,

1 signed by the United States and the defendant.

2 Paragraph 23. The undersigned attorneys for the United
3 States have been authorized by the Attorney General of the
4 United States to enter this plea agreement on behalf of the
5 United States.

6 The plea agreement is signed, is dated September 11th,
7 2009. It is signed by Mr. Larson and Mr. Michael and as well
8 by me.

9 THE COURT: Mr. Larson, is that your signature at the
10 end of the plea agreement?

11 THE DEFENDANT: Yes, it is.

12 THE COURT: Would you read me the last -- or the
13 paragraph 22 of the plea agreement.

14 THE DEFENDANT: "This plea agreement constitutes the
15 entire agreement between the United States and the defendant
16 concerning the disposition of the criminal charge in this case.
17 This plea agreement cannot be modified except in writing,
18 signed by the United States and the defendant."

19 THE COURT: The agreements that you've made in this
20 plea agreement, do you have any questions about them?

21 THE DEFENDANT: No, sir, I don't.

22 THE COURT: And you're under oath. Do you agree,
23 then, that your agreements in this plea agreement are true and
24 correct?

25 THE DEFENDANT: Yes, they are.

1 THE COURT: Aside from the plea agreement, has anyone
2 made any promise to you of any kind that induced you to plead
3 guilty?

4 THE DEFENDANT: No, they did not.

5 THE COURT: Aside from the plea agreement, which we've
6 been discussing, has any agent or officer of the United States
7 or any government, has any lawyer, any lawyer, has anyone
8 promised or even suggested that you'll receive a lighter
9 sentence or any other form of leniency if you plead guilty?

10 THE DEFENDANT: No, they have not.

11 THE COURT: Have any threats been made that induced
12 you to plead guilty?

13 THE DEFENDANT: No, sir.

14 THE COURT: Is it fair, then, for me to believe that
15 this decision of yours to plead guilty is your voluntary act
16 and deed?

17 THE DEFENDANT: Yes, it is.

18 THE COURT: Do you have any questions at this time?

19 THE DEFENDANT: No, sir, I don't.

20 THE COURT: Is it fair for me to believe, then, that
21 you're pleading guilty here today with a full understanding of
22 the nature of the charge against you and the consequences of
23 that plea of guilty?

24 THE DEFENDANT: Yes, that's true.

25 THE COURT: Would you turn to page 7 of the -- or no,

1 it's 3 of the plea agreement, please.

2 Now, would you paraphrase what happened here." We've
3 already gone through the record that you admit these facts to
4 be the truth that's set forth here in the fourth paragraph. Do
5 you see?

6 THE DEFENDANT: Yes.

7 THE COURT: Now, would you tell me what happened.

8 THE DEFENDANT: Yes, sir. I was aware of
9 conversations between Arctic employees and competitors
10 regarding customers that either we serviced or they serviced in
11 the Michigan marketplace. And customers would contact us
12 either regarding the competitor's service and ask us to come
13 see them, to inquire about servicing.

14 There were times that Arctic employees would contact the
15 competitor and give them a heads-up and give them a
16 notification that a customer called and give them a timeline,
17 or give them one or two weeks to say, "Here. This customer
18 called. Here's the issue. Fix it or we're going to take the
19 customer."

20 I was aware of those conversations. I participated in one
21 of those conversations. I shared with my -- with senior
22 management at Artic Glacier that these types of conversations
23 were taking place.

24 THE COURT: And did at least one of the agreements
25 occur down here in Cincinnati?

1 THE DEFENDANT: I believe it was by phone with someone
2 here in Cincinnati.

3 THE COURT: Cincinnati was involved?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: Mr. Michael, has your investigation into
6 the facts of this case established the truth of the factual
7 basis for the offense charged?

8 MR. MICHAEL: Yes, Judge.

9 THE COURT: Mr. Larson, is it fair, then, for me to
10 believe that you're pleading guilty here today because you are,
11 in fact, guilty of a violation of the Sherman Antitrust Act,
12 Section 1?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: Mr. Culum, is there anything further that
15 I should discuss with the defendant before I make my findings
16 in the matter?

17 MR. CULUM: No, Your Honor. We just would like the
18 Court to know that he has been cooperating, we fully expect him
19 to continue to cooperate, and we have nothing further to say.
20 But he has been very cooperative and has been very forthright
21 with his participation and acknowledgment of the conduct that
22 he was involved in.

23 THE COURT: Mr. Michael, anything you wish the Court
24 to discuss with the defendant or you wish to put on the record
25 before I make my findings?

1 MR. MICHAEL: No, Judge. I believe Mr. Larson fully
2 understands what's going on. I've discussed all of the
3 relevant sections of the plea agreement with him. We have
4 provided to him all of the statutory cites contained within the
5 plea agreement and gone over all of those. It's my
6 understanding that he fully appreciates his actions today, as
7 well as his cooperation with the Department of Justice that has
8 occurred in the past and is anticipated to occur in the future.

9 THE COURT: Mr. Larson, any questions at this time?

10 THE DEFENDANT: No, sir.

11 THE COURT: The trial judge has observed the
12 appearance and responsiveness of Mr. Larson, the defendant, in
13 giving his answers to the questions asked. Based on such
14 observation and the answers given, the trial judge is satisfied
15 that the defendant is in full possession of his faculties. He
16 is not suffering from any apparent physical or mental illness.
17 He is not under the influence of narcotics or alcohol. He
18 understands that Title 18, Section 3553 applies to his case and
19 will be determinative of the sentence in his case that is to be
20 sufficient but not greater than necessary to accomplish the
21 purposes set forth by Congress in that section. He understands
22 that the Sentencing Guidelines are an important element in that
23 determination but they are advisory only, and the Court may
24 sentence the defendant either greater than or less than those
25 Guideline determinations.

1 He understands the proceeding in which he is engaged. He
2 understands the nature and meaning of the charge and the
3 consequences of his plea of guilty, and he is aware of all plea
4 negotiations undertaken on his behalf.

5 Do you have any questions about any of these findings?

6 THE DEFENDANT: No, sir.

7 THE COURT: The trial judge therefore finds that the
8 plea has been made voluntarily with understanding of the nature
9 of the charge and the consequence of such plea. I will accept
10 your plea of guilty and enter a judgment of guilty to the
11 charge conspiracy to restrain trade, in violation of 15, United
12 States Code, Section 1, the Sherman Antitrust Act.

13 The matter will be referred to the United States Department
14 of Probation for a presentence investigation and report. The
15 Court will take the plea agreement under advisement. The Court
16 wishes to particularly point out the agreement not to seek
17 restitution in this matter. That is a determination that the
18 Court will take under advisement and consider at the time of
19 the sentencing to see whether it is impractical to order
20 restitution in this case. So I want you to understand that.

21 MR. CULUM: Your Honor, may I comment on that?

22 THE COURT: Yes.

23 MR. CULUM: I think you're aware, Your Honor, that
24 there is an ongoing civil litigation among the victims of the
25 potential crime and some of the corporate defendants, ongoing

1 in the Eastern District of Michigan. And I can get you the
2 cite, but there's an ongoing civil case trying to establish
3 what the proper restitution or recompense to the victims should
4 occur. So I wanted to make you aware of that.

5 THE COURT: I, of course, have been aware of that, and
6 I still stand on just what I said. If anybody is curious, I do
7 not accept plea agreements until I am satisfied they're proper.
8 I think I pointed that out here.

9 MR. CULUM: Yes.

10 MR. MICHAEL: Yes, Judge.

11 MR. CULUM: Yes, Your Honor.

12 THE COURT: All right. And hopefully we're always
13 reasonable, but that is not my job here. It's to be
14 sufficient, not reasonable.

15 The matter will be set for sentencing for Wednesday,
16 February the 3rd, at 10:00 AM, and, of course, the year is
17 2010. February 3rd, 2010, at 10:00 AM.

18 The probation department will provide a timeline for the
19 collection of information. It's designed to have the
20 information as complete as possible by the time of that
21 sentencing date, in fact, at least ten days before that
22 sentencing date, and so it is necessary that we follow along.

23 If, because of the complexities of the situation that we're
24 facing, if there are additional problems and it's already been
25 noted in the plea agreement, the Court will listen to reason,

1 not that I'll be reasonable, but I'll listen to reason. And
2 the purpose of that is so that, Mr. Larson, you and I can have
3 all the information on the table that we can consider so that I
4 can impose a just sentence in your case that is sufficient but
5 not greater than necessary. So your cooperation, which you've
6 already offered willingly to the United States, please offer
7 the same cooperation to the probation officer, which happens to
8 be part of the United States.

9 THE DEFENDANT: Absolutely.

10 THE COURT: The matter is before the Court now on the
11 establishment of a bond in this case. I have before me the
12 report of the pretrial services. Has the United States
13 received a copy of that report?

14 MR. CULUM: Yes, Your Honor.

15 THE COURT: And has the defense received a copy of the
16 report?

17 MR. MICHAEL: We have, Judge. We've read through it.
18 It's completely accurate except for one correction concerning
19 Mr. Larson's wife's maiden name.

20 THE COURT: Thank you.

21 MR. MICHAEL: Other than that, the substantive
22 information is accurate, Judge.

23 THE COURT: And what is that correction?

24 MR. MICHAEL: It is "Strand" as opposed to "Straub."

25 THE COURT: Strand?

1 MR. MICHAEL: Strand, yes, Judge.

2 THE COURT: Have you had a chance to read through it
3 too, Mr. Larson?

4 THE DEFENDANT: Yes, sir, I have.

5 THE COURT: And you agree with the accuracy?

6 THE DEFENDANT: Yes.

7 THE COURT: The Court will accept the recommendation,
8 hearing no objection.

9 MR. CULUM: No objection, Judge.

10 THE COURT: Since you already agreed to it in the plea
11 agreement --

12 MR. CULUM: Right.

13 THE COURT: -- but I give you that opportunity.

14 The Court will establish the bond in the case and will
15 establish the conditions, and the conditions while you're on
16 bond are these, Mr. Larson: .

17 That you shall not violate any federal, state or local law
18 while on release, that you immediately advise the Court,
19 defense counsel, and the U.S. Attorney in writing before any
20 change of address or telephone number, and that you appear in
21 court as required and surrender to serve any sentence imposed,
22 that you promise to appear in court as required and surrender
23 to serve any sentence imposed, that you surrender any passport
24 to the Clerk of Courts, that you obtain no new passport, that
25 you refrain from possessing a firearm, destructive device or

1 other dangerous weapon, you refrain from any excessive use of
2 alcohol, you refrain from the unlawful possession of narcotic
3 drug or other controlled substances unless prescribed by a
4 licensed medical practitioner. And the tangible matters that
5 must be complied with today is turning the passport in.

6 THE DEFENDANT: Yes, sir.

7 THE COURT: I will hand you a copy of the bond. It
8 also has in there the advice of penalties and sanctions. I
9 will give that to you at this time and Mr. Michael will go over
10 them with you. And if you accept them and you understand what
11 you're dealing with, why, then we'll proceed.

12 (Mr. Michael and the defendant confer privately.)

13 MR. MICHAEL: Your Honor, for the record, Mr. Larson
14 has gone over it and signed the form.

15 THE COURT: Mr. Larson, I have in my hand the
16 acknowledgment of the defendant to the advice and penalty
17 sections on the bond. Is that your signature?

18 THE DEFENDANT: Yes, sir, it is.

19 THE COURT: And you accept the conditions of the bond
20 that I have imposed upon you?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: Do you have any questions at this time?

23 THE DEFENDANT: No, sir, I don't.

24 THE COURT: Does the United States have anything
25 further they wish to add to the proceedings?

1 MR. CULUM: No, Your Honor.

2 THE COURT: Mr. Michael?

3 MR. MICHAEL: No, Judge. Thank you.

4 THE COURT: Any questions?

5 THE DEFENDANT: No.

6 THE COURT: I'll release the defendant after
7 processing. The matter is continued until February the 3rd at
8 10:00 o'clock, 2010.

9 Is there anything further from the United States?

10 MR. CULUM: No, Your Honor.

11 THE COURT: Anything further?

12 MR. MICHAEL: Just to alert the Court, we have Mr.
13 Larson's passport. We'll turn that in to the Clerk's office.
14 And he's been processed by the marshals prior to court this
15 morning.

16 THE COURT: Have a safe trip back home.

17 MR. MICHAEL: Thank you very much.

18 THE DEFENDANT: Thank you.

19 COURTROOM DEPUTY: All rise. This honorable court is
20 now in recess.

21 (Proceedings concluded at 11:10 AM.)

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C E R T I F I C A T E

I, Luke T. Lavin, RDR, CRR, the undersigned, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

s/Luke T. Lavin
Luke T. Lavin, RDR, CRR
Official Court Reporter

- - -

Exhibit 22

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

_____	:	Case Number: 2:10-cv-11689
IN RE PACKAGED ICE ANTITRUST	:	Case Number: 08-MD-01952
LITIGATION	:	
_____	:	Honorable Paul D. Borman
THIS DOCUMENT RELATES TO	:	
	:	DECLARATION OF
<i>Stanford v. Corbin, et al.,</i>	:	<u>GREGORY D. WRIGGLESWORTH</u>
	:	
ALL INDIRECT PURCHASER ACTIONS	:	
_____	:	

GREGORY D. WRIGGLESWORTH, hereby declares:

1. I am an attorney licensed to practice law in the Province of Ontario, and a member of Kirwin Partners LLP.
2. I have been retained to opine on Canadian law. In particular, I have been asked to answer the following question under Canadian law:

Can a former officer of a corporation be indemnified for damages arising out of a civil judgment for conduct that violates anti-trust laws, and further whether a corporation that has advanced funds for defence costs for those former officers is required to demand repayment of those funds.

Qualifications

3. I obtained my Bachelor of Arts (Honors) from the University of Windsor in 1997, and later graduated from the University of Windsor in 2001 with a Bachelor of Laws. I completed the Bar Admission Course and was called as a member of the Law Society of Upper Canada licensed to practice law in the Province of Ontario in 2002. Since my call to the bar, I have been practicing law in the area of commercial litigation, and have appeared before the Superior Court of Justice for

Ontario, the Ontario Divisional Court, the Ontario Court of Appeal and the Federal Court of Canada, primarily for commercial litigation related matters, and have lectured in this area at the University of Windsor. I am currently a member in good standing of the Law Society of Upper Canada.

Compensation

4. My firm is being compensated at our regular hourly rates. My hourly rate is C\$250.
5. My firm's compensation is not contingent on any basis.

Materials Considered

6. I reviewed the following papers filed in the above-referenced proceeding: (1) Plaintiffs' Motion to Disqualify Jones Day and Dykema Gossett (Dkt. #16); (2) Opposition to Stanford's Motion Disqualify Jones Day and Dykema Gossett (Dkt. #22); (3) Arctic Glacier Inc.'s By-Laws (Dkt. #22-8); and (4) Compendium of Canadian case law (#22-12). I also reviewed *In re Landmark Land Co. of Carolina, Inc.*, 76 F.3d 553 (1996).

7. In forming my opinion, legal research under my supervision was performed. This involved research completed by my articling student, Daniel Ableser, and I. I have reviewed all of Mr. Ableser's work and have completed a thorough review of the law in providing my opinion in this respect. My research involved a review of the law as set out in numerous texts, the Compendium of Canadian case law previously referenced as well as a number of additional decisions which I have considered to be of relevance and which have influenced my opinion in this regard to which I hereinafter refer. I have also reviewed the relevant provisions of the Ontario Business Corporations Act, R.S.O. 1990, c. B. 16 ("the OBCA") and the Canada Business Corporations Act, R.S., 1985, c. C-44 ("CBCA").

Opinion

8. With respect to the test to be applied in determining whether indemnification is

available, the starting point for my analysis was founded in the OBCA at S. 136 (“the Indemnification Section”). The relevant provisions of the CBCA mirror the foregoing subsections at S. 124, and Canadian courts have consistently ruled that the OBCA provides a comprehensive code for determining whether indemnification is available, a principle which was adopted by the Ontario Court of Appeal in R. v. Bata Industries Ltd., 127 D.L.R. (4th) 438.

9. The Indemnification Section sets out the circumstances in which the corporation *must* provide indemnification, and when it *may* provide indemnification. Subsection (1) provides as follows:

Indemnification

(1) A corporation may indemnify a director or officer of the corporation, a former director or officer of the corporation or another individual who acts or acted at the corporation’s request.... against all costs, charges and expenses, including an amount paid to settle an action or satisfy a judgment reasonably incurred by the individual in respect of any civil, criminal, administrative, investigative or other proceeding in which the individual is involved because of that association with the corporation or other entity.

10. The Indemnification Section also sets out the circumstances in which a corporation may not provide indemnification. Subsections (3) and (4) respectively, provide as follows:

Limitation

(3) A corporation shall not indemnify an individual under subsection (1) unless the individual acted honestly and in good faith with a view to the best interests of the corporation...

Same

(4) In addition to the conditions set out in subsection (3), if the matter is a criminal or administrative action or proceeding that is enforced by a monetary penalty, the corporation shall not indemnify an individual under subsection (1) unless the individual had reasonable grounds for believing that the individual's conduct was lawful.

11. In summary, the test that must be applied when considering whether indemnification ought to be available to the individual is to determine, based on the facts of the individual case, whether the individual acted honestly, in good faith, and with a reasonable belief that their conduct is lawful. Whether the person possessed a reasonable belief is a matter of fact.

12. I verily believe that the underlying policy and spirit behind the system of indemnification in Canadian law is to draw a balance between permitting indemnification in sufficiently broad circumstances to encourage responsible people to become directors and officers of corporations while denying indemnification in circumstances where directors and officers are engaged in conduct that is improper. Specifically, I would opine that it is the intention of the legislation to impose liability on directors and officers personally, without indemnification, in order to discourage them from acting or operating the corporation in an illegal fashion.

13. I am advised that the individuals in the present case who are seeking indemnification had previously entered a guilty plea in respect of certain anti-trust proceedings of a criminal nature which had been brought against them. As it is my belief that the entering of a guilty plea requires an admission of each of the elements of the crime to which the defendant is allocuting, including the *mens rea*, it would appear that this would give rise to a reasonable apprehension that the individuals have engaged in improper conduct.

14. I verily believe that the foregoing distinguishes the case at bar from the decision in Bennett v. Bennett Environmental Inc. 2009 Ont. Rep. LEXIS 41, relied upon in opposition to this motion. In Bennett, the court permitted indemnification to an officer who issued a misleading press release, but where the settlement agreement stated that he acted on “an honest but mistaken belief...” The court at paragraph 19 relied on the fact that there was “no conclusive objective evidence” on which to disbelieve Bennett’s claim that he was acting under the mistaken belief that his actions were lawful. This is distinguishable from the case at bar wherein the guilty plea of the indemnification seekers would appear to be clear and conclusive objective evidence of their guilty state of mind. I have also reviewed the decision in Blair v. Consolidated Enfield Corp. 1995 S.C.R. Lexis 525, referenced in the material filed in opposition to this motion. From my review of the reasons given in the Blair decision, at issue were actions which transpired during an annual shareholders meeting of the corporation, and did not involve even an allegation of criminal impropriety. Dissimilarly, the case at bar involves matters of a criminal nature to which not only allegations of criminal impropriety are being made, but a guilty plea has been entered.

15. Although there has been no judicial treatment of a case directly on point in Canada ie. involving anti-trust proceedings, I would opine that there is at least a compelling argument to be made, on the facts of this case, that indemnification would be improper when considering the application of the legal test.

16. I am also of the understanding that counsel for the corporation had previously been retained or consulted by the indemnification seeking individuals in respect of this proceeding.

17. I verily believe that in light of the foregoing, this would constitute a conflict of interest under the laws of Canada vis-à-vis the current directors of the corporation in the following

respect.

18. Subsection 130(2) of the Act provides as follows:

(2) Directors of a corporation who vote for or consent to a resolution authorizing,

(e) a payment of an indemnity contrary to section 136;

are jointly and severally liable to restore to the corporation any amounts so distributed or paid and not otherwise recovered by the corporation.

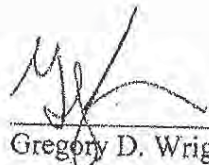
19. Accordingly, notwithstanding any of the other issues presented in this matter, if the availability of indemnification is an issue in dispute, it would appear that counsel would be required to prefer either the interests of the indemnification seekers or the existing directors of the corporation, and that these interests may be incongruous.

20. Annexed hereto is a true and correct copy of the authorities cited above.

21. I provide the foregoing opinion at the request of counsel for the plaintiff in this proceeding verily believing it to be true and accurate, and for no other or improper purpose.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on August 22, 2010



Gregory D. Wigglesworth

1995 CarswellOnt 923, 22 B.L.R. (2d) 135, 101 C.C.C. (3d) 86, 83 O.A.C. 343, 25 O.R. (3d) 321, 18 C.E.L.R. (N.S.) 11, 127 D.L.R. (4th) 438

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R. v. Bata Industries Ltd.

R. v. BATA INDUSTRIES LIMITED

Ontario Court of Appeal

Catzman, Carthy and Osborne J.J.A.

Heard: May 2, 1995

Judgment: September 18, 1995

Docket: Doc. CA C16272

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Counsel: *Douglas C. Hunt, Q.C.*, and *John S. Zimmer*, for appellant.

J. Herlihy, for the Crown.

Subject: Corporate and Commercial; Environmental; Criminal

Corporations --- Directors and officers --- Duty to manage --- Indemnification by corporation.

Environmental Law --- Statutory protection of environment --- Sentencing --- Fine --- Discharge of pollutants into water --- Miscellaneous pollutants.

Directors and officers --- Liabilities --- Indemnification for fines imposed on individual defendants in their capacity as directors or officers --- Business Corporations Act providing comprehensive code governing indemnification --- Statutory liability for payment indemnifying directors and officers in circumstances contrary to applicable legislation --- Improper to use probation order to circumvent legislation of general application to issue of indemnification of directors --- Business Corporations Act, R.S.O. 1990, c. B.16.

B Ltd. was convicted of causing or permitting the unlawful discharge of liquid industrial waste contrary to the *Ontario Water Resources Act* ("OWRA"). Two of the directors of B Ltd. were convicted, in their capacities as directors, of failing to take all reasonable care to prevent B Ltd. from causing or permitting the unlawful discharge.

The trial judge imposed a financial penalty \$120,000 on B Ltd. and fines of \$12,000 on each of the directors. In addition, the trial judge imposed a probation order on B Ltd., one of the terms of which prohibited B Ltd. from indemnifying the directors for the fines imposed on them. The trial judge further found on the evidence that the

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by-laws of B Ltd., in requiring that a director be substantially successful in the litigation to qualify for indemnification, would prohibit indemnifying the directors on the facts of this case.

B Ltd. and the directors appealed their sentences. The appellate judge reduced B Ltd.'s financial penalty to \$90,000 and the directors' fines to \$6,000 each. However, the appellate court judge affirmed the part of the probation order prohibiting B Ltd. from indemnifying the directors, on the basis that to do otherwise would result in the basis for the quantum and imposition of the fines to be "wasted".

B Ltd. appealed the non-indemnification provision of the probation order.

Held:

The appeal was allowed.

Because the OWRA is a provincial statute, the court's authority to impose a probation order is set out in the *Provincial Offences Act* ("POA") (Ont.). The POA allows a court to prescribe, in addition to the standard conditions that are deemed to be included in every probation order, such conditions relating to the circumstances of the offence, and of the defendant that contributed to the commission of the offence, as the court considers appropriate to prevent similar unlawful conduct or to contribute to the rehabilitation of the defendant.

Because the statutory basis for such additional conditions is the deterrence and rehabilitation of the defendant, it follows that the purpose of the non-indemnification provision of the probation order against B Ltd. must be deterrence and rehabilitation of B Ltd. However, it appears from the reasons of the trial judge and the appeal court judge that the main purpose of the non-indemnification provision was to ensure that the directors were appropriately punished. That was improper because the relevant provisions of the POA specify deterrence and rehabilitation of the person against whom the probation order is made.

The *Business Corporations Act* (Ont.) ("OBCA") establishes the circumstances under which a corporation may and must indemnify a director or officer, and by implication also establishes the circumstances under which a corporation cannot indemnify a director or officer. This provides a comprehensive code by which the indemnification of corporate officers and directors is regulated. The statutory scheme is completed by the provisions of the OBCA, which impose liability on a director who votes for indemnification in circumstances other than those permitted or required by the OBCA.

If B Ltd. was to be prohibited from indemnifying the directors, the prohibition should occur by virtue of the OBCA, not by virtue of a probation order under the POA. The OBCA provides that indemnification is permissible if the directors acted honestly, in good faith, and in the reasonable belief that their conduct was lawful. If the directors failed to meet those requirements, then the probation order was superfluous because B Ltd. was prohibited from indemnifying them pursuant to the OBCA. If the directors satisfied the requirements, then the non-indemnification provision of the probation order contradicted the OBCA.

Absent compelling circumstances, it is not appropriate to impose a term of probation that would deny directors access to legislation which is intended to be of general application to the issue of indemnification of directors.

The probation order would further be superfluous if the trial judge was correct in finding that the by-laws of B Ltd. prohibited indemnifying the directors on the facts of this case.

As a practical consideration, because a probation order under the POA can only be effective for a maximum of

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two years, B Ltd., if it were intent on indemnifying its directors, could do so unencumbered by the probation order by waiting for it to expire. As such, the non-indemnification provision of the probation order could do little to advance general deterrence objectives, a central consideration in making a probation order under the POA.

Annotation

Apart from its environmental aspects, the *Bata* decision is of interest for its consideration of the indemnification provisions of the applicable corporation legislation. In finding that the provisions of the OBCA set out the circumstances in which indemnification is permitted, required and, by implication, prohibited, the Court of Appeal expressly termed the legislation a "comprehensive code" regulating the indemnification of officers and directors.

As a result, the Court of Appeal affirmed the intention of the legislature to allow a corporation to decide whether to indemnify its directors and officers. In considering the trial judge's finding that the directors would not have been entitled to indemnification pursuant to Bata's by-laws, the Court of Appeal endorsed the validity of corporate by-laws limiting a director's entitlement to indemnification where not required by the applicable legislation.

The Court of Appeal also considered the safeguard against a corporation wrongfully indemnifying a director or officer, making reference to the statutory liability of directors who vote for the payment of an indemnity contrary to the statute. Noting that this is intended to "put teeth into" the indemnification scheme, the court stated that it is clearly the responsibility of a board of directors to ensure that the requirements of the legislation are met before an indemnification payment is made.

In holding that it is inappropriate to deny indemnification by way of a probation order, it is interesting to note the court's use of the phrase "absent compelling circumstances". One wonders, and is given no further direction, as to what type of circumstances would be compelling enough to warrant overriding the indemnification scheme of the OBCA. Indeed, given the court's statement that the Ontario legislation represents a "comprehensive code" for indemnification, it is difficult to imagine any case in which a prohibition of indemnification otherwise permitted by the legislation would be justified.

An argument for such prohibition might be made in cases where a corporation is closely held and managed by directors who are, or represent, shareholders. If the directors were to be charged and convicted, the potential for a conflict of interest might exist should they seek indemnification from the corporation. Perhaps in such cases a court could find an interest in protecting the corporation's interests by overriding the legislated indemnification provisions.

The decision of the Court of Appeal is to be welcomed, not only for the above-mentioned reasons, but also on the basis of sound public policy. If the non-indemnification provision had been upheld, corporate officials would be faced with the prospect of automatic personal liability for fines imposed against them. Honesty and a reasonable belief in the lawfulness of one's actions would count for little if a court could take away the legislated right to indemnification.

Had the lower court decisions stood, it would have represented yet another basis for the increasing reluctance of capable individuals to serve as corporate officers and directors. At a time when Canadian companies need individuals to accept responsibility for and take initiative in environmental and other matters, this would have been a major setback.

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The decision of the Court of Appeal does not obviate the need for directors and officers to be aware of, and adhere to, their environmental responsibilities. What it does do, however, is provide assurance that if they are convicted of an environmental (or other) offence, they will be allowed to seek indemnification from the corporation, provided that they have satisfied the criteria in the OBCA and any applicable articles or by-laws.

Ralph J. Glass, John S. Zimmer

Cases considered:

R. v. F. (J.) (August 19, 1994), Doc. Kitchener none given, Salhany J. (Ont. Gen. Div.) — referred to

R. v. Lavender (1981), 59 C.C.C. (2d) 551 (B.C. C.A.) — referred to

R. v. Ziatas (1973), 13 C.C.C. (2d) 287 (Ont. C.A.) — applied

United States v. Abushar, 761 F.2d 954 (3rd Cir., 1985) — referred to

United States v. Pastore, 537 F.2d 675 (2nd Cir., 1976) — referred to

Statutes considered:

Business Corporations Act, 1982, S.O. 1982, c. 4 [R.S.O. 1990, c. B.16] —

s. 130(2) [R.S.O. 1990, c. B.16, s. 130(2)]

s. 136 [R.S.O. 1990, c. B.16, s. 136]

s. 136(1) [R.S.O. 1990, c. B.16, s. 136(1)]

s. 136(2) [R.S.O. 1990, c. B.16, s. 136(2)]

Criminal Code, R.S.C. 1970, c. C-34 [R.S.C. 1985, c. C-46] —

s. 246(2)(b) [R.S.C. 1985, c. C-46, s. 270(1)(b)]

Environment Enforcement Statute Law Amendment Act, 1986, S.O. 1986, c. 68 —

s. 42

Environment Statute Law Amendment Act, 1988, S.O. 1988, c. 54 —

s. 87

Environmental Protection Act, R.S.O. 1980, c. 141 [R.S.O. 1990, c. E.19].

Ontario Water Resources Act, R.S.O. 1980, c. 361 [R.S.O. 1990, c. O.40] —

s. 16(1) [am. S.O. 1986, c. 68, s. 23(1); re-en. S.O. 1988, c. 54, s. 61] [R.S.O. 1990, c. O.40, s. 30(1)]

s. 75(1) [en. S.O. 1986, c. 68, s. 41; re-en. S.O. 1988, c. 54, s. 87] [R.S.O. 1990, c. O.40, s. 116(1)]

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Provincial Offences Act, R.S.O. 1990, c. P.33 —

s. 72

s. 72(1)(b)

s. 72(1)(c)

s. 72(2)

s. 72(3)(c)

Appeal from judgment reported at (1993), 14 O.R. (3d) 354, 11 C.E.L.R. (N.S.) 208 (Gen. Div.), affirming in part a judgment reported at (1992), 7 C.E.L.R. (N.S.) 293 (Ont. Prov. Div.), imposing sentence on the appellant as result of infractions under the *Ontario Water Resources Act*.

The judgment of the court was delivered by Osborne J.A.:

1 The appellant Bata was convicted of causing, or permitting, the discharge of a material, liquid industrial waste, at its shoe manufacturing facility in Batawa, Ontario, contrary to s. 16(1) of the *Ontario Water Resources Act*, R.S.O. 1980, c. 361 [now s. 30(1), R.S.O. 1990, c. O.40]. Douglas Marchant and Keith Weston, in their capacity as directors of Bata, were convicted of failing to take all reasonable care to prevent Bata from causing or permitting an unlawful discharge, contrary to s. 75(1) [now s. 116(1)] of the *Ontario Water Resources Act*, as added by the *Environment Enforcement Statute Law Amendment Act, 1986*, S.O. 1986, c. 68, s. 42, repealed and substituted with the *Environment Statute Law Amendment Act, 1988*, S.O. 1988, c. 54, s. 87]. The acts giving rise to the convictions of Bata, Marchant and Weston occurred during 1988 and 1989. The trial decision is reported at (1992), 9 O.R. (3d) 329.

2 Following the convictions, the trial judge imposed a probation order and a \$120,000 financial penalty upon Bata. He fined each of Messrs. Marchant and Weston \$12,000. Bata's \$120,000 financial penalty consisted of a \$60,000 fine and a further \$60,000, which the trial judge required Bata to pay to a local waste management program. This latter payment was prescribed in the probation order. A further term of the probation order prohibited Bata from indemnifying the directors Marchant and Weston in respect of the fines each was required to pay as a result of his conviction under the *Ontario Water Resources Act*. The probation order was issued pursuant to s. 72 of the *Provincial Offences Act*, R.S.O. 1990, c. P.33. The sentencing decision was delivered April 6, 1992 [reported at (1992), 7 C.E.L.R. (N.S.) 245 at p. 293 (Ont. Prov. Div.)].

3 Bata, Marchant and Weston appealed the sentences imposed by the trial judge. On June 30, 1993, Cosgrove J. reduced the financial penalty imposed upon Bata from \$120,000 to \$90,000. He reduced the fines imposed against Messrs. Marchant and Weston from \$12,000 to \$6,000. He affirmed that part of the probation order prohibiting Bata from indemnifying Marchant and Weston for the fines imposed against them. Cosgrove J.'s decision is reported at (1993), 14 O.R. (3d) 354.

4 On August 4, 1993, Bata was granted leave to appeal that part of Cosgrove J.'s decision that affirmed the non-indemnification provision of the probation order made by the trial judge. No appeal from Cosgrove J.'s judgment has been taken by Marchant and Weston. The only issue on this appeal by Bata concerns the trial judge's jurisdiction to impose the non-indemnification provision of the probation order, and, if the trial judge did not have jurisdiction, the fitness of the prohibition.

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The Facts

5 I do not propose to review the evidence in detail. I think it will be sufficient to outline, in a general way, the basis upon which Bata and its directors Marchant and Weston were convicted.

6 Bata was charged with six offences, four under the *Environmental Protection Act*, R.S.O. 1980, c. 141 [now R.S.O. 1990, c. E.19], and two under the *Ontario Water Resources Act*. Bata was acquitted of four of the six charges. A fifth charge was stayed. The sixth charge resulted in Bata's conviction of causing or permitting the discharge of a material, liquid industrial waste, contrary to s. 16(1).

7 Marchant and Weston were each charged, as Bata's directors, with failing to take all reasonable care to prevent an unlawful discharge, contrary to both the *Environmental Protection Act* and the *Ontario Water Resources Act*. They were each convicted of failing to take all reasonable care, as directors, to prevent Bata from causing or permitting an unlawful discharge, contrary to s. 75(1). The *Environmental Protection Act* charges in respect of Marchant and Weston were stayed.

8 Bata's conviction arose from its storage of chemical waste in drums proximate to its manufacturing facility in Batawa, Ontario. Over time the storage drums deteriorated, with the result that chemical waste escaped into the ground. Bata's culpability was put in these terms by the trial judge, at p. 347:

Bata did not establish a proper system to prevent the commission of the offence, nor did they take reasonable steps to ensure the effective operation of whatever system they had. They simply allowed the barrels to sit, rust and eventually disintegrate. There is no evidence that any barrels were ever moved. They not only ignored the direction given to them in TAC 298, but were oblivious to the actions being taken by their next door neighbour.

9 Both Marchant and Weston were directors of Bata. Weston was "on site," in the sense that he had day-to-day access to, and general responsibility for, the storage of environmental contaminants. Marchant was Weston's superior. The trial judge found that Marchant had personal knowledge of the problem with Bata's storage of chemical waste, and that he failed to take steps to minimize the damage. The trial judge assessed Marchant's culpability as follows (p. 365):

The evidence, therefore, establishes for at least the last six months of the time alleged in the charges (February 15, 1989 to August 31, 1989), *he had personal knowledge*. There is no evidence that he took any steps after having knowledge to view the site and assess the problem. There is no evidence that the system of storage was made safer or temporary steps were taken for containment until such time as removal could be effected.

He had a responsibility not only to give instruction but also to see to it that those instructions were carried out in order to minimize the damage. The delay in cleanup showed a lack of due diligence. [Emphasis in original.]

10 With respect to Weston, the trial judge found (pp. 366-367):

In addition to the evidence previously related in respect to the due diligence of Bata Industries, it is my opinion, red flags should have been raised in his environmental consciousness when the first quote of

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\$58,000 was obtained. Instead of simply dismissing it out of hand, he should have inquired why it was so high and investigated the problem. I find that he had no qualms about accepting the second quote of \$28,000 and he had no further information other than it was cheaper. This was not an informed business judgment, and he cannot rely upon the business judgment rule, which at its core recognizes that a business corporation is profit oriented and that an honest error of judgment should not impose liability *provided* the requisite standard of care is met.

.....

As the "on site" director Mr. Weston had a responsibility in this type of industry to personally inspect on a regular basis, i.e., "walk-about". To simply look at the site "not too closely" 20 times over his four year tenure does not meet the mark. He had an obligation if he decided to delegate responsibility to ensure that the delegate received the training necessary for the job and to receive detailed reports from that delegate. [Emphasis in original.]

11 In dealing with Weston and Marchant, the trial judge observed that the case was novel with respect to the liability of corporate officers and directors under environmental legislation. He said:

... until this decision there were no specific judicial guidelines against which the directors could measure their environmental conduct.

12 The trial judge viewed the novelty of the case as a mitigating factor in sentencing. He also emphasized, in his extensive reasons, that the environmental damage caused was not "irreparable, extensive or likely to have numerous consequential adverse effects." It did not impair the quality of the nearby Trent River system. Bata cooperated fully with Ministry officials, and derived no windfall profit as a result of its failure to adequately control the discharge from the barrels in which it stored waste products.

13 The trial judge concluded that Bata had been specifically deterred from engaging in similar conduct by the fact of its prosecution, and by the further fact that the environmental contamination, which could have been remedied by spending \$56,000 in 1986, progressed to the point where the eventual remedial cost was close to \$450,000.

14 In his reasons for sentence, the trial judge devoted relatively little attention to the issue of Bata indemnifying Marchant and Weston for their fines. He referred to two theories on this issue. First, he noted that if Marchant and Weston were indemnified by Bata, "the viable sentencing options of the trial judge are limited and incarceration gains prominence." This suggests that if Bata were permitted to indemnify Marchant and Weston, the only way to punish the directors in a meaningful way was to incarcerate them. Second, the trial judge observed that on his view of the evidence, Marchant and Weston would not qualify for indemnification under Bata's corporate by-laws, that specify that to qualify for indemnification, the directors must have been substantially successful in the litigation, which Marchant and Weston were not.

15 In reducing the fines imposed by the trial judge, Cosgrove J. found that the trial judge did not give Bata, Marchant, or Weston enough credit for their unblemished records, and the remorse all three expressed. When he considered that part of the probation order that prohibited Bata from indemnifying Marchant and Weston for their fines, he stated, at p. 372:

It was urged that the extension of the order in para. 6 to require the corporation not to indemnify the indi-

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vidual defendants for the fine imposed by the court was again an unreasonable exercise of jurisdiction over the defendants. I respectfully disagree with that line of argument. The role of the individual defendants as employees of the corporation is intimately intertwined with the corporate interests. *If the court does not impose the prohibition against indemnification, then the whole basis for the quantum and the imposition of the fine against the individuals will be wasted.* ... This provision, I believe, is essential to the whole purpose of the sentence by the judge at trial. [Emphasis added.]

16 From this passage, it appears that Cosgrove J. believed Bata should not be left to do "what it wanted" in respect of indemnification, because if Marchant and Weston were indemnified for their fines (as reduced on appeal), the purpose of imposing the fines would be "wasted." I take that to mean if Marchant and Weston did not have to pay their own fines, there was no purpose in fining them in the first place.

Analysis

17 The authority to impose a probation order on Bata is set out in s. 72 of the *Provincial Offences Act*, R.S.O. 1990, c. P.33. The relevant parts of s. 72 provide:

72. (1) Where a defendant is convicted of an offence in a proceeding commenced by information, the court may, having regard to the age, character and background of the defendant, the nature of the offence and the circumstances surrounding its commission,

.....

(b) in addition to fining the defendant or sentencing the defendant to imprisonment, whether in default of payment of a fine or otherwise, direct that the defendant comply with the conditions prescribed in a probation order; or

(c) where it imposes a sentence of imprisonment on the defendant, whether in default of payment of a fine or otherwise, that does not exceed ninety days, order that the sentence be served intermittent at such times as are specified in the order and direct that the defendant, at all times when he or she is not in confinement pursuant to such order, comply with the conditions prescribed in a probation order.

(2) A probation order shall be deemed to contain the conditions that,

(a) the defendant not commit the same or any related or similar offence, or any offence under a statute of Canada or Ontario or any other province of Canada that is punishable by imprisonment;

(b) the defendant appear before the court as and when required; and

(c) the defendant notify the court of any change in the defendant's address.

(3) In addition to the conditions set out in subsection (2), the court may prescribe as a condition in a probation order,

.....

(c) where the conviction is of an offence punishable by imprisonment, such other conditions relating to the circumstances of the offence and of the defendant that contributed to the commission of the offence as the

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court considers appropriate to prevent similar unlawful conduct or to contribute to the rehabilitation of the defendant;....

18 The provision of the Bata probation order which prohibits Bata from indemnifying Marchant and Weston in respect of their fines was made under s. 72(3)(c). This section authorizes terms of probation in addition to the standard terms set out in s. 72(2). The purpose of an additional term, such as the non-indemnification provision in the Bata probation order, is "to prevent similar unlawful conduct or to contribute to the rehabilitation of the defendant." The statutory basis for terms beyond those specifically set out in s. 72(2) is founded in deterrence, and the rehabilitation of the defendant as referred to in s. 72(3)(c). It follows that the purpose of the non-indemnification provision of the probation order against Bata must be deterrence, and the rehabilitation of Bata.

19 As I assess the reasons of both the trial judge and the appeal court judge, the main purpose of the indemnification prohibition term of the Bata probation order was to ensure that Marchant and Weston were appropriately punished. Both the trial judge and the appeal court judge seem to have concluded that this could only be accomplished if Marchant and Weston personally bore the burden of paying the fines imposed upon them.

20 In my view, using the indemnification prohibition to serve this purpose was improper because s. 72(3)(c) specifies deterrence and rehabilitation of the defendant, that is, Bata, as the prescribed purposes of a probation order. It does not seem to have been Cosgrove J.'s intention in imposing the prohibition to deter Bata, or other corporations, from engaging in environmentally objectionable activities. As I have said, the focus of the indemnification prohibition in the Bata probation order was on Marchant and Weston.

21 The general issue of a term of prohibition intended to operate as an additional punishment was considered by this court in *R. v. Ziatas* (1973), 13 C.C.C. (2d) 287. In that case, the accused was fined \$150 and placed on probation for one year upon his conviction of assault with intent to resist arrest, contrary to s. 246(2)(b) of the *Criminal Code*, R.S.C. 1970, c. C-34 [now R.S.C. 1985, c. C-46, s. 270(1)(b)]. One of the terms of the probation order prohibited the accused from operating a motor vehicle for one year. In dealing with the fitness of that term, Martin J.A. said at p. 288:

Without deciding whether or not the Provincial Judge had jurisdiction to impose this condition as a term of the probation order, we are all of the view that he proceeded upon a wrong principle, inasmuch as he imposed this term of the probation order as an additional punishment to be imposed upon the accused, whereas his only power, if he had any jurisdiction to impose the condition under s. 663(2) of the *Criminal Code*, was to impose such reasonable conditions as he considered desirable for securing the good conduct of the accused and for preventing the repetition by him of the same offence or the commission of other offences.

22 The *Ziatas* case establishes that a term of probation is inappropriate if it represents an additional punishment exceeding the proper scope of the probation order. Here, the term of the probation order in issue goes somewhat beyond *Ziatas* in that the order made against Bata was used for a collateral purpose, that is, to ensure that two parties not subject to the probation order were punished by receiving no indemnification in respect of their fines. See also *R. v. Lavender* (1981), 59 C.C.C. (2d) 551 (B.C. C.A.).

23 The trial judge made no reference in his reasons to s. 136 of the *Ontario Business Corporations Act*, 1982, S.O. 1982, c. 4 [now R.S.O. 1990, c. B.16]. Section 136 sets out a statutory scheme of general application governing the indemnification of officers and directors, and former officers and directors. It provides:

136. (1) A corporation may indemnify a director or officer of the corporation, a former director or officer of

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the corporation or a person who acts or acted at the corporation's request as a director or officer of a body corporate of which the corporation is or was a shareholder or creditor, and his or her heirs and legal representatives, against all costs, charges and expenses, including an amount paid to settle an action or satisfy a judgment, reasonably incurred by him or her in respect of any civil, criminal or administrative action or proceeding to which he or she is made a party by reason of being or having been a director or officer of such corporation or body corporate, if,

(a) he or she acted honestly and in good faith with a view to the best interests of the corporation; and

(b) in the case of a criminal or administrative action or proceeding that is enforced by a monetary penalty, he or she had reasonable grounds for believing that his or her conduct was lawful.

(2) A corporation may, with the approval of the court, indemnify a person referred to in subsection (1) in respect of an action by or on behalf of the corporation or body corporate to procure a judgment in its favour, to which the person is made a party by reason of being or having been a director or an officer of the corporation or body corporate, against all costs, charges and expenses reasonably incurred by the person in connection with such action if he or she fulfils the conditions set out in clauses (1)(a) and (b).

(3) Despite anything in this section, a person referred to in subsection (1) is entitled to indemnity from the corporation in respect of all costs, charges and expenses reasonably incurred by him in connection with the defence of any civil, criminal or administrative action or proceeding to which he or she is made a party by reason of being or having been a director or officer of the corporation or body corporate, if the person seeking indemnity,

(a) was substantially successful on the merits in his or her defence of the action or proceeding; and

(b) fulfils the conditions set out in clauses (1)(a) and (b).

24 Section 136 establishes the circumstances under which a corporation *may*, with and without court approval, indemnify an officer or director, and when a corporation *must* indemnify an officer or director. By implication, s. 136 also establishes the circumstances under which a corporation *cannot* indemnify an officer or director.

25 Section 136 of the Ontario *Business Corporations Act* provides a comprehensive code of general application by which the indemnification of officers and directors, and former officers and directors, is regulated. It establishes not only the circumstances under which indemnification is permitted, but also the circumstances under which indemnification is mandatory. The section should be read in conjunction with section 130(2), which provides that directors who vote for the indemnification of an officer or director contrary to s. 136 are jointly and severally liable to pay the corporation the amount wrongfully paid to indemnify the officers and directors, not otherwise recovered by the corporation. Section 130(2) thus completes the statutory scheme regulating the indemnification of officers and directors by imposing personal liability on a director who votes for indemnification in circumstances where s. 136 would not permit it. Section 130(2) was obviously intended to put teeth into the comprehensive scheme contemplated by s. 136.

26 If Bata is to be prohibited from indemnifying Marchant and Weston, in my view, the prohibition should occur by virtue of s. 136, not by virtue of a probation order under the *Provincial Offences Act*. According to s. 136(1), indemnification is permitted if the directors acted honestly, in good faith, and in the reasonable belief

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that their conduct was lawful. If Marchant and Weston failed to meet these requirements, the probation order is superfluous because Bata is prohibited from indemnifying them under s. 136(1). If they did act honestly, in good faith, and in the reasonable belief that their conduct was lawful, the probation order contradicts the legislative scheme of the Ontario *Business Corporations Act*.

27 In the light of the statutory scheme and general application established by the Legislature, I do not think that it is appropriate, absent compelling circumstances, to impose a term of probation that would in its most benign application deny directors such as Marchant and Weston access to legislation intended to be of general application to the issue of the indemnification of directors. See *United States v. Abushar*, 761 F.2d 954 (3rd Cir., 1985) and *United States v. Pastore*, 537 F.2d 675 (2nd Cir., 1976). See also *R. v. F. (J.)*, unreported, released August 19, 1994 (Ont. Gen. Div.), for a consideration of the issue whether, upon conviction of an offence under the *Education Act*, R.S.O. 1990, c. E.2, it was open to the court to impose a probation order under s. 72 of the *Provincial Offences Act*, a penalty not contained in the list of penalties set out in the *Education Act*.

28 The probation order may also lack real effect because of Bata's own corporate by-laws, which contain provisions regarding the indemnification of officers and directors in certain circumstances. The trial judge found that under these provisions, Bata, by its own rules, could not indemnify Marchant and Weston for their fines. If the trial judge was correct in his assessment of application of Bata's indemnification by-law, the probation order is superfluous insofar as it prohibits the indemnification of Marchant and Weston.

29 In addition, there is a practical consideration which I think militates against prohibiting Bata, by way of a probation order, from indemnifying Marchant and Weston for their fines. The probation order has application for a fixed period, in this case, the maximum two years permitted by the *Provincial Offences Act*. Thus, if a corporation were intent on providing indemnification to a director who had been fined, it could do so unencumbered by a probation order by simply waiting for it to expire. Viewed in those terms, an indemnity prohibition in a probation order can do very little to advance general deterrence objectives, a central consideration in making a probation order under s. 72(3)(c).

30 I accept that the goals of general and specific deterrence may be achieved to some degree by prohibiting a company from indemnifying a director or officer for a fine, given the fact that companies act through their directors, officers, and employees. Nonetheless, I am of the view, for the reasons I have set out, that the indemnification prohibition in the Bata probation order is not appropriate, and should be struck out of the probation order. I would allow the appeal to give effect to this variation.

Appeal allowed.

END OF DOCUMENT

Liability of directors

130. (1) Directors of a corporation who vote for or consent to a resolution authorizing the issue of a share for a consideration other than money contrary to section 23 are jointly and severally liable to the corporation to make good any amount by which the consideration received is less than the fair equivalent of the money that the corporation would have received if the share had been issued for money on the date of the resolution. R.S.O. 1990, c. B.16, s. 130 (1).

Idem

- (2) Directors of a corporation who vote for or consent to a resolution authorizing,
- (a) Repealed: 2006, c. 34, Sched. B, s. 22 (1).
 - (b) a purchase, redemption or other acquisition of shares contrary to section 30, 31 or 32;
 - (c) a commission contrary to section 37;
 - (d) a payment of a dividend contrary to section 38;
 - (e) a payment of an indemnity contrary to section 136; or
 - (f) a payment to a shareholder contrary to section 185 or 248,

are jointly and severally liable to restore to the corporation any amounts so distributed or paid and not otherwise recovered by the corporation. R.S.O. 1990, c. B.16, s. 130 (2); 2006, c. 34, Sched. B, s. 22 (1).

Joint liability

(3) A director who has satisfied a judgment rendered under this section is entitled to contribution from the other directors who voted for or consented to the unlawful act upon which the judgment was founded. R.S.O. 1990, c. B.16, s. 130 (3).

Application to court

(4) A director liable under subsection (2) is entitled to apply to the court for an order compelling a shareholder or other recipient to pay or deliver to the director any money or property that was paid or distributed to the shareholder or other recipient contrary to section 30, 31, 32, 37, 38, 136, 185 or 248. R.S.O. 1990, c. B.16, s. 130 (4); 2006, c. 34, Sched. B, s. 22 (2).

What court may order

- (5) In connection with an application under subsection (4), the court may, if it is satisfied that it is equitable to do so,
- (a) order a shareholder or other recipient to pay or deliver to a director any money or property that was paid or distributed to the shareholder or other recipient contrary to section 30, 31, 32, 37, 38, 136, 185 or 248;
 - (b) order a corporation to return or issue shares to a person from whom the corporation has purchased, redeemed or otherwise acquired shares; or
 - (c) make any further order it thinks fit. R.S.O. 1990, c. B.16, s. 130 (5); 2006, c. 34, Sched. B, s. 22 (3).

Exception to subs. (1)

(6) A director is not liable under subsection (1) if the director proves that he or she did not know and could not reasonably have known that the share was issued for a consideration less than the fair equivalent of the money that the corporation would have received if the share had been issued for money. R.S.O. 1990, c. B.16, s. 130 (6).

(7) Repealed: 2002, c. 24, Sched. B, s. 25.

Indemnification

136. (1) A corporation may indemnify a director or officer of the corporation, a former director or officer of the corporation or another individual who acts or acted at the corporation's request as a director or officer, or an individual acting in a similar capacity, of another entity, against all costs, charges and expenses, including an amount paid to settle an action or satisfy a judgment, reasonably incurred by the individual in respect of any civil, criminal, administrative, investigative or other proceeding in which the individual is involved because of that association with the corporation or other entity. 2006, c. 34, Sched. B, s. 26.

Advance of costs

(2) A corporation may advance money to a director, officer or other individual for the costs, charges and expenses of a proceeding referred to in subsection (1), but the individual shall repay the money if the individual does not fulfil the conditions set out in subsection (3). 2006, c. 34, Sched. B, s. 26.

Limitation

(3) A corporation shall not indemnify an individual under subsection (1) unless the individual acted honestly and in good faith with a view to the best interests of the corporation or, as the case may be, to the best interests of the other entity for which the individual acted as a director or officer or in a similar capacity at the corporation's request. 2006, c. 34, Sched. B, s. 26.

Same

(4) In addition to the conditions set out in subsection (3), if the matter is a criminal or administrative action or proceeding that is enforced by a monetary penalty, the corporation shall not indemnify an individual under subsection (1) unless the individual had reasonable grounds for believing that the individual's conduct was lawful. 2006, c. 34, Sched. B, s. 26.

Derivative actions

(4.1) A corporation may, with the approval of a court, indemnify an individual referred to in subsection (1), or advance moneys under subsection (2), in respect of an action by or on behalf of the corporation or other entity to obtain a judgment in its favour, to which the individual is made a party because of the individual's association with the corporation or other entity as described in subsection (1), against all costs, charges and expenses reasonably incurred by the individual in connection with such action, if the individual fulfils the conditions set out in subsection (3). 2006, c. 34, Sched. B, s. 26.

Right to indemnity

(4.2) Despite subsection (1), an individual referred to in that subsection is entitled to indemnity from the corporation in respect of all costs, charges and expenses reasonably incurred by the individual in connection with the defence of any civil, criminal, administrative, investigative or other proceeding to which the individual is subject because of the individual's association with the corporation or other entity as described in subsection (1), if the individual seeking an indemnity,

(a) was not judged by a court or other competent authority to have committed any fault or

omitted to do anything that the individual ought to have done; and

(b) fulfils the conditions set out in subsections (3) and (4). 2006, c. 34, Sched. B, s. 26.

Insurance

(4.3) A corporation may purchase and maintain insurance for the benefit of an individual referred to in subsection (1) against any liability incurred by the individual,

(a) in the individual's capacity as a director or officer of the corporation; or

(b) in the individual's capacity as a director or officer, or a similar capacity, of another entity, if the individual acts or acted in that capacity at the corporation's request. 2006, c. 34, Sched. B, s. 26.

Application to court

(5) A corporation or a person referred to in subsection (1) may apply to the court for an order approving an indemnity under this section and the court may so order and make any further order it thinks fit. R.S.O. 1990, c. B.16, s. 136 (5).

Idem

(6) Upon an application under subsection (5), the court may order notice to be given to any interested person and such person is entitled to appear and be heard in person or by counsel. R.S.O. 1990, c. B.16, s. 136 (6).

Directors' liability

118. (1) Directors of a corporation who vote for or consent to a resolution authorizing the issue of a share under section 25 for a consideration other than money are jointly and severally, or solidarily, liable to the corporation to make good any amount by which the consideration received is less than the fair equivalent of the money that the corporation would have received if the share had been issued for money on the date of the resolution.

Further directors' liabilities

(2) Directors of a corporation who vote for or consent to a resolution authorizing any of the following are jointly and severally, or solidarily, liable to restore to the corporation any amounts so distributed or paid and not otherwise recovered by the corporation:

- (a) a purchase, redemption or other acquisition of shares contrary to section 34, 35 or 36;
- (b) a commission contrary to section 41;
- (c) a payment of a dividend contrary to section 42;
- (d) a payment of an indemnity contrary to section 124; or
- (e) a payment to a shareholder contrary to section 190 or 241.

Contribution

(3) A director who has satisfied a judgment rendered under this section is entitled to contribution from the other directors who voted for or consented to the unlawful act on which the judgment was founded.

Recovery

(4) A director liable under subsection (2) is entitled to apply to a court for an order compelling a shareholder or other recipient to pay or deliver to the director any money or property that was paid or distributed to the shareholder or other recipient contrary to section 34, 35, 36, 41, 42, 124, 190 or 241.

Order of court

(5) In connection with an application under subsection (4) a court may, if it is satisfied that it is equitable to do so,

- (a) order a shareholder or other recipient to pay or deliver to a director any money or property that was paid or distributed to the shareholder or other recipient contrary to section 34, 35, 36, 41, 42, 124, 190 or 241;
- (b) order a corporation to return or issue shares to a person from whom the corporation has purchased, redeemed or otherwise acquired shares; or
- (c) make any further order it thinks fit.

No liability

(6) A director who proves that the director did not know and could not reasonably have known that the share was issued for a consideration less than the fair equivalent of the

money that the corporation would have received if the share had been issued for money is not liable under subsection (1).

Limitation:

(7) An action to enforce a liability imposed by this section may not be commenced after two years from the date of the resolution authorizing the action complained of.
R.S., 1985, c. C-44, s. 118; 2001, c. 14, ss. 46, 135(E).

Indemnification

124. (1) A corporation may indemnify a director or officer of the corporation, a former director or officer of the corporation or another individual who acts or acted at the corporation's request as a director or officer, or an individual acting in a similar capacity, of another entity, against all costs, charges and expenses, including an amount paid to settle an action or satisfy a judgment, reasonably incurred by the individual in respect of any civil, criminal, administrative, investigative or other proceeding in which the individual is involved because of that association with the corporation or other entity.

Advance of costs

(2) A corporation may advance moneys to a director, officer or other individual for the costs, charges and expenses of a proceeding referred to in subsection (1). The individual shall repay the moneys if the individual does not fulfil the conditions of subsection (3).

Limitation

(3) A corporation may not indemnify an individual under subsection (1) unless the individual

(a) acted honestly and in good faith with a view to the best interests of the corporation, or, as the case may be, to the best interests of the other entity for which the individual acted as director or officer or in a similar capacity at the corporation's request; and

(b) in the case of a criminal or administrative action or proceeding that is enforced by a monetary penalty, the individual had reasonable grounds for believing that the individual's conduct was lawful.

Indemnification in derivative actions

(4) A corporation may with the approval of a court, indemnify an individual referred to in subsection (1), or advance moneys under subsection (2), in respect of an action by or on behalf of the corporation or other entity to procure a judgment in its favour, to which the individual is made a party because of the individual's association with the corporation or other entity as described in subsection (1) against all costs, charges and expenses reasonably incurred by the individual in connection with such action, if the individual fulfils the conditions set out in subsection (3).

Right to indemnity

(5) Despite subsection (1), an individual referred to in that subsection is entitled to indemnity from the corporation in respect of all costs, charges and expenses reasonably incurred by the individual in connection with the defence of any civil, criminal, administrative, investigative or other proceeding to which the individual is subject because of the individual's association with the corporation or other entity as described in subsection (1), if the individual seeking indemnity

(a) was not judged by the court or other competent authority to have committed any fault or omitted to do anything that the individual ought to have done; and

(b) fulfils the conditions set out in subsection (3).

Insurance

(6) A corporation may purchase and maintain insurance for the benefit of an individual referred to in subsection (1) against any liability incurred by the individual

(a) in the individual's capacity as a director or officer of the corporation; or

(b) in the individual's capacity as a director or officer, or similar capacity, of another entity, if the individual acts or acted in that capacity at the corporation's request.

Application to court

(7) A corporation, an individual or an entity referred to in subsection (1) may apply to a court for an order approving an indemnity under this section and the court may so order and make any further order that it sees fit.

Notice to Director

(8) An applicant under subsection (7) shall give the Director notice of the application and the Director is entitled to appear and be heard in person or by counsel.

Other notice

(9) On an application under subsection (7) the court may order notice to be given to any interested person and the person is entitled to appear and be heard in person or by counsel.

R.S., 1985, c. C-44, s. 124; 2001, c. 14, s. 51.