



This is the 1st Affidavit
of Jordan Beaulieu in this case
and was made on September 17, 2024

No. S-243389
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN BANKRUPTCY AND INSOLVENCY

**IN THE MATTER OF THE RECEIVERSHIP OF
ECOASIS DEVELOPMENTS LLP AND OTHERS**

BETWEEN:

SANOVEST HOLDINGS LTD.

PETITIONER

AND:

**ECOASIS DEVELOPMENTS LLP,
ECOASIS BEAR MOUNTAIN DEVELOPMENTS LTD.,
ECOASIS RESORT AND GOLF LLP,
0884185 B.C. LTD.,
0884188 B.C. LTD.,
0884190 B.C. LTD.,
0884194 B.C. LTD.,
BM 81/82 LANDS LTD.,
BM 83 LANDS LTD.,
BM 84 LANDS LTD.,
BM CAPELLA LANDS LTD.,
BM HIGHLANDS GOLF COURSE LTD.,
BM HIGHLANDS LANDS LTD.,
BM MOUNTAIN GOLF COURSE LTD., and
BEAR MOUNTAIN ADVENTURES LTD.**

RESPONDENTS

AFFIDAVIT

I, Jordan Beaulieu, of 2900 – 550 Burrard Street, Vancouver, B.C., SWEAR THAT:

1. I am a legal assistant in the law firm of Fasken Martineau DuMoulin LLP, solicitors for the Petitioner, Sanovest Holdings Ltd., and as such have personal knowledge of the facts

hereinafter deposed to except where stated to be on information and belief, in which case I verily believe them to be true.

2. Attached and marked as **Exhibit "A"** is a true copy of a transcript of proceedings in chambers from 11:48 to 3:01pm on Thursday, September 12, 2024.

SWORN BEFORE ME at Vancouver,)
British Columbia, on September 17, 2024.)



A Commissioner for taking Affidavits for)
British Columbia)



JORDAN BEAULIEU

LISA HIEBERT
Barrister & Solicitor
Fasken Martineau DuMoulin LLP
2900 - 550 Burrard Street
Vancouver, BC V6C 0A3
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This is Exhibit "A" in the Affidavit of
Jordan Beaulieu made before me on
the 17th day of September 2024

A commissioner for taking Affidavits
for British Columbia

No. S234048
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA
(BEFORE THE HONOURABLE JUSTICE WALKER)

Vancouver, BC
September 12, 2024

BETWEEN:

599315 B.C. LTD. and DANIEL MATTHEWS

Petitioners

AND:

ECOASIS BEAR MOUNTAIN DEVELOPMENTS LTD.,
ECOASIS DEVELOPMENTS LLP, and
ECOASIS RESORT AND GOLF LLP, TIAN KUSUMOTO, and
SANOVEST HOLDINGS LTD.

Respondents

No. S243389
Vancouver Registry

IN BANKRUPTCY AND INSOLVENCY

**IN THE MATTER OF THE RECEIVERSHIP OF ECOASIS
DEVELOPMENTS LLP AND OTHERS**

BETWEEN:

SANOVEST HOLDINGS LTD.

Petitioners

AND:

ECOASIS DEVELOPMENTS LLP,
ECOASIS BEAR MOUNTAIN DEVELOPMENTS LTD.,
ECOASIS RESORT AND GOLF LLP, 0884185 B.C. LTD.,
0884188 B.C. LTD., 0884190 B.C. LTD., 0884194 B.C. LTD.,
BM 81/82 LANDS LTD., BM 83 LANDS LTD., BM 84 LANDS LTD.,
BM CAPELLA LANDS LTD., BM HIGHLANDS GOLF COURSE LTD.,
BM HIGHLANDS LANDS LTD., BM MOUNTAIN GOLF COURSE LTD.,
and BEAR MOUNTAIN ADVENTURES LTD.

Respondents

EXCERPT FROM PROCEEDINGS IN CHAMBERS
(Proceedings from 11:48 AM to 3:01 PM)

COPY

APPEARANCES

Counsel for the petitioners:

G. Brandt
C. Ferris
W. Roberts
C. Ohama-Darcus

Counsel for the respondents:

A. Nathanson
L. Herbert
K. Jackson
D. Byma

Counsel for the receiver:

P. Rubin

EXCERPT FROM PROCEEDINGS IN CHAMBERS
SEPTEMBER 12, 2024
 (Proceedings from 11:48 AM to 3:01 PM)

PROCEEDINGS

Witness	Proceedings	Page
	Discussion re terms of receivership agreement	1
	Submissions by Cnsl C. Ferris	9
	Discussion re terms of receivership agreement	19
	Submissions by Cnsl A. Nathanson	23
	Reporter certification	40

EXHIBITS

Exhibit	Description	Page
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No exhibits marked.

1
Discussion re terms of receivership agreement

September 12, 2024
Vancouver, BC

(EXCERPT FROM PROCEEDINGS)

(PROCEEDINGS COMMENCED AT 10:02 AM)
(EXCERPT BEGINS AT 11:48 PM)

CNSL W. ROBERTS: Just before --

THE CLERK: We're back on the record, Justice.

CNSL W. ROBERTS: Justice, you've browbeat us into submission. We've come to what we think is an agreed form of order --

THE COURT: Okay.

CNSL W. ROBERTS: -- that -- I'm going to give you an outline of it.

THE COURT: Okay.

CNSL W. ROBERTS: What our proposal is is between now and 2:00 PM we would go work on it --

THE COURT: M'mm-hmm.

CNSL W. ROBERTS: -- and either come to an agreement on, yes, we've got it right, or if we don't then so be it.

THE COURT: Okay.

CNSL W. ROBERTS: But the -- the form is there will be -- A&M will be appointed as receiver over -- remember before I said development and resort? We're not going to draw that distinction -- will be appointed as receiver over lands with carveout -- not as receiver over operations. A&M to have sufficient power to investigate both lands, sales process, and operations, and to come back to you and make a report about what happens next, both in terms of sales process and if the receiver says they should do something about operations, they can make their recommendation as well.

THE COURT: So when you say "lands," you're going to refer to all of the lands --

CNSL W. ROBERTS: Correct.

THE COURT: -- out of the assets? All right.

CNSL W. ROBERTS: Correct. And that's why it gets --

THE COURT: Yeah.

CNSL W. ROBERTS: -- it's more nuanced.

THE COURT: Yeah.

CNSL W. ROBERTS: Power to borrow --

THE COURT: Right.

2

Discussion re terms of receivership agreement

1 CNSL W. ROBERTS: -- at the receiver's discretion
2 including paying payables of either of
3 developments or resorts in the receiver's
4 discretion, all secured by a priority charge.
5 And power to compel sufficient necessary
6 information to make that report to you --
7 THE COURT: Okay.
8 CNSL W. ROBERTS: -- and to come back as the receiver
9 sees fit to deal with any interim issues that it
10 sees arising.
11 THE COURT: Okay.
12 CNSL W. ROBERTS: Yes? Sure. Yeah, no.
13 THE COURT: And I'd like to have some time frame put
14 on when. So the receiver's told, look, it's not
15 three months or four months before you come back.
16 CNSL W. ROBERTS: Yes. Good.
17 THE COURT: It needs to be -- I mean, there's some --
18 the parties have rightly pointed out some
19 commercial urgency to this.
20 CNSL W. ROBERTS: Yes.
21 THE COURT: Yeah, so I think --
22 CNSL W. ROBERTS: And so our plan was to talk to the
23 receiver and receiver's counsel over the break.
24 THE COURT: All right.
25 CNSL W. ROBERTS: In my mind it was 60 days. The
26 receiver may tell me something different.
27 CNSL K. JACKSON: Right. Yeah, we thought there's two
28 things to report on, Justice. There was the --
29 the issue about operations and management.
30 THE COURT: Right.
31 CNSL K. JACKSON: We thought -- I think we had 30 days
32 as a concept for that.
33 THE COURT: Yeah.
34 CNSL K. JACKSON: But we do want to make sure we're
35 not putting the court's officer in a -- in a
36 bind --
37 THE COURT: Right.
38 CNSL K. JACKSON: -- where he's saying, what are you
39 talking about.
40 THE COURT: Because in my --
41 CNSL K. JACKSON: And then there's a separate question
42 which is the -- what to do about a sale process.
43 THE COURT: Right.
44 CNSL K. JACKSON: And that probably will take a bit
45 longer.
46 THE COURT: Right.
47 CNSL K. JACKSON: And we were content to suggest

3
Discussion re terms of receivership agreement

1 that we leave that to the discretion of the
2 receiver, noting that they'll want to get going.
3 THE COURT: Right.
4 CNSL K. JACKSON: But if the court is more comfortable
5 having a deadline, then we should probably put it
6 to them as to what that might be.
7 THE COURT: All right.
8 CNSL K. JACKSON: Receiver [indiscernible] --
9 THE COURT: Well, keep -- bear this in mind too, I
10 start a long trial supposedly on October 7th..
11 CNSL K. JACKSON: Okay.
12 THE COURT: So I want to be able to carve out --
13 CNSL W. ROBERTS: M'mm-hmm.
14 THE COURT: -- set some specific days that you know
15 you can come back.
16 CNSL W. ROBERTS: Good.
17 CNSL K. JACKSON: That was one of the things we
18 mentioned we were going to do --
19 THE COURT: Because I -- it's supposed to be a
20 nine-week trial.
21 CNSL K. JACKSON: Sorry.
22 CNSL W. ROBERTS: Ouch.
23 CNSL K. JACKSON: We were going to come back --
24 THE COURT: There will be some breaks in it, and I --
25 and I have some time away in November. So I want
26 to be able to say, all right, look --
27 CNSL K. JACKSON: Right.
28 CNSL W. ROBERTS: Good.
29 THE COURT: -- to the parties in the long trial, if it
30 goes, you're not going to be sitting on this
31 date.
32 CNSL K. JACKSON: Yeah.
33 THE COURT: Because there's an -- you're going to
34 be -- expectation the receiver comes back.
35 CNSL K. JACKSON: I think we will have a pretty good
36 line of sight on that over the lunch hour.
37 THE COURT: Yeah, if we could -- because this -- oh,
38 there's Mr. Rubin now.
39 CNSL K. JACKSON: Right.
40 THE COURT: If -- if we -- if we set it so that
41 sometime in October you come -- the receiver
42 comes back --
43 CNSL K. JACKSON: Right.
44 THE COURT: -- we know there's a day there --
45 CNSL K. JACKSON: Exactly.
46 THE COURT: -- and I can -- I can carve that out.
47 Because I don't think this should be --

Discussion re terms of receivership agreement

1 CNSL K. JACKSON: No.
2 THE COURT: I should -- I think I should hear at least
3 the next couple of applications.
4 CNSL K. JACKSON: Absolutely. No. No. No. We --
5 well, Justice, we hope -- in the ordinary course
6 you would normally be seized of the process.
7 THE COURT: Yeah.
8 CNSL K. JACKSON: And it would be helpful to have that
9 here of course again. On the -- and so we'll
10 come up with a date, but if the report -- you
11 know, the first report is within a month or so --
12 THE COURT: Yeah.
13 CNSL K. JACKSON: -- end of October.
14 THE COURT: Yeah. We --
15 CNSL K. JACKSON: But we'll ask for some dates from
16 the receiver's counsel and come back to you with
17 a suggestion.
18 THE COURT: Yeah, we can -- no, we could come -- I
19 could carve out a date --
20 CNSL K. JACKSON: Right.
21 THE COURT: -- for hearing late -- at the very end of
22 October.
23 CNSL K. JACKSON: And what might arise -- anything
24 that arises from that. Yeah.
25 THE COURT: Yeah. Otherwise, if there's something
26 urgent, I can hear it at 9:00 or 4:30 --
27 CNSL K. JACKSON: Of course. Of course.
28 THE COURT: -- or 4:00 o'clock.
29 CNSL K. JACKSON: All right. And so, Justice, one of
30 the -- one of the concepts baked in here is -- I
31 mean, it's -- just to be clear, it's -- it's all
32 assets -- the easier way to do it is not to
33 describe what they're appointed over. I mean,
34 the real assets are the lands, but it's all
35 assets but not the business and not the
36 operations.
37 THE COURT: Right.
38 CNSL K. JACKSON: That's really what we're looking at
39 here. And those remain with EBMD, Ecoasis Bear
40 Mountain will continue to manage.
41 There is the borrowings power. My friend --
42 THE COURT: Yeah.
43 CNSL K. JACKSON: I want to be clear on something
44 just -- just so it's not lost. My friend pointed
45 out that there is a borrowings power for the
46 receiver, and it has the -- the -- it is -- it
47 is -- it has a discretion, because the -- the

5
Discussion re terms of receivership agreement

1 discretion as to whether to lend funds to the --
2 to the business which is not in receivership.
3 THE COURT: M'mm-hmm.
4 CNSL K. JACKSON: So -- so -- which is -- it creates
5 an interesting distinction.
6 THE COURT: Yeah.
7 CNSL K. JACKSON: You wouldn't see that in many
8 receiverships, where receivership borrowings are
9 being used to fund a business or an operation
10 outside of the receivership fold.
11 THE COURT: Right.
12 CNSL K. JACKSON: Now -- now, my friend's client has
13 insisted upon that discretion in favour of the
14 receiver.
15 THE COURT: So the receiver can obtain borrowings for
16 the business?
17 CNSL K. JACKSON: That it's not receiver of.
18 THE COURT: Right.
19 CNSL K. JACKSON: It's a bit unusual.
20 THE COURT: Interesting.
21 CNSL K. JACKSON: Right. Right. Interesting is -- is
22 right.
23 THE COURT: So it would require court approval for
24 that, or ...?
25 CNSL K. JACKSON: Well, the intention is to have the
26 borrowings -- the order to authorize that loan,
27 effectively, from the -- from the receiver -- the
28 receivership estate to the business, and that
29 will be in the receiver's discretion. And one of
30 the things we said was it's a bit, well, first,
31 unexpected given submissions about -- about --
32 about liquidity of the business.
33 But leaving that aside for a moment, it
34 would need to be secured --
35 THE COURT: That's --
36 CNSL K. JACKSON: -- back in favour of the estate.
37 And so where you see --
38 THE COURT: Yeah.
39 CNSL K. JACKSON: -- as you know, in CCAAs where they
40 all say any intercompany advances during this
41 process are secured in favour of the company --
42 THE COURT: Right.
43 CNSL K. JACKSON: -- making the advances, the order
44 that we would propose and that we'll be working
45 on -- and I've talked about this with my
46 friend -- is that the advances from the estate to
47 the business outside the receivership would be

6
Discussion re terms of receivership agreement

1 secured with a first charge over the business.
2 THE COURT: Okay. So there's not going to be a fight
3 later over the nature of the security?
4 CNSL K. JACKSON: That's right. No.
5 THE COURT: I want to make sure you can --
6 CNSL K. JACKSON: It would be clear as to what it is.
7 THE COURT: Yeah.
8 CNSL K. JACKSON: And, you know, this all may be moot
9 if in the end the business is brought into the
10 receivership.
11 THE COURT: Right.
12 CNSL K. JACKSON: But if it remains outside, it will
13 simply have an obligation back to the -- to the
14 estate.
15 THE COURT: Okay.
16 CNSL K. JACKSON: So that's the concept. I think I've
17 got that right.
18 THE COURT: Okay. Very good.
19 CNSL K. JACKSON: Very good.
20 THE COURT: All right.
21 CNSL W. ROBERTS: Sorry. And I would add -- and
22 Mr. Brandt just reminded me -- in it we're going
23 to carve out the arbitration --
24 THE COURT: Arbitration, of course.
25 CNSL W. ROBERTS: -- proceedings, so they could just
26 [indiscernible].
27 THE COURT: Okay. What's that?
28 CNSL K. JACKSON: One small thing, hardly worth
29 mentioning, when we said "the lands," we said all
30 the lands. And I thought that, I just want to be
31 clear, it includes the BMA lands --
32 THE COURT: Yeah.
33 CNSL K. JACKSON: -- which I think were one of the
34 things my friend had raised as being in question.
35 But I don't see why it wouldn't be. I mean, it
36 would be strange to have --
37 THE COURT: Right.
38 CNSL K. JACKSON: -- one thing carved out of this
39 whole fold.
40 THE COURT: Yeah. Yeah.
41 CNSL W. ROBERTS: Let's talk about that. It's hard to
42 get instructions over the rail.
43 THE COURT: Yeah.
44 CNSL K. JACKSON: How long do we need?
45 THE COURT: Yeah.
46 CNSL W. ROBERTS: Five minutes? Just ...
47 THE COURT: I'll stand you down for five minutes.

7
Discussion re terms of receivership agreement

1 CNSL W. ROBERTS: Very good. Thank you, Justice.
2 THE COURT: I think if you can, if it helps, have --
3 letting the receiver have the authority over all
4 the lands to -- you can see the sense in that.
5 And -- and to allay concerns that either party
6 may have, the receiver can't do anything with
7 them --
8 CNSL W. ROBERTS: Yeah. Right.
9 CNSL K. JACKSON: Right.
10 THE COURT: -- with the lands. He can't sell them or
11 anything until he gets court approval.
12 CNSL K. JACKSON: Yeah.
13 THE COURT: So --
14 CNSL K. JACKSON: Even try to sell them.
15 THE COURT: Yeah.
16 CNSL K. JACKSON: That's right.
17 THE COURT: Yeah. Even -- even to engage, the lis has
18 to be worked out.
19 CNSL K. JACKSON: Right.
20 THE COURT: So I think it protects everyone from the
21 other side doing something inappropriate with
22 the -- the BMA land.
23 CNSL K. JACKSON: We agree, Justice.
24 CNSL W. ROBERTS: We might not agree, but I'll find
25 out.
26 THE COURT: It just seems to me that given the great
27 deal of distrust --
28 CNSL K. JACKSON: M'mm-hmm.
29 THE COURT: -- that if you -- if you have this
30 independent officer dealing with all the lands,
31 including that one, parties know they retain
32 their rights to come to court and say, we don't
33 agree, but they know the other one can't do
34 something untoward or inappropriate --
35 CNSL K. JACKSON: Right.
36 THE COURT: -- relating to that piece of property in
37 the meantime.
38 CNSL K. JACKSON: Understood.
39 THE COURT: It just avoids another lawsuit about that.
40 It just seems to -- I'll leave it at that.
41 CNSL K. JACKSON: Thank you, Justice.
42 THE COURT: I'll stand outside waiting. Thank you.
43 THE CLERK: Order in chambers. These chambers are
44 stood down for a few minutes.
45

46 (PROCEEDINGS RECESSED AT 11:56 AM)
47 (PROCEEDINGS RECONVENED AT 12:06 PM)

8
Discussion re terms of receivership agreement

1
2 THE COURT: Are we on?
3 THE CLERK: We're back on record, Justice.
4 THE COURT: Okay. Mr. Roberts?
5 CNSL W. ROBERTS: Thank you. We've agreed that the
6 BMA lands --
7 THE COURT: Okay. Good.
8 CNSL W. ROBERTS: -- which are described as "the
9 Gondola lands," are in.
10 THE COURT: Good.
11 CNSL W. ROBERTS: So we are going to go hash out an
12 order. And we --
13 THE COURT: Does 2:00 o'clock give you enough time, or
14 do you need a little bit longer than that?
15 CNSL W. ROBERTS: I think -- I think we should -- we
16 should set for 2:00.
17 THE COURT: All right.
18 CNSL W. ROBERTS: And then we'll come let Madam
19 Registrar know if we need longer. But then we --
20 yeah.
21 THE COURT: All right.
22 CNSL K. JACKSON: Our view -- no, our view is if we
23 haven't got this resolved largely by 2:00 then
24 they'd better finish their submissions in 15
25 minutes.
26 THE COURT: There's a problem. All right. All right.
27 Good. Okay.
28 CNSL W. ROBERTS: Fair.
29 CNSL K. JACKSON: Justice, just so you know, I think
30 he's on the record, but Peter Rubin is present in
31 the courtroom.
32 THE COURT: Right. And he's going to be acting for --
33 CNSL K. JACKSON: And so he's now on the record --
34 THE COURT: -- A&M. Okay. Good.
35 CNSL K. JACKSON: -- as counsel for A&M.
36 THE COURT: Good. All right. Well, that's good.
37 CNSL W. ROBERTS: Excellent.
38 THE COURT: And then you're going to be bringing the
39 CPC order to -- I just heard?
40 THE CLERK: That's right. For 2:00 o'clock.
41 THE COURT: Okay. We'll deal with that right away
42 then.
43 CNSL W. ROBERTS: Okay. Thank you, Justice.
44 THE COURT: All right. Well, thank you very much.
45 That's --
46 CNSL A. NATHANSON: Justice, I just want to be clear
47 because I haven't been in all these

9
Submissions by Cnsl C. Ferris

1 conversations. So if -- are we -- we're standing
2 down now --
3 THE COURT: Until 2:00.
4 CNSL A. NATHANSON: Okay. And if there's no
5 agreement, my friends are going to finish their
6 submissions in 15 minutes and then I'm going to
7 be up?
8 CNSL C. FERRIS: Yes.
9 CNSL G. BRANDT: Mr. Roberts said he was done, so --
10 THE COURT: Mr. Ferris says yes.
11 CNSL C. FERRIS: Yes.
12 CNSL G. BRANDT: Yes, very good. Okay.
13 CNSL A. NATHANSON: Okay. Thank you.
14 THE COURT: Okay.
15 CNSL C. FERRIS: Yeah.
16 THE COURT: And if it turns out there is an agreement
17 and we're just going through the form of the
18 order, then --
19 CNSL A. NATHANSON: Right.
20 THE COURT: -- certain counsel can be excused, I would
21 think.
22 CNSL A. NATHANSON: Yes. That would be great. Thank
23 you.
24 THE COURT: Okay. All right. Thank you very much
25 then. Thank you.
26 THE CLERK: Order in chambers. We're adjourned --
27 THE COURT: And just make sure you work out that date
28 later on in October too.
29 CNSL A. NATHANSON: Thank you.
30 CNSL K. JACKSON: The week we're looking for. Thank
31 you.
32 THE COURT: Yes, it's important. Okay. Thank you.
33 CNSL K. JACKSON: Good. Very good. Thank you.
34 THE CLERK: Order in chambers. These chambers are
35 adjourned until 2:00 PM.
36
37 (PROCEEDINGS RECESSED AT 12:08 PM)
38 (PROCEEDINGS RECONVENED AT 2:08 PM)
39
40 THE COURT: We've just got to go on --
41 THE CLERK: We're now back on the record, Justice.
42 THE COURT: All right. Okay. Now, go ahead,
43 Mr. Ferris.
44 CNSL C. FERRIS: So, Justice, I -- I understand -- I
45 haven't had an update, so I understand that
46 there's still work being done --
47 THE COURT: Okay.

10

Submissions by Cnsl C. Ferris

1 CNSL C. FERRIS: -- on an order. I don't know whether
2 that -- it will be agreed or not --
3 THE COURT: Okay.
4 CNSL C. FERRIS: -- but I understand they're ongoing.
5 And in light of the timing and my --
6 THE COURT: Yeah.
7 CNSL C. FERRIS: -- friend's concerns, we thought we
8 would just get going and proceed.
9 THE COURT: Okay.
10 CNSL C. FERRIS: And if it pops up, it pops up.
11 THE COURT: All right.
12 CNSL C. FERRIS: So I'm here to -- to finish. And as
13 I agreed, I have 15 minutes. Hopefully I won't
14 take all of that time, because I'm really just
15 going to address one final point which is the
16 test and the jurisdiction under the corporate
17 statute and why we think that that jurisdiction
18 is available to you.
19 And so I'm going to jump through a number of
20 smaller parts of the argument.
21 THE COURT: So what should I have in front of me then?
22 CNSL C. FERRIS: So you should only need the argument
23 and perhaps the books of authority.
24 THE COURT: Okay.
25 CNSL C. FERRIS: But -- but maybe just -- lets just
26 start on the argument.
27 THE COURT: I've got the argument here.
28 CNSL C. FERRIS: We'll see how we get -- how we get
29 going.
30 THE COURT: Okay.
31 CNSL C. FERRIS: So I'm on page 47. I'm at
32 paragraph 206.
33 THE COURT: Okay.
34 CNSL C. FERRIS: And just to remind you that, on what
35 we call the funding application, 599 and Matthews
36 has sought relief under 227(3) of the *Business*
37 *Corporation Act* as well as the *Law and Equity*
38 *Act*. And so I'm -- I'm focussing my submissions
39 just on 227(3) of the *Business Corporations Act*.
40 And so from there I'm going to jump -- I'm
41 going to jump over to page 51, paragraph 219.
42 And essentially my friends and I are *ad idem* that
43 the test under the *Business Corporations Act* is
44 the -- is the RJR MacDonald injunction test.
45 Whether it's two prongs or three prongs -- but
46 there's a serious question to be tried, there is
47 irreparable harm, and there is a balance of

11

Submissions by Cnsl C. Ferris

1 convenience and how that favours. There's --
2 there's some question as to whether or not this
3 is a mandatory injunction and so there's a strong
4 *prima facie* case needed. We say not, and I'll
5 address that. But at the very least it -- it
6 engages the injunction test.

7 And so at paragraph 220, you know, what is
8 our claim in the oppression proceeding? Our
9 claim in the oppression proceeding is the
10 standard oppression which is, here's our
11 reasonable expectations, these expectations were
12 breached, and that has unfairly prejudiced and
13 oppressed us. And so at paragraph 220 we set out
14 what Mr. Matthews says are -- are and were and
15 which continue to be his reasonable expectations.
16 And so that, you know, the Bear Mountain assets
17 will be managed for the purpose of realizing on
18 the bulk of lot sales their reflected market
19 value, that he would be -- he would be in
20 direction of EMD's overall operations, that
21 Sanovest's main responsibility was to provide
22 financing, and that repayment of the Sanovest
23 loans from the proceeds of sale would be a
24 priority. And that -- and as part of that they
25 wouldn't -- Sanovest wouldn't sort of try to --
26 try to abuse their position to profit unduly from
27 their -- from their financing and that each would
28 act in -- honestly in good faith and in the best
29 interests of the business and the management.

30 And so Mr. Matthews has further deposed that
31 as funds became available from sales or
32 operations they would get together to determine
33 the extent to which funds should be reinvested in
34 amenities, for funds not required for operations
35 to be payment of the Sanovest financing, and so
36 this would be an ongoing iterative process
37 between them. And so we say that there's ample
38 evidence that following the appointment of Tian
39 Kusumoto to replace his father Tom, that these
40 expectations have been violated. And it
41 certainly gets us to the -- the question to be
42 tried that's required for an injunction
43 application.

44 When you get to the balance of convenience
45 analysis, we say it favours the appointment of a
46 marketing agent because you don't need -- you
47 don't need a receiver over all of the lands to

12
Submissions by Cnsl C. Ferris

1 pay back the Sanovest loan. And so that is where
2 the convenience is, is how do you get this loan
3 repaid, and that that doesn't require anything
4 more than the appointment of an agent to sell
5 some of these lands.

6 At the present time Matthews and 599 are
7 suffering irreparable harm because they've been
8 stymied in any ability to raise funds. They've
9 been stymied on land sales, alternate financing,
10 and there's been a continuing drain on the
11 equity. And so the balance of convenience, also,
12 is that both sides have an interest in preserving
13 the value of the partnership assets. You'll see
14 Sanovest has said that. And we say that this is
15 the best way in which to -- to do that and to
16 maintain this value.

17 So the other point is that both sides agree
18 that some form of interim relief is necessary.
19 The only question is -- is that it's the form.
20 And we say that we -- Sanovest can't say that
21 damages are an adequate remedy because they
22 themselves are seeking the appointment of a
23 receiver which is an equitable form of relief
24 beyond simply the sale of assets to fund their
25 loan.

26 So just dealing with the jurisdiction point
27 then, which I start at page 53. And I'm not
28 going to take you through all of this --

29 THE COURT: Okay.

30 CNSL C. FERRIS: -- because I think it's relatively
31 straightforward, our point. Sanovest takes
32 the -- takes the position that because we're
33 dealing with partnerships, that oppression is not
34 available. And as a starting point, as a general
35 proposition, it is true that oppression is not
36 available to address issues arising in the
37 context of partnerships. However, there is
38 carveouts from that.

39 And at paragraph 230 we -- we set out -- and
40 following we set out the case law. And so it's
41 not in here, but the case at 230, the *Landvis*
42 case is at tab 23 --

43 THE COURT: M'mm-hmm.

44 CNSL C. FERRIS: -- of what is entitled the Sanovest
45 Interim Relief Book of Authorities. I'm not
46 going to take you there because I've quoted it.

47 THE COURT: Yeah.

13
Submissions by Cnsl C. Ferris

1 CNSL C. FERRIS: I'm just giving you the cite.
2 THE COURT: Okay.
3 CNSL C. FERRIS: It's Volume I, tab 23.
4 THE COURT: Okay.
5 CNSL C. FERRIS: And so what the court wrote there
6 was:

7
8 Relief from oppression pursuant to statutory
9 jurisdiction is not available to address
10 issues arising within a partnership, limited
11 or otherwise. The statutory regime is
12 intended to address oppressive (unfair)
13 conduct in the legal context of a
14 corporation, not conduct within what is
15 regarded by the law simply as a
16 relationship.
17

18 It goes on to say, though:

19
20 ... even in the context of a partnership or
21 relationship, to the extent that oppressive
22 conduct may properly be considered as that
23 of a corporate participant and prejudicial
24 consequences of such conduct can be said to
25 accrue to a 'complainant' as defined by the
26 governing legislation, recourse to the
27 statutory oppression jurisdiction may still
28 be appropriate.
29

30 And that's where we say we find ourselves. So
31 paragraph 232 is a -- is a case of -- of
32 Mr. Justice Nathan Smith of this court. And that
33 is found at tab 23(a) of one of our books of
34 authorities. That was a cite -- 23(a)?

35 No. Zone 15 -- I'll --

36 THE COURT: All right.

37 CNSL C. FERRIS: We'll -- we'll identify the cite.
38 But I'll just -- in the interests of time, I'll
39 take you through this. And Mr. Justice Smith
40 writes:

41
42 In this case, the petitioners clearly have
43 standing in relation to Holdings Ltd. --
44 Cascadia is a shareholder, and Mr. Cote is
45 the sole shareholder in Cascadia. They are
46 also members of the limited partnership that
47 holds one half of the shares in Boatyard

14
Submissions by Cnsl C. Ferris

1 Ltd., which in turn owns all of the shares
2 in Moorage Ltd. In that sense, I find that
3 they have an interest "not dissimilar" to
4 that of shareholders.
5

6 [58] The BCA refers to oppression in the
7 conduct of the "affairs" of a company. The
8 "affairs" of [Holdings], in which Cascadia
9 is a direct shareholder, include management
10 of the limited partnership. While the BCA
11 gives ... no direct rights against the
12 limited partnership, the manner in which
13 [Holdings] operates the limited partnership
14 may affect the petitioners' rights as
15 shareholders in Holdings Ltd. or as parties
16 with "not dissimilar" rights in [Boatyard]
17 and Moorage ...
18

19 Now -- though in that case Smith J. found the
20 court lacked jurisdiction on an application under
21 the BCA to order the respondents to purchase the
22 petitioners' limited partnership units, he went
23 on to say:
24

25 [61] Some of the relief available under
26 section 227 ... might indirectly apply to a
27 limited partnership through orders directed
28 to a corporation that is a limited or
29 general partner.
30

31 And we have the managing partner in this case.
32

33 For example section 227(3)(a) permits the
34 court to make an order directing or
35 prohibiting any act. Arguably, a
36 corporation that is the general partner in a
37 limited partnership may be directed to cause
38 the limited partnership to do or not do
39 certain things.
40

41 CNSL G. BRANDT: It's in the -- our blue book of
42 authorities, and it's 2(a).

43 CNSL C. FERRIS: 2(a). Apologies.

44 THE COURT: Okay. Let me just make note of that.
45 Just bear with me. Okay.

46 CNSL C. FERRIS: Okay. So just look down then to
47 paragraph 234.

15

Submissions by Cnsl C. Ferris

1 THE COURT: M'mm-hmm.

2 CNSL C. FERRIS: In this case 599 in fact is --
3 indirectly owns 50 percent shares of EMDB with
4 the balance owned by Sanovest. And that's the
5 managing partner in the two limited partnerships.
6 Further, EMDB itself holds an interest in each of
7 the partnership and the resort partnership. EMDB
8 was incorporated to act as the managing partner
9 for each partnership, and -- and, you know,
10 Sanovest is saying, well, you know, to -- to use
11 that as a lever to get in here would be sort
12 of -- it's not enough to engage -- to engage --
13 to engage corporate law. And they -- they make
14 sort of the -- the -- sort of "the sky is
15 falling" arguments, that this would be indirectly
16 sort of taking up too much of -- too much of
17 corporate law dealing with the partnerships.
18 And so there -- I just take you to the next
19 page, 240 --

20 THE COURT: M'mm-hmm.

21 CNSL C. FERRIS: -- where -- at paragraph 240 where
22 you see the orders that we're seeking. And these
23 are all orders that deal with the operation of
24 the EMDB [sic]. You know, an order removing Tian
25 Kusumoto as a director of that corporation, an
26 order authorising it to obtain debt, an order
27 directing it to purchase shares, a shotgun order.

28 THE COURT: How can I --

29 CNSL C. FERRIS: That there be a --

30 THE COURT: How can I grant all of that relief in view
31 of the -- on this application, in view of the
32 heavily contested --

33 CNSL C. FERRIS: You can't grant any of that relief.

34 THE COURT: Yeah, okay.

35 CNSL C. FERRIS: But I have to show you that I have
36 a *prima facie* case --

37 THE COURT: Oh I see.

38 CNSL C. FERRIS: -- for those. Right.

39 And I'm showing you that the remedies we're
40 seeking are corporate remedies relating to that
41 corporation and its management role of the two
42 partnerships. And -- and so continuing on here,
43 there's further examples over on page 56. And --
44 and -- and so we say that the relief we seek is
45 corporate relief and we fall in with the
46 exceptions in the case law that -- that carve
47 back this general principle that oppression

16

Submissions by Cnsl C. Ferris

1 proceedings are not to be used to deal with,
2 generally, partnership issues.
3 THE COURT: Just a minute. I just want to go back and
4 look at this for a minute.
5 CNSL C. FERRIS: Okay.
6 THE COURT: So you're not asking me, on your
7 application, to make the order set out in
8 paragraph -- paragraph 240?
9 CNSL C. FERRIS: No.
10 THE COURT: You're just saying --
11 CNSL C. FERRIS: I'm just -- I'm just showing you
12 that --
13 THE COURT: -- what you're seeking?
14 CNSL C. FERRIS: Yes. That at the end of the day that
15 that's the -- that's part of the relief that
16 we're seeking in our corporate oppression
17 proceeding. And that's why you can grant the
18 relief on this application to cause that company
19 to -- to cause the partnerships to sell this land
20 to pay off the Sanovest loan.
21 THE COURT: I'm not -- I'm not sure that I've
22 encountered this part before, but on a strong
23 *prima facie* case component of an application, if
24 the evidence -- if the conflicts in the evidence
25 are so significant that it's impossible to make
26 the determinations on a summary application, are
27 there -- how do I -- how do I determine if the
28 strong *prima facie* case has been made out?
29 CNSL C. FERRIS: Well, I think --
30 THE COURT: It requires me to weigh evidence; right?
31 CNSL C. FERRIS: So I should say this -- is that we
32 say it's not a strong *prima facie* case, that
33 that's --
34 THE COURT: I -- yeah.
35 CNSL C. FERRIS: -- that's not the test.
36 THE COURT: Yeah. It's a serious issue to be tried,
37 and you've shown it.
38 CNSL C. FERRIS: Right.
39 THE COURT: Yeah.
40 CNSL C. FERRIS: And we say that. And -- and it's
41 addressed in the argument, but essentially we're
42 simply saying that it's not causing the company
43 to do anything. It's just -- it's not forcing
44 the company to do anything. It's actually just
45 putting somebody in to market the lands and the
46 company just has to stand back and let them --
47 and let them. So we say that the -- we don't get

17
Submissions by Cnsl C. Ferris

1 to the mandatory injunction standard.
2 THE COURT: All right.
3 CNSL C. FERRIS: But that being as it may, what do you
4 do?
5 THE COURT: Yeah.
6 CNSL C. FERRIS: Well, you have to be able to get
7 yourself to a point that you can find that
8 there's a *prima facie* case. And if you look at
9 the evidence and you say that it's too conflicted
10 for you to be able to do that, well, then I
11 haven't met the standard.
12 THE COURT: I see.
13 CNSL C. FERRIS: But we say on -- you know, Mr. Brandt
14 took you through the evidence --
15 THE COURT: Right. Yes. Yes.
16 CNSL C. FERRIS: And we say that you certainly can get
17 to that level based on what we've -- what we've
18 shown you, especially if you get rid of
19 Mr. Clark's evidence because it's completely
20 unreliable, that there is a very strong -- it's
21 an objective fact --
22 THE COURT: Yeah.
23 CNSL C. FERRIS: -- that there was these letters of
24 intent for hundred of millions of dollars which
25 have not been accepted.
26 THE COURT: Yeah. All right.
27 CNSL C. FERRIS: You know, does that get you to the
28 *prima facie* case?
29 THE COURT: Yeah.
30 CNSL C. FERRIS: I would say yes. But if you can't
31 get there then I -- I would concede that I have
32 not succeeded here.
33 THE COURT: All right.
34 And then in terms of the use of the -- of
35 the nomenclature, "marketing agent," it doesn't
36 require me to consider the receivership
37 provisions of the BIA, simply deal with it under
38 the terms of a -- the injunction application
39 under the --
40 CNSL C. FERRIS: Correct.
41 THE COURT: -- corporate business -- BC *Business*
42 *Corporations Act*.
43 CNSL C. FERRIS: Yes. So --
44 THE COURT: But --
45 CNSL C. FERRIS: -- Justice, I've used up my
46 15 minutes.
47 THE COURT: All right.

1 CNSL C. FERRIS: I'm just going to tell you that the
2 rest of the argument deals with a couple of
3 points.
4 THE COURT: Okay.
5 CNSL C. FERRIS: Entitlement to a redemption period,
6 my friend was correct that Mr. Matthews and 599
7 don't have a personal right --
8 THE COURT: Right.
9 CNSL C. FERRIS: -- to a redemption period, but
10 they're asserting that on behalf of the
11 partnership as partners.
12 THE COURT: Yeah. Yeah.
13 CNSL C. FERRIS: And in our view they're entitled to
14 do that, that the partner should have a right of
15 redemption period.
16 THE COURT: Okay.
17 CNSL C. FERRIS: And then there's some other
18 miscellaneous points about the Gondola lands
19 et cetera, such that we say that we'll just leave
20 those provisions with you.
21 THE COURT: Okay.
22 CNSL C. FERRIS: And -- and I'll just -- I'll just end
23 with paragraph 264, just to reiterate this point.
24 THE COURT: All right.
25 CNSL C. FERRIS: That Sanovest and Tian Kusumoto
26 propose the appointment of a receiver over all of
27 the partnership and resort partnership assets
28 which are worth many times what they're owed --
29 THE COURT: Yeah.
30 CNSL C. FERRIS: -- at the same time seeking to
31 entrench their position as a lender, which we say
32 to continue to dilute my -- my client, seen for
33 what it really is, Sanovest and Tian Kusumoto
34 don't actually want the loan repaid and retired.
35 Rather, they want to draw out the partnership's
36 indebtedness, accumulating interest, chipping
37 away at Mr. Matthews' and 599's equity in a
38 concerted effort to push them out of Bear
39 Mountain in a distress situation. And that's
40 what we say our case is.
41 THE COURT: If I make a finding -- a determination
42 that there's a strong *prima facie* case, am I in
43 any way entrenching upon issues to be determined
44 at the trial in January 2026?
45 CNSL C. FERRIS: Well, I think you have to be
46 careful --
47 THE COURT: Yeah.

19

Discussion re terms of receivership agreement

1 CNSL C. FERRIS: -- in how -- how you write it.
2 THE COURT: Yeah.
3 CNSL C. FERRIS: But -- but that couldn't be the test
4 if -- if you weren't able to do it. That is the
5 test on -- on an interlocutory application. And
6 so there must be a way that you can come to that
7 finding on an interlocutory basis without
8 impeding upon the trial -- trial -- ultimate
9 trial, because otherwise it couldn't be the test
10 on an interlocutory application.
11 THE COURT: Yeah. Okay.
12 CNSL C. FERRIS: Okay?
13 THE COURT: Thank you.
14 CNSL C. FERRIS: Thank you, Justice.
15 THE COURT: Mr. Nathanson?
16 CNSL A. NATHANSON: Thank you, Justice. Justice, just
17 one moment while I give away a few things.
18 THE COURT: Okay.
19 CNSL K. JACKSON: So --
20 THE COURT: Mr. Jackson?
21 CNSL K. JACKSON: Thank you, Justice. Very quickly,
22 we advise you -- sorry.
23 THE COURT: That's fine.
24 CNSL K. JACKSON: Great. We advised you at the end of
25 the hearing this morning that there was an
26 agreement --
27 THE COURT: Right.
28 CNSL K. JACKSON: -- between the parties. We laid out
29 for you the terms of that deal in no small amount
30 of detail.
31 THE COURT: Right.
32 CNSL K. JACKSON: We went back to the office to settle
33 terms of an order. Our office delivered to
34 counsel for 599 a revised form of order. We also
35 copied counsel for the --
36 THE COURT: Yeah.
37 CNSL K. JACKSON: -- proposed receiver. That was done
38 at 12:53.
39 THE COURT: Yeah.
40 CNSL K. JACKSON: Quickly. We received comments very
41 quickly, minor comments, from counsel for the
42 proposed receiver and nothing from counsel for
43 599, no response at all. And Mr. Roberts
44 attended here today. I've asked him what's going
45 on, and it appears as if, despite the fact that
46 we have an agreement, his clients have decided to
47 not proceed with that agreement which is an

Discussion re terms of receivership agreement

1 interesting situation because we spoke to an
2 agreement to the court.
3 I will need instructions. I'd like to
4 discuss with my co-counsel as to what we do about
5 it, but there is the part of me which says we
6 should be sitting here settling the terms of an
7 order --
8 THE COURT: Yeah.
9 CNSL K. JACKSON: -- that was agreed to before the
10 court.
11 THE COURT: Yeah. Why don't I hear from Mr. Roberts
12 then.
13 CNSL K. JACKSON: Yes, of course. Please.
14 THE COURT: I thought there was -- I was told this
15 morning there was an agreement.
16 CNSL W. ROBERTS: The devil's in the details.
17 THE COURT: Yeah.
18 CNSL W. ROBERTS: He sent us a draft order. It's, as
19 you would expect, 14-pages long.
20 THE COURT: Yeah.
21 CNSL W. ROBERTS: And in that period of time we
22 haven't got through it.
23 THE COURT: Okay.
24 CNSL W. ROBERTS: I'm -- I'm certainly not saying
25 there is no agreement, but as of right now --
26 THE COURT: Are you telling me, though, there's an
27 agreement on the terms that I was told this
28 morning before the break?
29 CNSL W. ROBERTS: We told you what we told you, which
30 is we had an agreement on terms.
31 THE COURT: All right.
32 CNSL W. ROBERTS: Yes. There was an agreement on
33 those terms.
34 THE COURT: Okay. Well, do you have -- look, do you
35 have any sense of how long it will take for
36 your -- your side to respond to Mr. Jackson?
37 CNSL W. ROBERTS: In terms --
38 THE COURT: In terms of the order?
39 CNSL W. ROBERTS: It's hard. So if -- if we didn't
40 have this hearing booked this afternoon, we'd be
41 back at the office doing it right now.
42 THE COURT: Right.
43 CNSL W. ROBERTS: But we had to come back for this.
44 So I will certainly, at the first
45 opportunity, be outside with our clients talking
46 to them about the terms and trying to get through
47 it, but not while this is going on. I need

21

Discussion re terms of receivership agreement

1 Mr. Ferris out there with me.
2 THE COURT: Oh, I see. Oh. All right.
3 CNSL K. JACKSON: Well, Justice, we have --
4 THE COURT: Just a minute, Mr. Jackson.
5 CNSL K. JACKSON: Oh, sorry. Yes, of course. Of
6 course.
7 THE COURT: Okay. I guess I had thought, perhaps
8 naively so, that given the multiple sets of
9 counsel that -- in terms of the insolvency side,
10 [indiscernible] dealing with it and in terms of
11 the oppression side --
12 CNSL W. ROBERTS: Agreed. But there are substantive
13 underlying commercial issues --
14 THE COURT: All right.
15 CNSL W. ROBERTS: -- that come into play.
16 I'm not sure I should say any more than
17 that.
18 THE COURT: All right. Okay.
19 CNSL W. ROBERTS: And so that's all I can tell you
20 right now. Right now there's no agreement on a
21 form of order.
22 THE COURT: Okay. Mr. Jackson?
23 CNSL K. JACKSON: Right. So, Justice, we've been --
24 we left someone behind to do this.
25 THE COURT: Yeah.
26 CNSL K. JACKSON: There's no reason they couldn't have
27 done the same. And now that Mr. Ferris is done
28 his submissions and before he has to leave at
29 2:45, as I understand it --
30 THE COURT: Just a minute.
31 CNSL K. JACKSON: Oh, apologies. I should have
32 approached the [indiscernible].
33 THE COURT: Yeah.
34 CNSL K. JACKSON: Of course. Apologies. Mr. Ferris I
35 think has until 2:45. If I could suggest that
36 Mr. Ferris and Mr. Roberts and myself step out
37 with his clients if they need to -- I don't have
38 to speak to them, but to try and -- and talk
39 about what it is that I'm missing on this.
40 THE COURT: Okay.
41 CNSL K. JACKSON: I think it's --
42 THE COURT: Because unfortunately I can't be here
43 tomorrow to deal with this.
44 CNSL K. JACKSON: Correct. Exactly. I don't -- I
45 think there's no time like the present.
46 THE COURT: Thank you.
47 CNSL K. JACKSON: We shouldn't -- we should be in

22

Discussion re terms of receivership agreement

1 the -- we should be -- some of us --
2 THE COURT: Yeah.
3 CNSL K. JACKSON: -- should be out there doing this
4 right now.
5 THE COURT: Okay.
6 CNSL K. JACKSON: And so I'm going to invite my
7 friends to do that.
8 THE COURT: Does that work?
9 CNSL C. FERRIS: Yeah. That's fine.
10 THE COURT: Mr. Nathanson, I know --
11 CNSL A. NATHANSON: Justice, I mean -- look, we could
12 take the --
13 THE COURT: I can -- I can sit part of next Wednesday
14 too, but ...
15 CNSL A. NATHANSON: We could take the break early.
16 THE COURT: Yeah. And if the --
17 CNSL A. NATHANSON: I -- I -- but, I mean, if this is
18 not resolved by 3:00 o'clock, I should be making
19 my submissions.
20 THE COURT: I know. I know.
21 CNSL A. NATHANSON: We're running out of time.
22 THE COURT: Let's --
23 CNSL C. FERRIS: No. No, just -- I'm fine to leave
24 Mr. Brandt here, if -- if Mr. Nathanson wishes to
25 start right now. And I can go outside and --
26 THE COURT: Okay.
27 CNSL C. FERRIS: -- speak to Mr. Jackson and
28 Mr. Roberts.
29 THE COURT: Does that work, Mr. Nathanson?
30 CNSL A. NATHANSON: That's fine.
31 THE COURT: All right. If you're -- look, I'll just
32 say this to counsel and the parties who are here.
33 If you're -- I'm told there's a deal. I was --
34 the terms were conveyed to me this morning.
35 It's -- now it's a matter of drafting an order
36 that reflects that. I take it that you're going
37 to be taking quite a bit from the model order but
38 also crafting some parts that deal with any
39 unique aspect of it. But the terms were relayed
40 to me on the record, so I would think with all of
41 the -- the experience in this room, you'd be able
42 to come up with an order and -- and one that I
43 could look at and --
44 CNSL K. JACKSON: Agreed, Justice.
45 THE COURT: And -- and then it stops the erosion of --
46 no offence to counsel -- ongoing legal expense
47 that erodes the value of the assets of the

23

Submissions by Cnsl A. Nathanson

1 partnership because of the -- what I view to be
2 the enormous costs of this --
3 CNSL K. JACKSON: These are expensive minutes.
4 THE COURT: Yeah.
5 CNSL K. JACKSON: Agreed. Justice I --
6 THE COURT: So if you can work something out, I would
7 encourage you to do it. I -- I was quite taken
8 with the -- what I was told this morning was the
9 agreement. I think it's a way that protects
10 everyone at least for now. Okay.
11 CNSL A. NATHANSON: Can I have one moment, Justice?
12 THE COURT: Of course. And, Mr. Nathanson, I was
13 going to tell you, look, I know Mr. Ferris isn't
14 available Wednesday, but I -- I moved a personal
15 matter from Thursday to Wednesday, but I can
16 work -- I have to attend that, but I can work
17 around that to give more time on Wednesday.
18 CNSL A. NATHANSON: You've -- you've been very
19 gracious. I can -- I can finish --
20 THE COURT: Yeah.
21 CNSL A. NATHANSON: -- in time -- on the schedule that
22 we've discussed.
23 THE COURT: Okay. All right. Thank you.
24 CNSL A. NATHANSON: So we don't, in my view, require
25 more --
26 THE COURT: All right. If you need it, you got it.
27 CNSL A. NATHANSON: Thank you.
28 THE COURT: If you need more, you've got it.
29 CNSL A. NATHANSON: I appreciate that. So, Justice,
30 what you should have for me to begin --
31 THE COURT: Yeah.
32 CNSL A. NATHANSON: You -- you have, I know, my
33 cerloxed book of submissions --
34 THE COURT: Yeah.
35 CNSL A. NATHANSON: -- that have the table of actions
36 that you've been referred to several times.
37 THE COURT: Yeah. Okay. Let me just get it. There's
38 a lot up here. Just a minute.
39 CNSL A. NATHANSON: Yeah. I appreciate that.
40 THE COURT: I'm just going to have to stand up here
41 and figure out where it all is. Let's put this
42 away. That's the receivership [indiscernible].
43 Okay. Here it is. Here we are. No. Right.
44 Right.
45 CNSL A. NATHANSON: So --
46 THE COURT: Okay. I've got it.
47 CNSL A. NATHANSON: Okay. So that -- that's part of

Submissions by Cnsl A. Nathanson

1 the battle.
2 THE COURT: I've got it.
3 CNSL A. NATHANSON: And then what you should have been
4 handed by Madam Registrar, unfortunately, are a
5 two-volume book of authorities --
6 THE COURT: Right.
7 CNSL A. NATHANSON: -- with the kind of yellow-ish
8 tabs -- or yellow-ish cover and then a two-volume
9 condensed book to save us going into --
10 THE COURT: Thank you.
11 CNSL A. NATHANSON: -- the application record. And
12 I'll be making reference to that as I go.
13 So I'm going to start briefly in my written
14 submissions, but then I'm going to try and
15 diverge to engage directly with how matters have
16 evolved --
17 THE COURT: Right.
18 CNSL A. NATHANSON: -- and where we are. And I know
19 that you've read this, so I'm not going to read
20 it to you. I'm going to highlight some --
21 THE COURT: I -- I can't tell you that I read it -- I
22 didn't read all of it in depth.
23 CNSL A. NATHANSON: It's very long. I appreciate
24 that. But --
25 THE COURT: Yeah, no, and I was -- I was -- all right.
26 I was -- go ahead.
27 CNSL A. NATHANSON: I will tell you the important
28 points, but I will not read it to you.
29 THE COURT: Okay.
30 CNSL A. NATHANSON: All right. As -- as you would
31 expect. So -- so, Justice, at page 1,
32 paragraph 1, introduction.
33 THE COURT: Yeah.
34 CNSL A. NATHANSON: As you --
35 THE COURT: Well -- I'm sorry.
36 CNSL A. NATHANSON: Yes.
37 THE COURT: Would it help -- do you say the test is
38 serious question to be tried, or do you say
39 it's --
40 CNSL A. NATHANSON: Strong *prima facie* case.
41 THE COURT: Yeah.
42 CNSL A. NATHANSON: Yes. It's in all the -- and I'm
43 going to come to this in my introduction but,
44 sorry, let's just take this on right away.
45 THE COURT: Yeah.
46 CNSL A. NATHANSON: So I agree with parts of what
47 Mr. Ferris said and parts I don't agree with. So

1 the -- let me start with the parts I do agree
2 with. I do agree with him that you need to view
3 the evidence and the findings you're being asked
4 to make through the filter of an injunction test,
5 number 1. Number 2, I agree with what he said to
6 you just a few minutes ago, that it's a proper
7 concern to not want to prejudice the trial of
8 these complicated proceedings but at the same
9 time you have to be able to act.
10 THE COURT: Right.
11 CNSL A. NATHANSON: And I don't say that you're not
12 able to act. Where we part company is that I say
13 it's clear that what the Supreme Court of Canada
14 tells you is that you view whether it's a
15 mandatory or prohibitory injunction, so positive
16 or negative conduct, by looking at the question
17 of substance. And I'll develop this later.
18 THE COURT: Okay.
19 CNSL A. NATHANSON: So -- but the essential question
20 is as a matter of substance, not how the relief
21 is framed, is the party being asked to -- not do
22 something. So you can't enter into that
23 contract, you can't terminate that contract, you
24 can't terminate someone's employment --
25 THE COURT: Right.
26 CNSL A. NATHANSON: -- you can't violate your -- you
27 know, go onto your neighbour's property, those
28 are all negative injunctions; right?
29 THE COURT: Yeah.
30 CNSL A. NATHANSON: A positive injunction -- a
31 mandatory injunction requires a positive course
32 of action. It requires, for example, here, the
33 regulation --
34 THE COURT: M'mm-hmm.
35 CNSL A. NATHANSON: -- of the conduct of this
36 enterprise, which in my submission in substance
37 clearly my friend's order does. They want to
38 take \$100 million plus of development lands and
39 put it in the hands of a third party now to be
40 sold. The appointment of a receiver or sales
41 agent or whatever you want to call it is clearly
42 not prohibiting action.
43 THE COURT: M'mm-hmm.
44 CNSL A. NATHANSON: It's requiring action.
45 So --
46 THE COURT: The only prohibitory part would be --
47 well, no, even -- even having Mr. Kusumoto

26

Submissions by Cnsl A. Nathanson

1 removed as a director is a mandatory act --
2 CNSL A. NATHANSON: Yes, it would be. It would be.
3 But you're not as, Mr. Ferris said, just to be
4 clear --
5 THE COURT: Right.
6 CNSL A. NATHANSON: -- he was right. He's saying, I'm
7 trying to persuade you -- I'm -- he was showing
8 you in that paragraph a few minutes ago,
9 Justice --
10 THE COURT: Right.
11 CNSL A. NATHANSON: -- he's saying this is what will
12 happen at the trial in 14 months. I'm not asking
13 you to do it today, but he recognizes properly
14 that he needs to satisfy you that there's a high
15 degree of assurance that the trial judge in that
16 case will do that. That's what the strong *prima*
17 *facie* case standard is. You're probably going to
18 win. There's a strong likelihood, and so we're
19 basically saying if you're going to win anyways
20 then the risk on an interim basis --
21 THE COURT: Yeah.
22 CNSL A. NATHANSON: -- of being wrong is small.
23 THE COURT: Yeah, and the risk of -- the prejudice
24 is --
25 CNSL A. NATHANSON: Exactly.
26 THE COURT: Yeah.
27 CNSL A. NATHANSON: Exactly. You have the point.
28 So -- so in a nutshell, what I say -- sorry to
29 wave my glasses at you.
30 THE COURT: That's all right.
31 CNSL A. NATHANSON: In a nutshell, what I say is -- is
32 this is a mandatory injunction --
33 THE COURT: M'mm-hmm.
34 CNSL A. NATHANSON: -- the strong *prima facie* case
35 standard applies. And then I'm going to
36 endeavour to show you that you haven't been told
37 the whole picture, that the evidence is very
38 substantially different from what you've been
39 told. And I agree -- like, I thought your -- I
40 accept that the -- the first impression comments
41 that you gave us on the first morning of the
42 hearing, in my respectful submission, are
43 correct, that there are substantial conflicts in
44 the evidence, that you are not in a position to
45 say with a high degree of assurance that this has
46 been a calculated course of oppression to dilute
47 Mr. Matthews and 599 into nothing. And if you

27

Submissions by Cnsl A. Nathanson

1 can't conclude that that is likely to be so at
2 the conclusion of the trial to a high degree of
3 confidence then the injunctions fails.
4 THE COURT: M'mm-hmm.
5 CNSL A. NATHANSON: But, Justice, here's the point
6 that's getting a little lost. There are two
7 competing applications. And so let me be very
8 clear about what I say. I say the injunction
9 must fail. It is radical. It is not something
10 that could be supported in any way, shape, or
11 form. But I do accept that when you look at the
12 question of what you should do on our
13 application, what Mr. Jackson spoke to --
14 it's you have an equitable discretion, and
15 there's a question about what the terms should
16 be. And so my friends can get to essentially
17 where they want to get to but only under the
18 rubric of the *BIA* and the *Law and Equity Act*.
19 THE COURT: Right. Right.
20 CNSL A. NATHANSON: So their positive course of action
21 cannot, in my respectful submission, succeed.
22 But you can do what you think is equitable in all
23 of the circumstances by attaching terms to the
24 order that we ask you to make.
25 THE COURT: Under the *BIA* or --
26 CNSL A. NATHANSON: Under the *BIA* --
27 THE COURT: Yeah, right.
28 CNSL A. NATHANSON: -- and -- or the *Law and Equity*
29 Act.
30 THE COURT: Right.
31 CNSL A. NATHANSON: So I'm not here being Dr. No to
32 what the right commercial and equitable answer
33 is. I'm here to persuade you that if you're
34 being presented with two analytic boxes, one box
35 is radically wrong, oppression, the other box is
36 available to you and you can do what you need to
37 do to adjust the parties' rights in that box --
38 THE COURT: Well, that's where --
39 CNSL A. NATHANSON: -- in that paragraph.
40 THE COURT: That's where I was getting to when I put
41 that question to Mr. Ferris. If at the end of
42 the day the evidence is in such conflict, sure,
43 you can -- you can -- there's a serious question
44 to be tried every -- all sides have raised
45 serious questions to be tried. But I'm being
46 asked to do something more than -- that's more
47 than prohibitory. I'm being asked to take

Submissions by Cnsl A. Nathanson

1 active -- issue orders that require people to do
2 things.
3 CNSL A. NATHANSON: And -- and not just that, if I
4 could say this.
5 THE COURT: Yeah.
6 CNSL A. NATHANSON: But if I could kind of have a
7 three-part --
8 THE COURT: Yeah.
9 CNSL A. NATHANSON: -- point here. So the courts have
10 said repeatedly that injunctions are
11 extraordinary remedies; right?
12 THE COURT: M'mm-hmm.
13 CNSL A. NATHANSON: They're -- they're relief before
14 trial --
15 THE COURT: Yeah.
16 CNSL A. NATHANSON: -- before the court's been able to
17 adjust on the merits what the party --
18 THE COURT: Yeah.
19 CNSL A. NATHANSON: -- the right answer for the
20 parties is. Then you add on if the injunction is
21 mandatory, it adds to the -- the costs and the
22 risks and the significance. Like, that
23 extraordinary nature goes up.
24 THE COURT: M'mm-hmm.
25 CNSL A. NATHANSON: Right? Which is why we require
26 the high degree of assurance. And then we have
27 on top of that -- is an action where there's a --
28 a fundamental difference of what I say is
29 corporate policy -- and I'm going show you some
30 law --
31 THE COURT: Okay.
32 CNSL A. NATHANSON: -- where the courts say there
33 aren't right and wrong answers when it comes to
34 questions of corporate policy, investment,
35 strategy, risk taking, and the courts don't
36 involve themselves in those questions and those
37 questions, only in the most rare circumstances
38 where there's a disagreement -- and that this is
39 what it is, Justice -- between two partners about
40 the right investment strategy for their
41 partnership, for the court to come down and say
42 you're right, you're wrong, I'm going to make the
43 decision for you, and the person that doesn't
44 agree is acting oppressively.
45 THE COURT: M'mm-hmm.
46 CNSL A. NATHANSON: The courts don't do that. That's
47 the business judgment rule.

29

Submissions by Cnsl A. Nathanson

1 THE COURT: M'mm-hmm.
2 CNSL A. NATHANSON: That's that kind of margin of
3 appreciation. Courts are not well suited to make
4 those calls and they don't like to and they
5 shouldn't, which is another reason why that
6 oppression paradigm in my submission is wrong.
7 So when you pile -- and, sorry, in the last
8 piling --
9 THE COURT: Yeah, no.
10 CNSL A. NATHANSON: -- of extraordinary is the court's
11 going to make what amounts to a final decision --
12 if you did what my friends are -- and I'm going
13 to make this point again in a second -- my
14 friends are saying two slightly -- more than
15 slightly contradictory things.
16 On the one hand they're saying, we're not
17 abandoning our marketing agent motion, but at the
18 same time you heard Mr. Roberts say it's far from
19 perfect and we were just aiming to achieve some
20 principles and Sanovest can tell us what's wrong
21 and we could work it out.
22 THE COURT: M'mm-hmm.
23 CNSL A. NATHANSON: And in fact you have, as happens
24 in dynamic commercial cases, this convergence;
25 right?
26 THE COURT: M'mm-hmm.
27 CNSL A. NATHANSON: This is what you're reacting to,
28 which is you -- the parties, what they told you
29 this morning, are extremely close.
30 THE COURT: Well, they have a deal.
31 CNSL A. NATHANSON: Yeah. Sure. Okay. I'll go
32 further. I'll agree with you. I --
33 THE COURT: I was told and Mr. Roberts just confirmed
34 they have a deal.
35 CNSL A. NATHANSON: Right. But I'm making my
36 submissions on the basis that there isn't.
37 THE COURT: Right.
38 CNSL A. NATHANSON: We'll see. We may be saying there
39 is a binding deal --
40 THE COURT: Right.
41 CNSL A. NATHANSON: -- and you just have to affirm it.
42 THE COURT: But you say they're close in approach.
43 CNSL A. NATHANSON: Assume -- assume they're not,
44 Justice.
45 THE COURT: All right.
46 CNSL A. NATHANSON: The reality is, if I can be plain,
47 one -- put it this way: One course of action

1 that is available to you, even if you conclude
2 there isn't a deal, is to say I'm just going to
3 choose between one of those two positions.
4 THE COURT: M'mm-hmm.
5 CNSL A. NATHANSON: Because even if there's not a
6 binding agreement --
7 THE COURT: M'mm-hmm.
8 CNSL A. NATHANSON: -- there were concessions made
9 before me --
10 THE COURT: M'mm-hmm.
11 CNSL A. NATHANSON: -- that narrow the issues to this
12 practical question. And to retreat -- I mean, I
13 can only imagine -- I've never been where you
14 are, but I can only imagine the difficulty of
15 being confronted with something that looks so
16 close to having a sensible practical resolution
17 and then being asked to retreat to, I might have
18 to write a very difficult judgment on masses of
19 material in commercially urgent circumstances
20 that affects, Justice, \$100 million of assets --
21 THE COURT: Yeah.
22 CNSL A. NATHANSON: -- in a summary motion in chambers
23 where I've only been taken to a very thin film of
24 the entire record. That's a difficult thing to
25 ask -- I mean, courts sometimes have to do it.
26 THE COURT: Yeah.
27 CNSL A. NATHANSON: But in my respectful submission,
28 you don't. And the path that's available to you
29 is, I say, the insolvency path --
30 THE COURT: Yeah.
31 CNSL A. NATHANSON: -- and it's, even if there's no
32 binding agreement, to choose between the two
33 converging positions you heard this morning. And
34 that would certainly make -- be a benefit of
35 simplicity --
36 THE COURT: Yeah.
37 CNSL A. NATHANSON: -- expediency --
38 THE COURT: Yeah.
39 CNSL A. NATHANSON: -- speed, cost as opposed to
40 retreating to, are we going to write a deal or
41 treatise on corporate law.
42 THE COURT: Yeah. Yeah.
43 Well, look, in -- we do see this in -- in
44 high -- high conflict insolvency cases from time
45 to time, where there is the -- there are
46 allegations of oppressive conduct and in
47 management and self-interested dealing and the

Submissions by Cnsl A. Nathanson

1 like, and we turn to the court's officer, whether
2 it's a monitor, a trustee, or a receiver
3 appointed by the court, to provide independent
4 views and recommendations.
5 And so that's why I said, I think to
6 Mr. Brandt, well, why did -- even based on their
7 analysis of the evidence, why is it that Mr. Tian
8 Kusumoto has taken the steps that he has? Is it
9 because he stepped in and realized the gravity of
10 what his father's done? I don't know if that's
11 the case.
12 CNSL A. NATHANSON: Well, why don't I -- can I deal
13 with that right now --
14 THE COURT: Sure.
15 CNSL A. NATHANSON: -- since you raised it?
16 So this is my submission. You -- you asked
17 a number of times what was the change of
18 direction.
19 THE COURT: Right.
20 CNSL A. NATHANSON: So I'm going to give you -- I
21 think I've got four or five points.
22 THE COURT: Okay.
23 CNSL A. NATHANSON: So first, it wasn't such a change
24 of direction as my friends have told you.
25 THE COURT: Right.
26 CNSL A. NATHANSON: In other words, when I show you
27 the evidence of what this partnership did over
28 the years prior to the disputes emerging, it was
29 far more nuanced than the consistent practice my
30 friends say of it's just lot sales. That's
31 number 1.
32 Number 2 is it was exactly what you supposed
33 in one of your questions to my friends, which is
34 Tian Kusumoto came in, discovered problems that
35 raised serious concerns. Those have yet to be
36 ventilated.
37 THE COURT: Right.
38 CNSL A. NATHANSON: But -- but that's not just -- and
39 can I just make this point, Justice? I think --
40 I don't want this to escape our common sense.
41 How extraordinary a thing for a son -- he didn't
42 just sue Mr. Matthews -- cause Sanovest to sue
43 Mr. Matthews. And that claim is seeking relief
44 under the disclosable interest provisions of the
45 BCA, so the conflict provisions, which would be
46 for the benefit of the partnership as a whole.
47 But he didn't just sue Mr. Matthews.

32

Submissions by Cnsl A. Nathanson

1 THE COURT: Right.
2 CNSL A. NATHANSON: He said, Mr. Matthews and my dad
3 both did these things.
4 THE COURT: Yeah.
5 CNSL A. NATHANSON: That's a pretty tough thing for a
6 son to have to do.
7 THE COURT: Yeah.
8 CNSL A. NATHANSON: But, Justice, he's a director. He
9 has an fiduciary obligation. If he discovers
10 transactions of the kind you saw this morning,
11 you were shown the reservoir agreement -- do you
12 recall that?
13 THE COURT: I do.
14 CNSL A. NATHANSON: The assignment agreement?
15 THE COURT: Right.
16 CNSL A. NATHANSON: Where Mr. Matthews and Mr. Tom
17 Kusumoto sign on both sides of the deal to push
18 \$3 million -- 3.3, Mr. Brandt told you, into an
19 entirely different entity that they control
20 outside of the partnership. And, Justice, here's
21 the point: Outside the reach of Sanovest
22 Security. That's a grave concern. Now, my
23 friends have explanations that they want to give
24 about that, but the -- why the voltus -- so
25 the next proposition is the self-interested
26 transactions are a problem. If that 14 or 10 or
27 whatever million dollars of cash were back --
28 Justice, just so you have it, the loan that --
29 remember Mr. Brandt took you through them and one
30 was, like, a million dollar loan?
31 THE COURT: Yeah. Right.
32 CNSL A. NATHANSON: That was money loaned by a
33 third-party lender that was subject to
34 restrictions on the purpose for the money. It
35 wasn't allowed to be given to Mr. Matthews. So
36 that's part of the reason for the term. And then
37 the next reason for the term comes right to the
38 question you asked me two minutes ago, about why
39 can't we just have the court officer have a --
40 have, you know, neutral commercial
41 recommendation, look -- unhindered to look at
42 what the right thing to do is? That's what
43 normally happens. That's the point you've been
44 making repeatedly over the last three days.
45 Well, as you'll see in the evidence I take
46 you to, that was what Tian Kusumoto said. He
47 said, I don't want to do lot sales before we've

1 evaluated the alternatives. And we need an
2 expert to help us. And I'm not going to throw in
3 on this strategy worth tens or hundred of
4 millions of dollars until we've decided that it's
5 the best strategy with the benefit of proper
6 advice, and I want to see a business plan. And
7 guess what? Mr. Matthews wouldn't do that. And
8 that's -- you're going to see that repeatedly in
9 the evidence.

10 And then the third -- the last reason for
11 the shift is because this partnership doesn't
12 have financial statements. It doesn't have a
13 budget. It doesn't have an overall business
14 plan. And, Justice, these are all things that,
15 I'll show you, were required under the terms of
16 the agreements between the parties.

17 So Mr. Matthews wants to invoke oral
18 discussions he'd had with Tom Kusumoto in
19 practice back in 2013. I'm invoking agreements.
20 And I'm invoking the law, that I'll show you,
21 that says the most important source of the
22 parties' reasonable expectations are their
23 agreements and would have to be a strong equity,
24 I submit, indeed to override the parties' written
25 agreements.

26 So those are the reasons for the change.
27 And so just to come back to your point, that's --
28 our point is the same as yours. One of the
29 reasons why we want a receiver with full powers
30 is to do the very sensible things that haven't
31 been done: Investigate alternatives, look at all
32 of the options, take expert advice, look at the
33 tax questions, assess whether based on the true
34 financial position of these partnerships A is the
35 right call or B is the right call. But that
36 hasn't been done. So when you hear complaints
37 about the taps been -- I'm going to go through
38 this --

39 THE COURT: M'mm-hmm.

40 CNSL A. NATHANSON: -- the tap's been turned off, the
41 lot sales have been blocked, you're not being
42 told why.

43 THE COURT: M'mm-hmm.

44 CNSL A. NATHANSON: You're not being told the whole
45 story. Mr. Kusumoto is saying we need to do our
46 duty as directors, we need to investigate
47 alternatives, we need to take advice, we need to

34
Submissions by Cnsl A. Nathanson

1 do all the things that would happen if a
2 receiver's appointed and the receiver comes and
3 makes the recommendation that you keep saying is
4 is the normal course, which I accept.
5 THE COURT: Yeah. Because what -- the way -- to boil
6 it all down, the way it was put to me is it's a
7 *mala fides* play or attempt by Mr. Tian Kusumoto
8 to parlay his position as a secured creditor and
9 wipe out Mr. Matthews' --
10 CNSL A. NATHANSON: Right.
11 THE COURT: -- part of the partnership.
12 CNSL A. NATHANSON: But -- but, Justice, can I make
13 one other -- can I make one other point about
14 that, please? So you've heard a lot about what
15 vendor doesn't want to be repaid and --
16 THE COURT: Right.
17 CNSL A. NATHANSON: -- they're just deluding -- so can
18 I just make a couple points? So one -- what
19 you're going to see is that Sanovest as lender
20 actually was quite patient. It took years for it
21 to get to this point. The loan's been in default
22 for years. Two, Sanovest has no longer got a
23 position as lender. It's a secured creditor that
24 wants the property sold. But that's the very
25 thing that Mr. Matthews says he wants too. You
26 recall --
27 THE COURT: I know. I know.
28 CNSL A. NATHANSON: -- Mr. Ferris showed you the
29 letter --
30 THE COURT: I know --
31 CNSL A. NATHANSON: And he went through all of his
32 options, the buyout and the partition and the
33 unblocked sale and, we just want to do something
34 here. But that's -- that's the commercial effect
35 of our application. I mean, we're -- we're
36 accepting that if the receiver's appointed and
37 says they're plan is a better plan --
38 THE COURT: M'mm-hmm.
39 CNSL A. NATHANSON: -- and -- and has good reasoning
40 and backup, then -- then you'll order it,
41 Justice, and that will be okay. But if that's
42 not what the receiver recommends, and if they do
43 what we expect they're going to do, which is this
44 has to be dealt with finally and the most
45 sensible commercial course is unblock. Because
46 part of the problem, as you're going to hear in
47 the evidence, selling these things is going to

35

Submissions by Cnsl A. Nathanson

1 flood the market.
2 THE COURT: M'mm-hmm.
3 CNSL A. NATHANSON: And it's going take a long time to
4 subdivide. It's going to take a long time to
5 list and expose them to the market. It's going
6 to take a long time to close, and it's going to
7 really soak -- because remember you were told --
8 I was quite struck by this evidence, this -- what
9 Mr. Brandt told you, the projection is to be
10 8,000 more residents.
11 THE COURT: M'mm-hmm.
12 CNSL A. NATHANSON: Like, we're creating a
13 non-insignificant sized town --
14 THE COURT: Right.
15 CNSL A. NATHANSON: -- right -- in the projected
16 development of -- of Bear Mountain.
17 So the -- one of the concerns -- and it may
18 be true, maybe not. We had an expert come in --
19 I'll show you -- says there are all these
20 problems with their plan. But if that turns out
21 not to be true, that's fine.
22 But my only point is this whole trope, to
23 use Mr. Brandt's word, of Tian Kusumoto trying to
24 oppressively orchestrate the dilution and
25 insolvency fails because there is no more lender.
26 Right? This is -- under our plan, this is all
27 going to end. So they're not seeking to continue
28 to be lender. And the other point that's -- my
29 friends seem to overlook, Mr. Ferris told you 13
30 and a half thousand dollars a day is a very
31 important number. That might be an important
32 number, but that's not the dilution of
33 Mr. Matthews.
34 THE COURT: M'mm-hmm.
35 CNSL A. NATHANSON: That's the interest per day that
36 the partnership pays. So that dilution is
37 accruing to both partners, number 1, and
38 number 2, it accrues actually more aggressively
39 to Sanovest because they're not -- in the
40 waterfall I'll show you, they're not equal.
41 Sanovest has a 30 million preference after the
42 first 15 million that's distributed.
43 THE COURT: Mm.
44 CNSL A. NATHANSON: So in my respectful submission,
45 you haven't, regrettably, been given the whole
46 sorry.
47 THE COURT: M'mm-hmm.

36

Submissions by Cnsl A. Nathanson

1 CNSL A. NATHANSON: And where you're going to come to
2 is that, in my submission, strong *prima facie*
3 case fails. And even if it didn't, you'll recall
4 this part of the injunction test -- the merits
5 don't go away. They come back in the balance of
6 convenience. They're a factor to be
7 considered --
8 THE COURT: M'mm-hmm. M'mm-hmm.
9 CNSL A. NATHANSON: -- in the holistic approach --
10 THE COURT: M'mm-hmm.
11 CNSL A. NATHANSON: -- that you have to take. And
12 when you compare the running away that -- you
13 know, the alternative that my friends have put in
14 their motion but are now running away from --
15 from what is proposed or what might be adjusted
16 by you in the exercise of your discretion,
17 there's not any close contest in my respectful
18 submission.
19 THE COURT: M'mm-hmm.
20 CNSL A. NATHANSON: And that's why Mr. Roberts is
21 running away from the relief. Like, imagine --
22 and imagine a mandatory injunction for -- to
23 sell -- appoint a sales agent, and sell
24 \$100 million, and then in the middle of the
25 motion, the party says, actually that's not the
26 relief that I'm seeking at all.
27 THE COURT: M'mm-hmm.
28 CNSL A. NATHANSON: Extraordinary. Doesn't happen.
29 So maybe if I could press on for five
30 minutes --
31 THE COURT: Sure.
32 CNSL A. NATHANSON: -- and then take the break?
33 THE COURT: Sure.
34 CNSL A. NATHANSON: Okay. So I jumped all around my
35 introduction.
36 THE COURT: No, but that's because I asked you a
37 number of questions.
38 CNSL A. NATHANSON: But let's -- let's go here. So --
39 no. No. So I'm just going to hold up what my
40 friends say, which I've sort of been doing --
41 THE COURT: Okay.
42 CNSL A. NATHANSON: -- and I'll be faster and then
43 I'll show you why I think it fails.
44 So my friends say you should see this for
45 what it is, that Tian Kusumoto has manufactured
46 this default and insolvency --
47 THE COURT: Right.

37

Submissions by Cnsl A. Nathanson

1 CNSL A. NATHANSON: -- to enhance Sanovest's position,
2 dilute 599, and circumvent the ongoing litigation
3 between the partners. And I'll come back to that
4 last point. We say there's no circumvention at
5 all. And in fact Mr. Ferris was quite strong in
6 his submissions -- you'll recall this yesterday
7 morning -- called it fabricated insolvency.
8 THE COURT: Right.
9 CNSL A. NATHANSON: Getting quite -- it was getting --
10 the temperature was rising.
11 THE COURT: Right.
12 CNSL A. NATHANSON: And my friends described the three
13 pillars of this -- or prongs, I think
14 Mr. Brandt's word was -- for oppression, Sanovest
15 refused to advance financing under the loan, it
16 blocked sales, and they refused to permit
17 refinancing. So in other words, I've painted you
18 a picture of a choking off --
19 THE COURT: M'mm-hmm.
20 CNSL A. NATHANSON: -- right, to get power --
21 THE COURT: Right.
22 CNSL A. NATHANSON: -- to get control, to amass a
23 greater share of their equity. So in my
24 submission that is a selective, incomplete,
25 curated, unfair view of the evidence.
26 And so let me give you a summary on each of
27 those three pillars, and I'm going to show you
28 more of this later. So the first point is
29 Sanovest did advance financing under the loan.
30 It advanced 5.5 million of it after this dispute.
31 THE COURT: Sorry. 5.5 million, you say?
32 CNSL A. NATHANSON: 5.5 million.
33 THE COURT: Okay.
34 CNSL A. NATHANSON: It agreed to renew the loan in
35 2022 when it was in default. It took no steps in
36 default of the loan to call the loan for three
37 years, from '21 to '24. And, Justice, this is an
38 important point. This was subtle. It's actually
39 in -- you'll see it, I'll show you the
40 agreement --
41 THE COURT: Yeah.
42 CNSL A. NATHANSON: -- but it was in part of
43 Mr. Brandt's argument. So you'll recall he
44 showed you just the purpose of the loan and the
45 provision about "it will be made in advances."
46 But at the bottom of that -- and I don't
47 criticize him for this at all, but -- but at the

38
Submissions by Cnsl A. Nathanson

1 bottom of that paragraph, which wasn't -- didn't
2 get any prominent mention, the advances are
3 subject to conditions. And you haven't heard
4 anything about those conditions.

5 THE COURT: No.

6 CNSL A. NATHANSON: And you haven't heard anything
7 about whether those conditions were complied
8 with. And so I'm going to show you both the
9 conditions and how they weren't complied with.
10 This is not an ATM. Mr. Matthews doesn't get to
11 go to Sanovest and say, on two day's notice, give
12 me money for whatever you want. It's as you
13 would expect, like any -- I mean, they're not --
14 they're an arm's length commercial lender, that's
15 true. But it doesn't mean that they're not
16 entitled to the normal commercial protections
17 that are in their loan agreement as security. So
18 we're going to see that.

19 And so Sanovest cooperated by subordinating
20 its financing to other third-party financing that
21 was obtained, construction and other financing.

22 THE COURT: M'mm-hmm. Okay. I don't think I was told
23 about that, was I?

24 CNSL A. NATHANSON: No. It's -- it's not necessarily
25 material. But, again, the point being they're
26 being painted as this is, you know, some puppet
27 master of oppression. That's not the case.

28 But, Justice, this is a really important
29 point. I'm going to show you a letter from
30 Mr. Ferris. When this dispute really got going
31 in 2021, Mr. Ferris wrote what I would
32 characterize as a pretty extraordinary letter,
33 pretty ferocious letter, if I can say so. And do
34 you know what Mr. Ferris said, Justice? He
35 said -- he made essentially the same arguments
36 that you've heard in the last three days three
37 years ago. He said, if this doesn't stop, we're
38 pulling the pin. The partnership is deadlocked,
39 we'll dissolve the partnership, it'll be over.
40 That's all that's happening now.

41 And the further point is if this course of
42 oppressive -- this choking off of Mr. Matthews'
43 and 599's equity, if this was so terrible, they
44 could have put it -- an end to it at any time
45 over the preceding three years. They had a case
46 for deadlock in 2021.

47 THE COURT: M'mm-hmm.

1 CNSL A. NATHANSON: There's a case for deadlock now.
2 And, Justice, if I could -- we haven't put
3 this authority before you, but my friends are
4 saying this is all so extraordinary. You
5 observed any sensible person would have looked at
6 this record and say these partners are hopelessly
7 deadlocked. Under the *Partnership Act*, that
8 gives rise to a right of dissolution, just and
9 equitable or otherwise.
10 THE COURT: M'mm-hmm.
11 CNSL A. NATHANSON: What's the default remedy when
12 there's a partnership that's dissolved? It's the
13 appointment of a receiver, Justice --
14 THE COURT: M'mm-hmm. M'mm-hmm.
15 CNSL A. NATHANSON: -- to wind up the affairs of the
16 partnership, to settle the accounts, and to
17 liquidate the property, pay the creditors,
18 distribute the balance to the partners. This is
19 not some extraordinary thing that's happening.
20 And either partner could have done that three
21 years ago, and either partner could do that
22 tomorrow.
23 THE COURT: That's under the *Partnership Act*; right?
24 CNSL A. NATHANSON: That's right. Section 38. And --
25 and so the -- and the last point, again -- this
26 is on the didn't advance financing --
27 THE COURT: M'mm-hmm.
28 CNSL A. NATHANSON: -- the didn't advance financing is
29 connected to these policy disagreements, these
30 strategy disagreements that I'm going to show you
31 in the evidence.
32 THE COURT: Okay.
33 CNSL A. NATHANSON: These are just my summary --
34 THE COURT: No. No. Thank you. That's --
35 CNSL A. NATHANSON: Yeah. I just don't want you to be
36 waiting --
37 THE COURT: No, that's why I've been asking.
38 CNSL A. NATHANSON: Yeah, I didn't want you to wait
39 in -- in suspense.
40 THE COURT: No.
41 CNSL A. NATHANSON: So, sorry, would you like to take
42 the break?
43 THE COURT: Sure.
44 CNSL A. NATHANSON: Thank you.
45 THE COURT: Because I've been asking where is -- is
46 there evidence of why the present position in
47 Mr. Tian Kusumoto --

40
Reporter certification

1 CNSL A. NATHANSON: And -- and this is my preview, and
2 I'm going to actually show you the evidence.
3 THE COURT: Okay. All right. Thank you.
4 THE CLERK: Order in chambers. These chambers are
5 adjourned for the afternoon recess.
6


7 (END OF EXCERPT AT 3:01 PM)
8 (PROCEEDINGS ADJOURNED AT 4:05 PM)
9

10
11 REPORTER CERTIFICATION
12

13 I, Lisa Ciurysek, Official Reporter in the
14 Province of British Columbia, Canada, do hereby
15 certify:
16

17 That the proceedings were transcribed by me
18 from audio provided of recorded proceedings, and
19 the same is a true and correct and complete
20 transcript of said proceedings to the best of my
21 skill and ability.
22

23 IN WITNESS WHEREOF, I have hereunto
24 subscribed my name on this day, the 15th of
25 September, 2024.
26

27
28 
29 _____
30 Lisa Ciurysek
31 Authorized Reporter.
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\$100 [3] - 25:38, 30:20, 36:24	3 [1] - 32:18 3.3 [1] - 32:18 30 [2] - 2:31, 35:41 38 [1] - 39:24 3:00 [1] - 22:18 3:01 [1] - 40:7	abuse [1] - 11:26 accept [3] - 26:40, 27:11, 34:4 accepted [1] - 17:25 accepting [1] - 34:36 accounts [1] - 39:16 accrue [1] - 13:25 accrues [1] - 35:38 accruing [1] - 35:37 accumulating [1] - 18:36 achieve [1] - 29:19 act [6] - 11:28, 14:35, 15:8, 25:9, 25:12, 26:1 Act [9] - 10:37, 10:38, 10:39, 10:43, 17:42, 27:18, 27:29, 39:7, 39:23 acting [2] - 8:32, 28:44 action [6] - 25:32, 25:42, 25:44, 27:20, 28:27, 29:47 actions [1] - 23:35 active [1] - 28:1 ad [1] - 10:42 add [2] - 6:21, 28:20 address [5] - 10:15, 11:5, 12:36, 13:9, 13:12 addressed [1] - 16:41 adds [1] - 28:21 adequate [1] - 12:21 adjourned [3] - 9:26, 9:35, 40:5 ADJOURNED [1] - 40:8 adjust [2] - 27:37, 28:17 adjusted [1] - 36:15 advance [4] - 37:15, 37:29, 39:26, 39:28 advanced [1] - 37:30 advances [5] - 5:40, 5:43, 5:46, 37:45, 38:2 advice [3] - 33:6, 33:32, 33:47 advise [1] - 19:22 advised [1] - 19:24 affairs [1] - 39:15 affect [1] - 14:14 affects [1] - 30:20 affirm [1] - 29:41 afternoon [2] - 20:40, 40:5 agent [6] - 11:46, 12:4, 17:35, 25:41, 29:17, 36:23	aggressively [1] - 35:38 ago [5] - 25:6, 26:8, 32:38, 38:37, 39:21 agree [12] - 7:23, 7:24, 7:33, 12:17, 24:46, 24:47, 25:1, 25:2, 25:5, 26:39, 28:44, 29:32 agreed [9] - 1:13, 8:5, 10:2, 10:13, 20:9, 21:12, 22:44, 23:5, 37:34 agreement [20] - 1:21, 9:5, 9:16, 19:26, 19:46, 19:47, 20:2, 20:15, 20:25, 20:27, 20:30, 20:32, 21:20, 23:9, 30:6, 30:32, 32:11, 32:14, 37:40, 38:17 agreements [4] - 33:16, 33:19, 33:23, 33:25 ahead [2] - 9:42, 24:26 aiming [1] - 29:19 allay [1] - 7:5 allegations [1] - 30:46 allowed [1] - 32:35 alternate [1] - 12:9 alternative [1] - 36:13 alternatives [3] - 33:1, 33:31, 33:47 AM [2] - 1:6, 7:46 amass [1] - 37:22 amenities [1] - 11:34 amount [1] - 19:29 amounts [1] - 29:11 ample [1] - 11:37 analysis [2] - 11:45, 31:7 analytic [1] - 27:34 answer [2] - 27:32, 28:19 answers [1] - 28:33 anyways [1] - 26:19 apologies [3] - 14:43, 21:31, 21:34 application [14] - 10:35, 11:43, 14:20, 15:31, 16:7, 16:18, 16:23, 16:26, 17:38, 19:5, 19:10, 24:11, 27:13, 34:35 applications [2] - 4:3, 27:7 applies [1] - 26:35 apply [1] - 14:26 appoint [1] - 36:23 appointed [6] - 1:26,	1:29, 4:33, 31:3, 34:2, 34:36 appointment [7] - 11:38, 11:45, 12:4, 12:22, 18:26, 25:40, 39:13 appreciate [3] - 23:29, 23:39, 24:23 appreciation [1] - 29:3 approach [2] - 29:42, 36:9 approached [1] - 21:32 appropriate [1] - 13:28 approval [2] - 5:23, 7:11 arbitration [2] - 6:23, 6:24 Arguably [1] - 14:35 argument [7] - 10:20, 10:22, 10:26, 10:27, 16:41, 18:2, 37:43 arguments [2] - 15:15, 38:35 arise [1] - 4:23 arises [1] - 4:24 arising [3] - 2:10, 12:36, 13:10 arm's [1] - 38:14 aside [1] - 5:33 aspect [1] - 22:39 asserting [1] - 18:10 assess [1] - 33:33 assets [10] - 1:41, 4:32, 4:34, 4:35, 11:16, 12:13, 12:24, 18:27, 22:47, 30:20 assignment [1] - 32:14 assume [2] - 29:43 assurance [3] - 26:15, 26:45, 28:26 AT [6] - 1:6, 1:7, 7:46, 7:47, 9:37, 9:38, 40:7, 40:8 ATM [1] - 38:10 attaching [1] - 27:23 attempt [1] - 34:7 attend [1] - 23:16 attended [1] - 19:44 audio [1] - 40:18 authorising [1] - 15:26 Authorities [1] - 12:45 authorities [3] - 13:34, 14:42, 24:5 authority [3] - 7:3, 10:23, 39:3 authorize [1] - 5:26
'				
'21 [1] - 37:37 '24 [1] - 37:37				
1	4			
1 [5] - 24:31, 24:32, 25:5, 31:31, 35:37 10 [1] - 32:26 10:02 [1] - 1:6 11:48 [1] - 1:7 11:56 [1] - 7:46 12 [1] - 1:1 12:06 [1] - 7:47 12:08 [1] - 9:37 12:53 [1] - 19:38 13 [1] - 35:29 14 [2] - 26:12, 32:26 14-pages [1] - 20:19 15 [6] - 8:24, 9:6, 10:13, 13:35, 17:46, 35:42 15th [1] - 40:24	47 [1] - 10:31 4:00 [1] - 4:28 4:05 [1] - 40:8 4:30 [1] - 4:26			
	5			
	5.5 [3] - 37:30, 37:31, 37:32 50 [1] - 15:3 51 [1] - 10:41 53 [1] - 12:27 56 [1] - 15:43 58 [1] - 14:6 599 [6] - 10:35, 12:6, 15:2, 18:6, 19:34, 19:43, 26:47, 37:2 599's [2] - 18:37, 38:43			
	6			
	60 [1] - 2:25 61 [1] - 14:25			
	7			
	7th [1] - 3:10			
	8			
	8,000 [1] - 35:10			
	9			
	9:00 [1] - 4:26			
	A			
2 [3] - 25:5, 31:32, 35:38 2(a) [2] - 14:42, 14:43 2013 [1] - 33:19 2021 [2] - 38:31, 38:46 2022 [1] - 37:35 2024 [2] - 1:1, 40:25 2026 [1] - 18:44 206 [1] - 10:32 219 [1] - 10:41 220 [2] - 11:7, 11:13 227 [1] - 14:26 227(3) [2] - 10:36, 10:39 227(3)(a) [1] - 14:33 23 [2] - 12:42, 13:3 23(a) [2] - 13:33, 13:34 230 [2] - 12:39, 12:41 232 [1] - 13:31 234 [1] - 14:47 240 [3] - 15:19, 15:21, 16:8 264 [1] - 18:23 2:00 [7] - 1:19, 8:13, 8:16, 8:23, 8:40, 9:3, 9:35 2:08 [1] - 9:38 2:45 [2] - 21:29, 21:35	A&M [4] - 1:26, 1:30, 8:34, 8:35 abandoning [1] - 29:17 ability [2] - 12:8, 40:21 able [6] - 3:12, 3:26, 17:6, 17:10, 19:4, 22:41, 25:9, 25:12, 28:16 absolutely [1] - 4:4			

authorized [1] - 40:31 available [10] - 10:18, 11:31, 12:34, 12:36, 13:9, 14:25, 23:14, 27:36, 30:1, 30:28 avoids [1] - 7:39	13:33 borrow [1] - 1:46 borrowings [5] - 4:41, 4:45, 5:8, 5:15, 5:26 bottom [2] - 37:46, 38:1 box [3] - 27:34, 27:35, 27:37 boxes [1] - 27:34 Brandt [7] - 6:22, 17:13, 22:24, 31:6, 32:18, 32:29, 35:9 BRANDT [3] - 9:9, 9:12, 14:41 Brandt's [3] - 35:23, 37:14, 37:43 breached [1] - 11:12 break [5] - 2:23, 20:28, 22:15, 36:32, 39:42 breaks [1] - 3:24 briefly [1] - 24:13 bringing [1] - 8:38 British [1] - 40:14 brought [1] - 6:9 browbeat [1] - 1:11 budget [1] - 33:13 bulk [1] - 11:18 business [14] - 4:35, 5:2, 5:9, 5:16, 5:28, 5:32, 5:47, 6:1, 6:9, 11:29, 17:41, 28:47, 33:6, 33:13 Business [4] - 10:36, 10:39, 10:43, 17:41 buyout [1] - 34:32	39:1 cases [2] - 29:24, 30:44 cash [1] - 32:27 causing [1] - 16:42 CCAAs [1] - 5:39 cerloxed [1] - 23:33 certain [2] - 9:20, 14:39 certainly [5] - 11:41, 17:16, 20:24, 20:44, 30:34 CERTIFICATION [1] - 40:11 certify [1] - 40:15 cetera [1] - 18:19 chambers [8] - 7:43, 9:26, 9:34, 30:22, 40:4 change [3] - 31:17, 31:23, 33:26 characterize [1] - 38:32 charge [2] - 2:4, 6:1 chipping [1] - 18:36 choking [2] - 37:18, 38:42 choose [2] - 30:3, 30:32 circumstances [3] - 27:23, 28:37, 30:19 circumvent [1] - 37:2 circumvention [1] - 37:4 cite [3] - 13:1, 13:34, 13:37 Ciurysek [2] - 40:13, 40:30 claim [3] - 11:8, 11:9, 31:43 Clark's [1] - 17:19 clear [8] - 4:31, 4:43, 6:6, 6:31, 8:46, 25:13, 26:4, 27:8 clearly [3] - 13:42, 25:37, 25:41 CLERK [8] - 1:10, 7:43, 8:3, 8:40, 9:26, 9:34, 9:41, 40:4 client [2] - 5:12, 18:32 clients [3] - 19:46, 20:45, 21:37 close [5] - 29:29, 29:42, 30:16, 35:6, 36:17 CNSL [340] - 1:9, 1:11, 1:15, 1:18, 1:21, 1:25, 1:40, 1:42, 1:44, 1:46, 2:1, 2:8, 2:12, 2:16, 2:20,	2:22, 2:25, 2:27, 2:31, 2:34, 2:38, 2:41, 2:44, 2:47, 3:4, 3:8, 3:11, 3:13, 3:16, 3:17, 3:21, 3:22, 3:23, 3:27, 3:28, 3:32, 3:35, 3:39, 3:43, 3:45, 4:1, 4:4, 4:8, 4:13, 4:15, 4:20, 4:23, 4:27, 4:29, 4:38, 4:43, 5:4, 5:7, 5:12, 5:17, 5:19, 5:21, 5:25, 5:36, 5:39, 5:43, 6:4, 6:6, 6:8, 6:12, 6:16, 6:19, 6:21, 6:25, 6:28, 6:33, 6:38, 6:41, 6:44, 6:46, 7:1, 7:8, 7:9, 7:12, 7:14, 7:16, 7:19, 7:23, 7:24, 7:28, 7:35, 7:38, 7:41, 8:5, 8:8, 8:11, 8:15, 8:18, 8:22, 8:28, 8:29, 8:33, 8:35, 8:37, 8:43, 8:46, 9:4, 9:8, 9:9, 9:11, 9:12, 9:13, 9:15, 9:19, 9:22, 9:29, 9:30, 9:33, 9:44, 10:1, 10:4, 10:7, 10:10, 10:12, 10:22, 10:25, 10:28, 10:31, 10:34, 12:30, 12:44, 13:1, 13:3, 13:5, 13:37, 14:41, 14:43, 14:46, 15:2, 15:21, 15:29, 15:33, 15:35, 15:38, 16:5, 16:9, 16:11, 16:14, 16:29, 16:31, 16:35, 16:38, 16:40, 17:3, 17:6, 17:13, 17:16, 17:23, 17:27, 17:30, 17:40, 17:43, 17:45, 18:1, 18:5, 18:9, 18:13, 18:17, 18:22, 18:25, 18:30, 18:45, 19:1, 19:3, 19:12, 19:14, 19:16, 19:19, 19:21, 19:24, 19:28, 19:32, 19:37, 19:40, 20:9, 20:13, 20:16, 20:18, 20:21, 20:24, 20:29, 20:32, 20:37, 20:39, 20:43, 21:3, 21:5, 21:12, 21:15, 21:19, 21:23, 21:26, 21:31, 21:34, 21:41, 21:44, 21:47, 22:3, 22:6, 22:9, 22:11, 22:15, 22:17, 22:21,	22:23, 22:27, 22:30, 22:44, 23:3, 23:5, 23:11, 23:18, 23:21, 23:24, 23:27, 23:29, 23:32, 23:35, 23:39, 23:45, 23:47, 24:3, 24:7, 24:11, 24:18, 24:23, 24:27, 24:30, 24:34, 24:36, 24:40, 24:42, 24:46, 25:11, 25:19, 25:26, 25:30, 25:35, 25:44, 26:2, 26:6, 26:11, 26:22, 26:25, 26:27, 26:31, 26:34, 27:5, 27:20, 27:26, 27:28, 27:31, 27:39, 28:3, 28:6, 28:9, 28:13, 28:16, 28:19, 28:25, 28:32, 28:46, 29:2, 29:10, 29:23, 29:27, 29:31, 29:35, 29:38, 29:41, 29:43, 29:46, 30:5, 30:8, 30:11, 30:22, 30:27, 30:31, 30:37, 30:39, 31:12, 31:15, 31:20, 31:23, 31:26, 31:38, 32:2, 32:5, 32:8, 32:14, 32:16, 32:32, 33:40, 33:44, 34:10, 34:12, 34:17, 34:28, 34:31, 34:39, 35:3, 35:12, 35:15, 35:35, 35:44, 36:1, 36:9, 36:11, 36:20, 36:28, 36:32, 36:34, 36:38, 36:42, 37:1, 37:9, 37:12, 37:20, 37:22, 37:32, 37:34, 37:42, 38:6, 38:24, 39:1, 39:11, 39:15, 39:24, 39:28, 39:33, 39:35, 39:38, 39:41, 39:44, 40:1 co [1] - 20:4 co-counsel [1] - 20:4 Columbia [1] - 40:14 comfortable [1] - 3:4 COMMENCED [1] - 1:6 comments [3] - 19:40, 19:41, 26:40 commercial [9] - 2:19, 21:13, 27:32, 29:24, 32:40, 34:34, 34:45, 38:14, 38:16 commercially [1] - 30:19 common [1] - 31:40 company [7] - 5:41,
B				
backup [1] - 34:40 baked [1] - 4:30 balance [6] - 10:47, 11:44, 12:11, 15:4, 36:5, 39:18 based [3] - 17:17, 31:6, 33:33 basis [3] - 19:7, 26:20, 29:36 battle [1] - 24:1 BC [2] - 1:2, 17:41 BCA [4] - 14:6, 14:10, 14:21, 31:45 bear [2] - 3:9, 14:45 Bear [4] - 4:39, 11:16, 18:38, 35:16 became [1] - 11:31 begin [1] - 23:30 BEGINS [1] - 1:7 behalf [1] - 18:10 behind [1] - 21:24 benefit [3] - 30:34, 31:46, 33:5 best [4] - 11:28, 12:15, 33:5, 40:20 better [2] - 8:24, 34:37 between [5] - 1:18, 11:37, 19:28, 28:39, 30:3, 30:32, 33:16, 37:3 beyond [1] - 12:24 BIA [4] - 17:37, 27:18, 27:25, 27:26 blind [1] - 2:36 binding [3] - 29:39, 30:6, 30:32 bit [5] - 2:44, 5:19, 5:30, 8:14, 22:37 blocked [2] - 33:41, 37:16 blue [1] - 14:41 BMA [3] - 6:31, 7:22, 8:6 Boatyard [2] - 13:47, 14:16 boil [1] - 34:5 Book [1] - 12:45 book [4] - 14:41, 23:33, 24:5, 24:9 booked [1] - 20:40 books [2] - 10:23,				
	C			
	calculated [1] - 26:46 Canada [2] - 25:13, 40:14 cannot [1] - 27:21 careful [1] - 18:46 carve [5] - 3:12, 3:46, 4:19, 6:23, 15:46 carved [1] - 6:38 carveout [1] - 1:30 carveouts [1] - 12:38 Cascadia [3] - 13:44, 13:45, 14:8 case [27] - 11:4, 12:40, 12:41, 12:42, 13:31, 13:42, 14:19, 14:31, 15:2, 15:36, 15:46, 16:23, 16:28, 16:32, 17:8, 17:28, 18:40, 18:42, 24:40, 26:16, 26:17, 26:34, 31:11, 36:3, 38:27, 38:45,			

<p>14:7, 16:18, 16:42, 16:44, 16:46, 25:12</p> <p>compare [1] - 36:12</p> <p>compel [1] - 2:5</p> <p>competing [1] - 27:7</p> <p>complaints [1] - 33:36</p> <p>complete [1] - 40:19</p> <p>completely [1] - 17:19</p> <p>complicated [1] - 25:8</p> <p>complied [2] - 38:7, 38:9</p> <p>component [1] - 16:23</p> <p>concede [1] - 17:31</p> <p>concept [2] - 2:32, 6:16</p> <p>concepts [1] - 4:30</p> <p>concern [2] - 25:7, 32:22</p> <p>concerns [4] - 7:5, 10:7, 31:35, 35:17</p> <p>concerted [1] - 18:38</p> <p>concessions [1] - 30:8</p> <p>conclude [2] - 27:1, 30:1</p> <p>conclusion [1] - 27:2</p> <p>condensed [1] - 24:9</p> <p>conditions [4] - 38:3, 38:4, 38:7, 38:9</p> <p>conduct [8] - 13:13, 13:14, 13:22, 13:24, 14:7, 25:16, 25:35, 30:46</p> <p>confidence [1] - 27:3</p> <p>confirmed [1] - 29:33</p> <p>conflict [3] - 27:42, 30:44, 31:45</p> <p>conflicted [1] - 17:9</p> <p>conflicts [2] - 16:24, 26:43</p> <p>confronted [1] - 30:15</p> <p>connected [1] - 39:29</p> <p>consequences [1] - 13:24</p> <p>consider [1] - 17:36</p> <p>considered [2] - 13:22, 36:7</p> <p>consistent [1] - 31:29</p> <p>construction [1] - 38:21</p> <p>content [1] - 2:47</p> <p>contest [1] - 36:17</p> <p>contested [1] - 15:32</p> <p>context [3] - 12:37, 13:13, 13:20</p> <p>continue [4] - 4:40, 11:15, 18:32, 35:27</p> <p>continuing [2] - 12:10, 15:42</p> <p>contract [2] - 25:23</p>	<p>contradictory [1] - 29:15</p> <p>control [2] - 32:19, 37:22</p> <p>convenience [5] - 11:1, 11:44, 12:2, 12:11, 36:6</p> <p>convergence [1] - 29:24</p> <p>converging [1] - 30:33</p> <p>conversations [1] - 9:1</p> <p>conveyed [1] - 22:34</p> <p>cooperated [1] - 38:19</p> <p>copied [1] - 19:35</p> <p>corporate [1] - 10:16, 13:23, 15:13, 15:17, 15:40, 15:45, 16:16, 17:41, 28:29, 28:34, 30:41</p> <p>corporation [5] - 13:14, 14:28, 14:36, 15:25, 15:41</p> <p>Corporation [1] - 10:37</p> <p>Corporations [3] - 10:39, 10:43, 17:42</p> <p>correct [7] - 1:40, 1:42, 17:40, 18:6, 21:44, 26:43, 40:19</p> <p>cost [1] - 30:39</p> <p>costs [2] - 23:2, 28:21</p> <p>Cote [1] - 13:44</p> <p>counsel [12] - 2:23, 4:16, 8:35, 9:20, 19:34, 19:35, 19:41, 19:42, 20:4, 21:9, 22:32, 22:46</p> <p>couple [3] - 4:3, 18:2, 34:18</p> <p>course [17] - 4:5, 4:9, 4:27, 6:24, 20:13, 21:5, 21:6, 21:34, 23:12, 25:31, 26:46, 27:20, 29:47, 34:4, 34:45, 38:41</p> <p>COURT [329] - 1:14, 1:17, 1:20, 1:24, 1:38, 1:41, 1:43, 1:45, 1:47, 2:7, 2:11, 2:13, 2:17, 2:21, 2:24, 2:30, 2:33, 2:37, 2:40, 2:43, 2:46, 3:3, 3:7, 3:9, 3:12, 3:14, 3:19, 3:24, 3:29, 3:33, 3:37, 3:40, 3:44, 3:46, 4:2, 4:7, 4:12, 4:14, 4:18, 4:21, 4:25, 4:28, 4:37,</p>	<p>4:42, 5:3, 5:6, 5:11, 5:15, 5:18, 5:20, 5:23, 5:35, 5:38, 5:42, 6:2, 6:5, 6:7, 6:11, 6:15, 6:18, 6:20, 6:24, 6:27, 6:32, 6:37, 6:40, 6:43, 6:45, 6:47, 7:2, 7:10, 7:13, 7:15, 7:17, 7:20, 7:26, 7:29, 7:36, 7:39, 7:42, 8:2, 8:4, 8:7, 8:10, 8:13, 8:17, 8:21, 8:26, 8:32, 8:34, 8:36, 8:38, 8:41, 8:44, 9:3, 9:10, 9:14, 9:16, 9:20, 9:24, 9:27, 9:32, 9:40, 9:42, 9:47, 10:3, 10:6, 10:9, 10:11, 10:21, 10:24, 10:27, 10:30, 10:33, 12:29, 12:43, 12:47, 13:2, 13:4, 13:36, 14:44, 15:1, 15:20, 15:28, 15:30, 15:34, 15:37, 16:3, 16:6, 16:10, 16:13, 16:21, 16:30, 16:34, 16:36, 16:39, 17:2, 17:5, 17:12, 17:15, 17:22, 17:26, 17:29, 17:33, 17:41, 17:44, 17:47, 18:4, 18:8, 18:12, 18:16, 18:21, 18:24, 18:29, 18:41, 18:47, 19:2, 19:11, 19:13, 19:15, 19:18, 19:20, 19:23, 19:27, 19:31, 19:36, 19:39, 20:8, 20:11, 20:14, 20:17, 20:20, 20:23, 20:26, 20:31, 20:34, 20:38, 20:42, 21:2, 21:4, 21:7, 21:14, 21:18, 21:22, 21:25, 21:30, 21:33, 21:40, 21:42, 21:46, 22:2, 22:5, 22:8, 22:10, 22:13, 22:16, 22:20, 22:22, 22:26, 22:29, 22:31, 22:45, 23:4, 23:6, 23:12, 23:20, 23:23, 23:26, 23:28, 23:31, 23:34, 23:37, 23:40, 23:46, 24:2, 24:6, 24:10, 24:17, 24:21, 24:25, 24:29, 24:33, 24:35, 24:37, 24:41, 24:45, 25:10, 25:18, 25:25, 25:29, 25:34,</p>	<p>25:43, 25:46, 26:5, 26:10, 26:21, 26:23, 26:26, 26:30, 26:33, 27:4, 27:19, 27:25, 27:27, 27:30, 27:38, 27:40, 28:5, 28:8, 28:12, 28:15, 28:18, 28:24, 28:31, 28:45, 29:1, 29:9, 29:22, 29:26, 29:30, 29:33, 29:37, 29:40, 29:42, 29:45, 30:4, 30:7, 30:10, 30:21, 30:26, 30:30, 30:36, 30:38, 30:42, 31:14, 31:19, 31:22, 31:25, 31:37, 32:1, 32:4, 32:7, 32:13, 32:15, 32:31, 33:39, 33:43, 34:5, 34:11, 34:16, 34:27, 34:30, 34:38, 35:2, 35:11, 35:14, 35:34, 35:43, 35:47, 36:8, 36:10, 36:19, 36:27, 36:31, 36:33, 36:36, 36:41, 36:47, 37:8, 37:11, 37:19, 37:21, 37:31, 37:33, 37:41, 38:5, 38:22, 38:47, 39:10, 39:14, 39:23, 39:27, 39:32, 39:34, 39:37, 39:40, 39:43, 39:45, 40:3</p> <p>court [13] - 3:4, 5:23, 7:11, 7:32, 13:5, 13:32, 14:20, 14:34, 20:2, 20:10, 28:41, 31:3, 32:39</p> <p>Court [1] - 25:13</p> <p>court's [4] - 2:35, 28:16, 29:10, 31:1</p> <p>courtroom [1] - 8:31</p> <p>courts [6] - 28:9, 28:32, 28:35, 28:46, 29:3, 30:25</p> <p>cover [1] - 24:8</p> <p>CPC [1] - 8:39</p> <p>crafting [1] - 22:38</p> <p>creates [1] - 5:4</p> <p>creating [1] - 35:12</p> <p>creditor [2] - 34:8, 34:23</p> <p>creditors [1] - 39:17</p> <p>criticize [1] - 37:47</p> <p>curated [1] - 37:25</p>	<p>date [4] - 3:31, 4:10, 4:19, 9:27</p> <p>dates [1] - 4:15</p> <p>day's [1] - 38:11</p> <p>days [5] - 2:25, 2:31, 3:14, 32:44, 38:36</p> <p>deadline [1] - 3:5</p> <p>deadlock [2] - 38:46, 39:1</p> <p>deadlocked [2] - 38:38, 39:7</p> <p>deal [17] - 2:9, 7:27, 8:41, 15:23, 16:1, 17:37, 19:29, 21:43, 22:33, 22:38, 29:30, 29:34, 29:39, 30:2, 30:40, 31:12, 32:17</p> <p>dealing [6] - 7:30, 12:26, 12:33, 15:17, 21:10, 30:47</p> <p>deals [1] - 18:2</p> <p>dealt [1] - 34:44</p> <p>debt [1] - 15:26</p> <p>decided [2] - 19:46, 33:4</p> <p>decision [2] - 28:43, 29:11</p> <p>default [5] - 34:21, 36:46, 37:35, 37:36, 39:11</p> <p>defined [1] - 13:25</p> <p>degree [4] - 26:15, 26:45, 27:2, 28:26</p> <p>delivered [1] - 19:33</p> <p>deluding [1] - 34:17</p> <p>deposed [1] - 11:30</p> <p>depth [1] - 24:22</p> <p>describe [1] - 4:33</p> <p>described [2] - 8:8, 37:12</p> <p>despite [1] - 19:45</p> <p>detail [1] - 19:30</p> <p>details [1] - 20:16</p> <p>determination [1] - 18:41</p> <p>determinations [1] - 16:26</p> <p>determine [2] - 11:32, 16:27</p> <p>determined [1] - 18:43</p> <p>develop [1] - 25:17</p> <p>development [3] - 1:27, 25:38, 35:16</p> <p>developments [1] - 2:3</p> <p>devil's [1] - 20:16</p> <p>difference [1] - 28:28</p> <p>different [3] - 2:26, 26:38, 32:19</p> <p>difficult [2] - 30:18,</p>
---	---	--	--	---

D

dad [1] - 32:2

damages [1] - 12:21

<p>30:24 difficulty [1] - 30:14 dilute [3] - 18:32, 26:46, 37:2 dilation [3] - 35:24, 35:32, 35:36 direct [2] - 14:9, 14:11 directed [2] - 14:27, 14:37 directing [2] - 14:34, 15:27 direction [3] - 11:20, 31:18, 31:24 directly [1] - 24:15 director [3] - 15:25, 26:1, 32:8 directors [1] - 33:46 disagreement [1] - 28:38 disagreements [2] - 39:29, 39:30 disclosable [1] - 31:44 discovered [1] - 31:34 discovers [1] - 32:9 discretion [9] - 2:1, 2:4, 3:1, 4:47, 5:1, 5:13, 5:29, 27:14, 36:16 discuss [1] - 20:4 discussed [1] - 23:22 discussions [1] - 33:18 dispute [2] - 37:30, 38:30 disputes [1] - 31:28 dissimilar [2] - 14:3, 14:16 dissolution [1] - 39:8 dissolve [1] - 38:39 dissolved [1] - 39:12 distinction [2] - 1:28, 5:5 distress [1] - 18:39 distribute [1] - 39:18 distributed [1] - 35:42 distrust [1] - 7:27 diverge [1] - 24:15 dollar [1] - 32:30 dollars [4] - 17:24, 32:27, 33:4, 35:30 done [9] - 9:9, 9:46, 19:37, 21:27, 31:10, 33:31, 33:36, 39:20 down [6] - 6:47, 7:44, 9:2, 14:46, 28:41, 34:6 Dr [1] - 27:31 draft [1] - 20:18 drafting [1] - 22:35</p>	<p>drain [1] - 12:10 draw [2] - 1:28, 18:35 during [1] - 5:40 duty [1] - 33:46 dynamic [1] - 29:24</p> <p>E</p> <p>early [1] - 22:15 easier [1] - 4:32 EBMD [1] - 4:39 Ecoasis [1] - 4:39 EDMB [1] - 15:24 effect [1] - 34:34 effectively [1] - 5:27 effort [1] - 18:38 either [5] - 1:21, 2:2, 7:5, 39:20, 39:21 EMD's [1] - 11:20 EMDB [3] - 15:3, 16:6, 15:7 emerging [1] - 31:28 employment [1] - 25:24 encountered [1] - 16:22 encourage [1] - 23:7 END [1] - 40:7 end [9] - 4:13, 4:21, 6:9, 16:14, 18:22, 19:24, 27:41, 35:27, 38:44 endeavour [1] - 26:36 engage [5] - 7:17, 15:12, 15:13, 24:15 engages [1] - 11:6 enhance [1] - 37:1 enormous [1] - 23:2 enter [1] - 25:22 enterprise [1] - 25:36 entire [1] - 30:24 entirely [1] - 32:19 entitled [3] - 12:44, 18:13, 38:16 entitlement [1] - 18:5 entity [1] - 32:19 entrench [1] - 18:31 entrenching [1] - 18:43 equal [1] - 35:40 equitable [5] - 12:23, 27:14, 27:22, 27:32, 39:9 Equity [3] - 10:37, 27:18, 27:28 equity [5] - 12:11, 18:37, 33:23, 37:23, 38:43 erodes [1] - 22:47 erosion [1] - 22:45</p>	<p>escape [1] - 31:40 especially [1] - 17:18 essential [1] - 25:19 essentially [4] - 10:42, 16:41, 27:16, 38:35 estate [4] - 5:28, 5:36, 5:46, 6:14 et [1] - 18:19 evaluated [1] - 33:1 evidence [2] - 11:38, 16:24, 16:30, 17:9, 17:14, 17:19, 25:3, 26:37, 26:44, 27:42, 31:7, 31:27, 32:45, 33:9, 34:47, 35:8, 37:25, 39:31, 39:46, 40:2 evolved [1] - 24:16 exactly [5] - 3:45, 21:44, 26:25, 26:27, 31:32 example [2] - 14:33, 25:32 examples [1] - 15:43 excellent [1] - 8:37 exceptions [1] - 15:46 EXCERPT [3] - 1:4, 1:7, 40:7 excused [1] - 9:20 exercise [1] - 36:16 expect [4] - 20:19, 24:31, 34:43, 38:13 expectation [1] - 3:34 expectations [5] - 11:11, 11:16, 11:40, 33:22 expediency [1] - 30:37 expense [1] - 22:46 expensive [1] - 23:3 experience [1] - 22:41 expert [3] - 33:2, 33:32, 35:18 explanations [1] - 32:23 expose [1] - 35:5 extent [2] - 11:33, 13:21 extraordinary [9] - 28:11, 28:23, 29:10, 31:41, 36:28, 38:32, 39:4, 39:19 extremely [1] - 29:29</p> <p>F</p> <p>fabricated [1] - 37:7 facile [12] - 11:4, 15:36, 16:23, 16:28, 16:32, 17:8, 17:28, 18:42, 24:40, 26:17,</p>	<p>26:34, 36:2 fact [5] - 15:2, 17:21, 19:45, 29:23, 37:5 factor [1] - 36:6 fall [1] - 27:9 falls [4] - 27:3, 35:25, 36:3, 36:43 fair [1] - 8:28 faith [1] - 11:28 fall [1] - 15:45 falling [1] - 15:15 far [2] - 29:18, 31:29 faster [1] - 36:42 father [1] - 11:39 father's [1] - 31:10 favour [3] - 5:13, 5:36, 5:41 favours [2] - 11:1, 11:45 ferocious [1] - 38:33 FERRIS [83] - 9:8, 9:11, 9:15, 9:44, 10:1, 10:4, 10:7, 10:10, 10:12, 10:22, 10:25, 10:28, 10:31, 10:34, 12:30, 12:44, 13:1, 13:3, 13:5, 13:37, 14:43, 14:46, 15:2, 15:21, 15:29, 15:33, 15:35, 15:38, 16:5, 16:9, 16:11, 16:14, 16:29, 16:31, 16:35, 16:38, 16:40, 17:3, 17:6, 17:13, 17:16, 17:23, 17:27, 17:30, 17:40, 17:43, 17:45, 18:1, 18:5, 18:9, 18:13, 18:17, 18:22, 18:25, 18:30, 18:45, 19:1, 19:3, 19:12, 19:14, 22:9, 22:23, 22:27 Ferris [16] - 9:10, 9:43, 21:1, 21:27, 21:34, 21:36, 23:13, 24:47, 26:3, 27:41, 34:28, 35:29, 37:5, 38:30, 38:31, 38:34 few [4] - 7:44, 19:17, 25:6, 26:8 fides [1] - 34:7 fiduciary [1] - 32:9 fight [1] - 6:2 figure [1] - 23:41 film [1] - 30:23 filter [1] - 25:4 final [2] - 10:15, 29:11 finally [1] - 34:44 financial [2] - 33:12, 33:34</p>	<p>financing [11] - 11:22, 11:27, 11:35, 12:9, 37:15, 37:29, 38:20, 38:21, 39:26, 39:28 findings [1] - 25:3 fine [5] - 19:23, 22:9, 22:23, 22:30, 35:21 finish [4] - 8:24, 9:5, 10:12, 23:19 first [9] - 4:11, 5:30, 6:1, 20:44, 26:40, 26:41, 31:23, 35:42, 37:28 fit [1] - 2:9 five [4] - 6:46, 6:47, 31:21, 36:29 flood [1] - 35:1 focussing [1] - 10:38 fold [2] - 5:10, 6:39 following [2] - 11:38, 12:40 forcing [1] - 16:43 form [9] - 1:13, 1:25, 9:17, 12:18, 12:19, 12:23, 19:34, 21:21, 27:11 four [2] - 2:15, 31:21 frame [1] - 2:13 framed [1] - 25:21 friend [5] - 4:41, 4:44, 5:46, 6:34, 18:6 friend's [3] - 5:12, 10:7, 25:37 friends [16] - 9:5, 10:42, 22:7, 27:16, 29:12, 29:14, 31:24, 31:30, 31:33, 32:23, 35:29, 36:13, 36:40, 36:44, 37:12, 39:3 FROM [1] - 1:4 front [1] - 10:21 full [1] - 33:29 fund [2] - 5:9, 12:24 fundamental [1] - 28:28 funding [1] - 10:35 funds [5] - 5:1, 11:31, 11:33, 11:34, 12:8</p> <p>G</p> <p>general [4] - 12:34, 14:29, 14:36, 15:47 generally [1] - 16:2 given [5] - 5:31, 7:26, 21:8, 32:35, 35:45 glasses [1] - 26:29 Gondola [2] - 8:9, 18:18 governing [1] - 13:26</p>
--	---	--	--	---

gracious [1] - 23:19 grant [3] - 15:30, 15:33, 16:17 grave [1] - 32:22 gravity [1] - 31:9 great [3] - 7:26, 9:22, 19:24 greater [1] - 37:23 guess [2] - 21:7, 33:7	hundred [2] - 17:24, 33:3	31:44, 35:35 Interested [2] - 30:47, 32:25 Interesting [4] - 5:5, 5:20, 5:21, 20:1 Interests [2] - 11:29, 13:38 Interim [1] - 12:45 Interim [3] - 2:9, 12:18, 26:20 Interlocutory [3] - 19:5, 19:7, 19:10 Introduction [3] - 24:32, 24:43, 36:35 Investigate [3] - 1:31, 33:31, 33:46 Investment [2] - 28:34, 28:40 Invite [1] - 22:6 invoke [1] - 33:17 Invoking [2] - 33:19, 33:20 involve [1] - 28:36 Irreparable [2] - 10:47, 12:7 Ish [2] - 24:7, 24:8 Issue [3] - 2:29, 16:36, 28:1 Issues [7] - 2:9, 12:36, 13:10, 16:2, 18:43, 21:13, 30:11 It'll [1] - 38:39 iterative [1] - 11:36 itself [1] - 15:6	20:13, 21:3, 21:5, 21:23, 21:26, 21:31, 21:34, 21:41, 21:44, 21:47, 22:3, 22:6, 22:44, 23:3, 23:5 Jackson [8] - 19:20, 20:36, 21:4, 21:22, 22:27, 27:13 January [1] - 18:44 Judge [1] - 26:15 Judgment [2] - 28:47, 30:18 Jump [3] - 10:19, 10:40, 10:41 Jumped [1] - 36:34 Jurisdiction [6] - 10:16, 10:17, 12:26, 13:9, 13:27, 14:20 Justice [46] - 1:10, 1:11, 2:28, 4:5, 4:29, 7:1, 7:23, 7:41, 8:3, 8:29, 8:43, 8:46, 9:41, 9:44, 13:32, 13:39, 17:45, 19:14, 19:16, 19:21, 21:3, 21:23, 22:11, 22:44, 23:5, 23:11, 23:29, 24:31, 28:9, 27:5, 28:39, 29:44, 30:20, 31:39, 32:8, 32:20, 32:28, 33:14, 34:12, 34:41, 37:37, 38:28, 38:34, 39:2, 39:13	last [6] - 29:7, 32:44, 33:10, 37:4, 38:36, 39:25 late [1] - 4:21 Law [3] - 10:37, 27:18, 27:28 law [8] - 12:40, 13:15, 15:13, 15:17, 15:46, 28:30, 30:41, 33:20 lawsuit [1] - 7:39 least [3] - 4:2, 11:5, 23:10 leave [5] - 3:1, 7:40, 18:19, 21:28, 22:23 leaving [1] - 5:33 left [1] - 21:24 legal [2] - 13:13, 22:46 legislation [1] - 13:26 lend [1] - 5:1 lender [7] - 18:31, 32:33, 34:19, 34:23, 35:25, 35:28, 38:14 length [1] - 38:14 letter [4] - 34:29, 38:29, 38:32, 38:33 letters [1] - 17:23 letting [1] - 7:3 level [1] - 17:17 lever [1] - 15:11 light [1] - 10:5 likelihood [1] - 26:18 likely [1] - 27:1 limited [1] - 13:10, 13:46, 14:10, 14:12, 14:13, 14:22, 14:27, 14:28, 14:37, 14:38, 15:5 line [1] - 3:36 liquidate [1] - 39:17 liquidity [1] - 5:32 lis [1] - 7:17 Lisa [2] - 40:13, 40:30 list [1] - 35:5 litigation [1] - 37:2 loan [15] - 5:26, 12:1, 12:2, 12:25, 16:20, 18:34, 32:28, 32:30, 37:15, 37:29, 37:34, 37:36, 37:44, 38:17 loan's [1] - 34:21 loaned [1] - 32:32 loans [1] - 11:23 look [16] - 2:14, 3:26, 14:46, 16:4, 17:8, 20:34, 22:11, 22:31, 22:43, 23:13, 27:11, 30:43, 32:41, 33:31, 33:32 looked [1] - 39:5 looking [3] - 4:38,
H	I	J	K	L
half [2] - 13:47, 35:30 hand [1] - 29:16 handed [1] - 24:4 hands [1] - 25:39 hard [2] - 6:41, 20:39 hardly [1] - 6:28 harm [2] - 10:47, 12:7 hash [1] - 8:11 hear [5] - 4:2, 4:26, 20:11, 33:36, 34:46 heard [7] - 8:39, 29:18, 30:33, 34:14, 38:3, 38:6, 38:36 hearing [4] - 4:21, 19:25, 20:40, 26:42 heavily [1] - 15:32 help [2] - 24:37, 33:2 helpful [1] - 4:8 helps [1] - 7:2 hereby [1] - 40:14 hereunto [1] - 40:23 high [6] - 26:14, 26:45, 27:2, 28:26, 30:44 highlight [1] - 24:20 hmm [39] - 1:20, 3:13, 5:3, 7:28, 12:43, 15:1, 15:20, 25:34, 25:43, 26:33, 27:4, 28:12, 28:24, 28:45, 29:1, 29:22, 29:26, 30:4, 30:7, 30:10, 33:39, 33:43, 34:38, 35:2, 35:11, 35:34, 35:47, 36:8, 36:10, 36:19, 36:27, 37:19, 38:22, 38:47, 39:10, 39:14, 39:27 hold [1] - 36:39 Holdings [4] - 13:43, 14:8, 14:13, 14:15 holds [2] - 13:47, 15:6 holistic [1] - 36:9 honestly [1] - 11:28 hope [1] - 4:5 hopefully [1] - 10:13 hopelessly [1] - 39:6 hour [1] - 3:36	idem [1] - 10:42 Identify [1] - 13:37 Imagine [4] - 30:13, 30:14, 36:21, 36:22 impeding [1] - 19:8 Important [7] - 9:32, 24:27, 33:21, 35:31, 37:38, 38:28 Impossible [1] - 16:25 Impression [1] - 26:40 IN [1] - 40:23 Inappropriate [2] - 7:21, 7:34 Include [1] - 14:9 Includes [1] - 6:31 including [2] - 2:2, 7:31 incomplete [1] - 37:24 Incorporated [1] - 15:8 Indebtedness [1] - 18:36 Indeed [1] - 33:24 Independent [2] - 7:30, 31:3 Indirectly [3] - 14:28, 15:3, 15:15 Indiscernible [2] - 3:8, 21:10 Indiscernible [3] - 6:26, 21:32, 23:42 Information [1] - 2:6 Injunction [15] - 10:44, 11:3, 11:6, 11:42, 17:1, 17:38, 25:4, 25:15, 25:30, 25:31, 26:32, 27:8, 28:20, 36:4, 36:22 Injunctions [3] - 25:28, 27:3, 28:10 Insignificant [1] - 35:13 Insisted [1] - 5:13 Insolvency [6] - 21:9, 30:29, 30:44, 35:25, 36:46, 37:7 Instructions [2] - 6:42, 20:3 Intended [1] - 13:12 Intent [1] - 17:24 Intention [1] - 5:25 Intercompany [1] - 5:40 Interest [6] - 12:12, 14:3, 15:6, 18:36,	JACKSON [89] - 2:27, 2:31, 2:34, 2:38, 2:41, 2:44, 2:47, 3:4, 3:8, 3:11, 3:17, 3:21, 3:23, 3:27, 3:32, 3:35, 3:39, 3:43, 3:45, 4:1, 4:4, 4:8, 4:13, 4:15, 4:20, 4:23, 4:27, 4:29, 4:38, 4:43, 5:4, 5:7, 5:12, 5:17, 5:19, 5:21, 5:25, 5:36, 5:39, 5:43, 6:4, 6:6, 6:8, 6:12, 6:16, 6:19, 6:28, 6:33, 6:38, 6:44, 7:9, 7:12, 7:14, 7:16, 7:19, 7:23, 7:28, 7:35, 7:38, 7:41, 8:22, 8:29, 8:33, 8:35, 9:30, 9:33, 19:19, 19:21, 19:24, 19:28, 19:32, 19:37, 19:40, 20:9, 20:13, 21:3, 21:5, 21:23, 21:26, 21:31, 21:34, 21:41, 21:44, 21:47, 22:3, 22:6, 22:44, 23:3, 23:5 Jackson [8] - 19:20, 20:36, 21:4, 21:22, 22:27, 27:13 January [1] - 18:44 Judge [1] - 26:15 Judgment [2] - 28:47, 30:18 Jump [3] - 10:19, 10:40, 10:41 Jumped [1] - 36:34 Jurisdiction [6] - 10:16, 10:17, 12:26, 13:9, 13:27, 14:20 Justice [46] - 1:10, 1:11, 2:28, 4:5, 4:29, 7:1, 7:23, 7:41, 8:3, 8:29, 8:43, 8:46, 9:41, 9:44, 13:32, 13:39, 17:45, 19:14, 19:16, 19:21, 21:3, 21:23, 22:11, 22:44, 23:5, 23:11, 23:29, 24:31, 28:9, 27:5, 28:39, 29:44, 30:20, 31:39, 32:8, 32:20, 32:28, 33:14, 34:12, 34:41, 37:37, 38:28, 38:34, 39:2, 39:13	keep [2] - 3:9, 34:3 kind [4] - 24:7, 28:6, 29:2, 32:10 Kusumoto [15] - 11:39, 15:25, 18:25, 18:33, 25:47, 31:8, 31:34, 32:17, 32:46, 33:18, 33:45, 34:7, 35:23, 36:45, 39:47	lacked [1] - 14:20 laid [1] - 19:28 land [3] - 7:22, 12:9, 16:19 lands [18] - 1:29, 1:32, 1:38, 1:39, 4:34, 6:29, 6:30, 6:31, 7:4, 7:10, 7:30, 8:6, 8:9, 11:47, 12:5, 16:45, 18:18, 25:38 Landvis [1] - 12:41 largely [1] - 8:23

9:30, 25:16 looks [1] - 30:15 lost [2] - 4:44, 27:6 Ltd [4] - 13:43, 14:1, 14:2, 14:15 lunch [1] - 3:36	master [1] - 38:27 material [2] - 30:19, 38:25 matter [3] - 22:35, 23:15, 25:20 matters [1] - 24:15 matthews [1] - 35:33 Matthews [16] - 10:35, 11:14, 11:30, 12:6, 18:6, 26:47, 31:42, 31:43, 31:47, 32:2, 32:16, 32:35, 33:7, 33:17, 34:25, 38:10 Matthews' [3] - 18:37, 34:9, 38:42 mean [11] - 2:17, 4:31, 4:33, 6:35, 22:11, 22:17, 30:12, 30:25, 34:35, 38:13, 38:15 meantime [1] - 7:37 members [1] - 13:46 mention [1] - 38:2 mentioned [1] - 3:18 mentioning [1] - 6:29 merits [2] - 28:17, 36:4 met [1] - 17:11 middle [1] - 36:24 might [7] - 3:6, 4:23, 7:24, 14:26, 30:17, 35:31, 36:15 million [11] - 25:38, 30:20, 32:18, 32:27, 32:30, 35:41, 35:42, 36:24, 37:30, 37:31, 37:32 millions [2] - 17:24, 33:4 mind [2] - 2:25, 3:9 minor [1] - 19:41 minute [5] - 16:3, 16:4, 21:4, 21:30, 23:38 minutes [12] - 6:46, 6:47, 7:44, 8:25, 9:6, 10:13, 17:46, 23:3, 25:6, 26:8, 32:38, 36:30 miscellaneous [1] - 18:18 missing [1] - 21:39 model [1] - 22:37 moment [3] - 5:33, 19:17, 23:11 money [3] - 32:32, 32:34, 38:12 monitor [1] - 31:2 month [1] - 4:11 months [3] - 2:15, 26:12	Moorage [2] - 14:2, 14:17 moot [1] - 6:8 morning [10] - 19:25, 20:15, 20:28, 22:34, 23:8, 26:41, 29:29, 30:33, 32:10, 37:7 most [3] - 28:37, 33:21, 34:44 motion [4] - 29:17, 30:22, 36:14, 36:25 Mountain [4] - 4:40, 11:16, 18:39, 35:16 moved [1] - 23:14 multiple [1] - 21:8 must [2] - 19:6, 27:9	36:11, 36:20, 36:28, 36:32, 36:34, 36:38, 36:42, 37:1, 37:9, 37:12, 37:20, 37:22, 37:32, 37:34, 37:42, 38:6, 38:24, 39:1, 39:11, 39:15, 39:24, 39:28, 39:33, 39:35, 39:38, 39:41, 39:44, 40:1 Nathanson [5] - 19:15, 22:10, 22:24, 22:29, 23:12 nature [2] - 6:3, 28:23 necessarily [1] - 38:24 necessary [2] - 2:5, 12:18 need [19] - 5:34, 6:44, 8:14, 8:19, 10:22, 11:46, 11:47, 20:3, 20:47, 21:37, 23:26, 23:28, 25:2, 27:36, 33:1, 33:45, 33:46, 33:47 needed [1] - 11:4 needs [2] - 2:17, 26:14 negative [2] - 25:16, 25:28 neighbour's [1] - 25:27 neutral [1] - 32:40 never [1] - 30:13 next [6] - 1:34, 4:3, 15:18, 22:13, 32:25, 32:37 nine [1] - 3:20 nine-week [1] - 3:20 nomenclature [1] - 17:35 non [1] - 35:13 non-insignificant [1] - 35:13 normal [2] - 34:4, 38:16 normally [2] - 4:6, 32:43 note [1] - 14:44 nothing [2] - 19:42, 26:47 notice [1] - 38:11 noting [1] - 3:2 November [1] - 3:25 nuanced [2] - 1:44, 31:29 number [11] - 10:19, 25:5, 31:17, 31:31, 31:32, 35:31, 35:32, 35:37, 35:38, 36:37 nutshell [2] - 26:28, 26:31	O o'clock [4] - 4:28, 8:13, 8:40, 22:18 objective [1] - 17:21 obligation [2] - 6:13, 32:9 observed [1] - 39:5 obtain [2] - 5:15, 15:26 obtained [1] - 38:21 October [5] - 3:10, 3:41, 4:13, 4:22, 9:28 OF [1] - 40:7 offence [1] - 22:46 office [3] - 19:32, 19:33, 20:41 officer [4] - 2:35, 7:30, 31:1, 32:39 Official [1] - 40:13 one [27] - 3:17, 4:29, 4:30, 5:29, 6:28, 6:33, 6:38, 7:31, 7:33, 10:15, 13:33, 13:47, 19:17, 22:42, 23:11, 27:34, 29:16, 29:47, 30:3, 31:33, 32:29, 33:28, 34:13, 34:18, 35:17 ongoing [4] - 10:4, 11:36, 22:46, 37:2 operates [1] - 14:13 operation [2] - 5:9, 15:23 operations [8] - 1:30, 1:32, 1:36, 2:29, 4:36, 11:20, 11:32, 11:34 opportunity [1] - 20:45 opposed [1] - 30:39 oppressed [1] - 11:13 oppression [16] - 11:8, 11:9, 11:10, 12:33, 12:35, 13:8, 13:27, 14:6, 15:47, 16:16, 21:11, 26:46, 27:35, 29:6, 37:14, 38:27 oppressive [4] - 13:12, 13:21, 30:46, 38:42 oppressively [2] - 28:44, 35:24 options [2] - 33:32, 34:32 oral [1] - 33:17 orchestrate [1] - 35:24 order [30] - 1:13, 5:26,
M m'mm [39] - 1:20, 3:13, 5:3, 7:28, 12:43, 15:1, 15:20, 25:34, 25:43, 26:33, 27:4, 28:12, 28:24, 28:45, 29:1, 29:22, 29:26, 30:4, 30:7, 30:10, 33:39, 33:43, 34:38, 35:2, 35:11, 35:34, 35:47, 36:8, 36:10, 36:19, 36:27, 37:19, 38:22, 38:47, 39:10, 39:14, 39:27 m'mm-hmm [39] - 1:20, 3:13, 5:3, 7:28, 12:43, 15:1, 15:20, 25:34, 25:43, 26:33, 27:4, 28:12, 28:24, 28:45, 29:1, 29:22, 29:26, 30:4, 30:7, 30:10, 33:39, 33:43, 34:38, 35:2, 35:11, 35:34, 35:47, 36:8, 36:10, 36:19, 36:27, 37:19, 38:22, 38:47, 39:10, 39:14, 39:27 MacDonald [1] - 10:44 Madam [2] - 8:18, 24:4 main [1] - 11:21 maintain [1] - 12:16 mala [1] - 34:7 manage [1] - 4:40 managed [1] - 11:17 management [5] - 2:29, 11:29, 14:9, 15:41, 30:47 managing [3] - 14:31, 15:5, 15:8 mandatory [8] - 11:3, 17:1, 25:15, 25:31, 26:1, 26:32, 28:21, 36:22 manner [1] - 14:12 manufactured [1] - 36:45 margin [1] - 29:2 market [4] - 11:18, 16:45, 35:1, 35:5 marketing [3] - 11:46, 17:35, 29:17 masses [1] - 30:18	N naïvely [1] - 21:8 name [1] - 40:24 narrow [1] - 30:11 Nathan [1] - 13:32 NATHANSON [137] - 8:46, 9:4, 9:13, 9:19, 9:22, 9:29, 19:16, 22:11, 22:15, 22:17, 22:21, 22:30, 23:11, 23:18, 23:21, 23:24, 23:27, 23:29, 23:32, 23:35, 23:39, 23:45, 23:47, 24:3, 24:7, 24:11, 24:18, 24:23, 24:27, 24:30, 24:34, 24:36, 24:40, 24:42, 24:46, 25:11, 25:19, 25:26, 25:30, 25:35, 25:44, 26:2, 26:6, 26:11, 26:22, 26:25, 26:27, 26:31, 26:34, 27:5, 27:20, 27:26, 27:28, 27:31, 27:39, 28:3, 28:6, 28:9, 28:13, 28:16, 28:19, 28:25, 28:32, 28:46, 29:2, 29:10, 29:23, 29:27, 29:31, 29:35, 29:38, 29:41, 29:43, 29:46, 30:5, 30:8, 30:11, 30:22, 30:27, 30:31, 30:37, 30:39, 31:12, 31:15, 31:20, 31:23, 31:26, 31:38, 32:2, 32:5, 32:8, 32:14, 32:16, 32:32, 33:40, 33:44, 34:10, 34:12, 34:17, 34:28, 34:31, 34:39, 35:3, 35:12, 35:15, 35:35, 35:44, 36:1, 36:9,			

<p>5:43, 7:43, 8:12, 8:39, 9:18, 9:26, 9:34, 10:1, 14:21, 14:34, 15:24, 15:26, 15:27, 16:7, 19:33, 19:34, 20:7, 20:18, 20:38, 21:21, 22:35, 22:37, 22:42, 25:37, 27:24, 34:40, 40:4</p> <p>orders [4] - 14:27, 15:22, 15:23, 28:1</p> <p>ordinary [1] - 4:5</p> <p>otherwise [4] - 4:25, 13:11, 19:9, 39:9</p> <p>ouch [1] - 3:22</p> <p>ourselves [1] - 13:30</p> <p>outline [1] - 1:16</p> <p>outside [8] - 5:10, 5:47, 6:12, 7:42, 20:45, 22:25, 32:20, 32:21</p> <p>overall [2] - 11:20, 33:13</p> <p>overlook [1] - 35:29</p> <p>override [1] - 33:24</p> <p>owed [1] - 18:28</p> <p>owned [1] - 15:4</p> <p>owns [2] - 14:1, 15:3</p>	<p>15:8, 18:14, 39:20, 39:21</p> <p>partners [6] - 18:11, 28:39, 35:37, 37:3, 39:6, 39:18</p> <p>partnership [30] - 12:13, 13:10, 13:20, 13:46, 14:10, 14:12, 14:13, 14:22, 14:27, 14:37, 14:38, 15:7, 15:9, 16:2, 18:11, 18:27, 23:1, 28:41, 31:27, 31:46, 32:20, 33:11, 34:11, 35:36, 38:38, 38:39, 39:12, 39:16</p> <p>Partnership [2] - 39:7, 39:23</p> <p>partnership's [1] - 18:35</p> <p>partnerships [7] - 12:33, 12:37, 15:5, 15:17, 15:42, 16:19, 33:34</p> <p>parts [5] - 10:20, 22:38, 24:46, 24:47, 25:1</p> <p>party [7] - 7:5, 25:21, 25:39, 28:17, 32:33, 36:25, 38:20</p> <p>path [2] - 30:28, 30:29</p> <p>patlent [1] - 34:20</p> <p>pay [3] - 12:1, 16:20, 39:17</p> <p>payables [1] - 2:2</p> <p>paying [1] - 2:2</p> <p>payment [1] - 11:35</p> <p>pays [1] - 35:36</p> <p>people [1] - 28:1</p> <p>per [1] - 35:35</p> <p>percent [1] - 15:3</p> <p>perfect [1] - 29:19</p> <p>perhaps [2] - 10:23, 21:7</p> <p>period [4] - 18:5, 18:9, 18:15, 20:21</p> <p>permit [1] - 37:16</p> <p>permits [1] - 14:33</p> <p>person [2] - 28:43, 39:5</p> <p>personal [2] - 18:7, 23:14</p> <p>persuade [2] - 26:7, 27:33</p> <p>Peter [1] - 8:30</p> <p>petitioners [1] - 13:42</p> <p>petitioners' [1] - 14:22</p> <p>petitioners' [1] - 14:14</p> <p>picture [2] - 26:37, 37:18</p>	<p>piece [1] - 7:36</p> <p>pile [1] - 29:7</p> <p>pling [1] - 29:8</p> <p>pillars [2] - 37:13, 37:27</p> <p>pin [1] - 38:38</p> <p>plain [1] - 29:46</p> <p>plan [7] - 2:22, 33:6, 33:14, 34:37, 35:20, 35:26</p> <p>play [2] - 21:15, 34:7</p> <p>plus [1] - 25:38</p> <p>PM [8] - 1:7, 1:19, 7:47, 9:35, 9:37, 9:38, 40:7, 40:8</p> <p>point [27] - 10:15, 12:17, 12:26, 12:31, 12:34, 17:7, 18:23, 26:27, 27:5, 28:9, 29:13, 31:39, 32:21, 32:43, 33:27, 33:28, 34:13, 34:21, 35:22, 35:28, 37:4, 37:28, 37:38, 38:25, 38:29, 38:41, 39:25</p> <p>pointed [2] - 2:18, 4:44</p> <p>points [5] - 18:3, 18:18, 24:28, 31:21, 34:18</p> <p>policy [3] - 28:29, 28:34, 39:29</p> <p>pops [2] - 10:10</p> <p>position [9] - 11:26, 12:32, 18:31, 26:44, 33:34, 34:8, 34:23, 37:1, 39:46</p> <p>positions [2] - 30:3, 30:33</p> <p>positive [4] - 25:15, 25:30, 25:31, 27:20</p> <p>power [6] - 1:31, 1:46, 2:5, 4:41, 4:45, 37:20</p> <p>powers [1] - 33:29</p> <p>practical [2] - 30:12, 30:16</p> <p>practice [2] - 31:29, 33:19</p> <p>preceding [1] - 38:45</p> <p>preference [1] - 35:41</p> <p>prejudice [2] - 25:7, 26:23</p> <p>prejudiced [1] - 11:12</p> <p>prejudicial [1] - 13:23</p> <p>present [4] - 8:30, 12:6, 21:45, 39:46</p> <p>presented [1] - 27:34</p> <p>preserving [1] - 12:12</p> <p>press [1] - 36:29</p>	<p>pretty [4] - 3:35, 32:5, 38:32, 38:33</p> <p>preview [1] - 40:1</p> <p>prima [12] - 11:4, 15:36, 16:23, 16:28, 16:32, 17:8, 17:28, 18:42, 24:40, 26:16, 26:34, 36:2</p> <p>principle [1] - 15:47</p> <p>principles [1] - 29:20</p> <p>priority [2] - 2:4, 11:24</p> <p>problem [3] - 8:26, 32:26, 34:46</p> <p>problems [2] - 31:34, 35:20</p> <p>proceed [2] - 10:8, 19:47</p> <p>proceeding [3] - 11:8, 11:9, 16:17</p> <p>proceedings [6] - 6:25, 16:1, 25:8, 40:17, 40:18, 40:20</p> <p>PROCEEDINGS [7] - 1:4, 1:6, 7:46, 7:47, 9:37, 9:38, 40:8</p> <p>proceeds [1] - 11:23</p> <p>process [6] - 1:32, 1:34, 2:42, 4:6, 5:41, 11:36</p> <p>profit [1] - 11:26</p> <p>prohibiting [2] - 14:35, 25:42</p> <p>prohibitory [3] - 25:15, 25:46, 27:47</p> <p>projected [1] - 35:15</p> <p>projection [1] - 35:9</p> <p>prominent [1] - 38:2</p> <p>prongs [3] - 10:45, 37:13</p> <p>proper [2] - 25:6, 33:5</p> <p>properly [2] - 13:22, 26:13</p> <p>property [4] - 7:36, 25:27, 34:24, 39:17</p> <p>proposal [1] - 1:18</p> <p>propose [2] - 5:44, 18:26</p> <p>proposed [3] - 19:37, 19:42, 36:15</p> <p>proposition [2] - 12:35, 32:25</p> <p>protections [1] - 38:16</p> <p>protects [2] - 7:20, 23:9</p> <p>provide [2] - 11:21, 31:3</p> <p>provided [1] - 40:18</p> <p>Province [1] - 40:14</p> <p>provision [1] - 37:45</p>	<p>provisions [4] - 17:37, 18:20, 31:44, 31:45</p> <p>pulling [1] - 38:38</p> <p>puppet [1] - 38:26</p> <p>purchase [2] - 14:21, 15:27</p> <p>purpose [3] - 11:17, 32:34, 37:44</p> <p>pursuant [1] - 13:8</p> <p>push [2] - 18:38, 32:17</p> <p>put [10] - 2:13, 3:5, 23:41, 25:39, 27:40, 29:47, 34:6, 36:13, 38:44, 39:2</p> <p>putting [2] - 2:35, 16:45</p>
P				
<p>page [8] - 10:31, 10:41, 12:27, 15:19, 15:43, 24:31</p> <p>painted [2] - 37:17, 38:26</p> <p>paradigm [1] - 29:6</p> <p>paragraph [15] - 10:32, 10:41, 11:7, 11:13, 12:39, 13:31, 14:47, 15:21, 16:8, 18:23, 24:32, 26:8, 27:39, 38:1</p> <p>parlay [1] - 34:8</p> <p>part [14] - 11:24, 16:15, 16:22, 20:5, 22:13, 23:47, 25:12, 25:46, 28:7, 32:36, 34:11, 34:46, 36:4, 37:42</p> <p>participant [1] - 13:23</p> <p>parties [9] - 2:18, 3:29, 7:31, 14:15, 19:28, 22:32, 28:20, 29:28, 33:16</p> <p>parties' [3] - 27:37, 33:22, 33:24</p> <p>partition [1] - 34:32</p> <p>partner [8] - 14:29, 14:31, 14:36, 15:5,</p>	<p>15:8, 18:14, 39:20, 39:21</p> <p>partners [6] - 18:11, 28:39, 35:37, 37:3, 39:6, 39:18</p> <p>partnership [30] - 12:13, 13:10, 13:20, 13:46, 14:10, 14:12, 14:13, 14:22, 14:27, 14:37, 14:38, 15:7, 15:9, 16:2, 18:11, 18:27, 23:1, 28:41, 31:27, 31:46, 32:20, 33:11, 34:11, 35:36, 38:38, 38:39, 39:12, 39:16</p> <p>Partnership [2] - 39:7, 39:23</p> <p>partnership's [1] - 18:35</p> <p>partnerships [7] - 12:33, 12:37, 15:5, 15:17, 15:42, 16:19, 33:34</p> <p>parts [5] - 10:20, 22:38, 24:46, 24:47, 25:1</p> <p>party [7] - 7:5, 25:21, 25:39, 28:17, 32:33, 36:25, 38:20</p> <p>path [2] - 30:28, 30:29</p> <p>patlent [1] - 34:20</p> <p>pay [3] - 12:1, 16:20, 39:17</p> <p>payables [1] - 2:2</p> <p>paying [1] - 2:2</p> <p>payment [1] - 11:35</p> <p>pays [1] - 35:36</p> <p>people [1] - 28:1</p> <p>per [1] - 35:35</p> <p>percent [1] - 15:3</p> <p>perfect [1] - 29:19</p> <p>perhaps [2] - 10:23, 21:7</p> <p>period [4] - 18:5, 18:9, 18:15, 20:21</p> <p>permit [1] - 37:16</p> <p>permits [1] - 14:33</p> <p>person [2] - 28:43, 39:5</p> <p>personal [2] - 18:7, 23:14</p> <p>persuade [2] - 26:7, 27:33</p> <p>Peter [1] - 8:30</p> <p>petitioners [1] - 13:42</p> <p>petitioners' [1] - 14:22</p> <p>petitioners' [1] - 14:14</p> <p>picture [2] - 26:37, 37:18</p>	<p>piece [1] - 7:36</p> <p>pile [1] - 29:7</p> <p>pling [1] - 29:8</p> <p>pillars [2] - 37:13, 37:27</p> <p>pin [1] - 38:38</p> <p>plain [1] - 29:46</p> <p>plan [7] - 2:22, 33:6, 33:14, 34:37, 35:20, 35:26</p> <p>play [2] - 21:15, 34:7</p> <p>plus [1] - 25:38</p> <p>PM [8] - 1:7, 1:19, 7:47, 9:35, 9:37, 9:38, 40:7, 40:8</p> <p>point [27] - 10:15, 12:17, 12:26, 12:31, 12:34, 17:7, 18:23, 26:27, 27:5, 28:9, 29:13, 31:39, 32:21, 32:43, 33:27, 33:28, 34:13, 34:21, 35:22, 35:28, 37:4, 37:28, 37:38, 38:25, 38:29, 38:41, 39:25</p> <p>pointed [2] - 2:18, 4:44</p> <p>points [5] - 18:3, 18:18, 24:28, 31:21, 34:18</p> <p>policy [3] - 28:29, 28:34, 39:29</p> <p>pops [2] - 10:10</p> <p>position [9] - 11:26, 12:32, 18:31, 26:44, 33:34, 34:8, 34:23, 37:1, 39:46</p> <p>positions [2] - 30:3, 30:33</p> <p>positive [4] - 25:15, 25:30, 25:31, 27:20</p> <p>power [6] - 1:31, 1:46, 2:5, 4:41, 4:45, 37:20</p> <p>powers [1] - 33:29</p> <p>practical [2] - 30:12, 30:16</p> <p>practice [2] - 31:29, 33:19</p> <p>preceding [1] - 38:45</p> <p>preference [1] - 35:41</p> <p>prejudice [2] - 25:7, 26:23</p> <p>prejudiced [1] - 11:12</p> <p>prejudicial [1] - 13:23</p> <p>present [4] - 8:30, 12:6, 21:45, 39:46</p> <p>presented [1] - 27:34</p> <p>preserving [1] - 12:12</p> <p>press [1] - 36:29</p>	<p>pretty [4] - 3:35, 32:5, 38:32, 38:33</p> <p>preview [1] - 40:1</p> <p>prima [12] - 11:4, 15:36, 16:23, 16:28, 16:32, 17:8, 17:28, 18:42, 24:40, 26:16, 26:34, 36:2</p> <p>principle [1] - 15:47</p> <p>principles [1] - 29:20</p> <p>priority [2] - 2:4, 11:24</p> <p>problem [3] - 8:26, 32:26, 34:46</p> <p>problems [2] - 31:34, 35:20</p> <p>proceed [2] - 10:8, 19:47</p> <p>proceeding [3] - 11:8, 11:9, 16:17</p> <p>proceedings [6] - 6:25, 16:1, 25:8, 40:17, 40:18, 40:20</p> <p>PROCEEDINGS [7] - 1:4, 1:6, 7:46, 7:47, 9:37, 9:38, 40:8</p> <p>proceeds [1] - 11:23</p> <p>process [6] - 1:32, 1:34, 2:42, 4:6, 5:41, 11:36</p> <p>profit [1] - 11:26</p> <p>prohibiting [2] - 14:35, 25:42</p> <p>prohibitory [3] - 25:15, 25:46, 27:47</p> <p>projected [1] - 35:15</p> <p>projection [1] - 35:9</p> <p>prominent [1] - 38:2</p> <p>prongs [3] - 10:45, 37:13</p> <p>proper [2] - 25:6, 33:5</p> <p>properly [2] - 13:22, 26:13</p> <p>property [4] - 7:36, 25:27, 34:24, 39:17</p> <p>proposal [1] - 1:18</p> <p>propose [2] - 5:44, 18:26</p> <p>proposed [3] - 19:37, 19:42, 36:15</p> <p>proposition [2] - 12:35, 32:25</p> <p>protections [1] - 38:16</p> <p>protects [2] - 7:20, 23:9</p> <p>provide [2] - 11:21, 31:3</p> <p>provided [1] - 40:18</p> <p>Province [1] - 40:14</p> <p>provision [1] - 37:45</p>	<p>provisions [4] - 17:37, 18:20, 31:44, 31:45</p> <p>pulling [1] - 38:38</p> <p>puppet [1] - 38:26</p> <p>purchase [2] - 14:21, 15:27</p> <p>purpose [3] - 11:17, 32:34, 37:44</p> <p>pursuant [1] - 13:8</p> <p>push [2] - 18:38, 32:17</p> <p>put [10] - 2:13, 3:5, 23:41, 25:39, 27:40, 29:47, 34:6, 36:13, 38:44, 39:2</p> <p>putting [2] - 2:35, 16:45</p>
Q				
<p>questions [7] - 27:45, 28:34, 28:36, 28:37, 31:33, 33:33, 36:37</p> <p>quickly [3] - 19:21, 19:40, 19:41</p> <p>quite [6] - 22:37, 23:7, 34:20, 35:8, 37:5, 37:9</p> <p>quoted [1] - 12:46</p>	<p>15:8, 18:14, 39:20, 39:21</p> <p>partners [6] - 18:11, 28:39, 35:37, 37:3, 39:6, 39:18</p> <p>partnership [30] - 12:13, 13:10, 13:20, 13:46, 14:10, 14:12, 14:13, 14:22, 14:27, 14:37, 14:38, 15:7, 15:9, 16:2, 18:11, 18:27, 23:1, 28:41, 31:27, 31:46, 32:20, 33:11, 34:11, 35:36, 38:38, 38:39, 39:12, 39:16</p> <p>Partnership [2] - 39:7, 39:23</p> <p>partnership's [1] - 18:35</p> <p>partnerships [7] - 12:33, 12:37, 15:5, 15:17, 15:42, 16:19, 33:34</p> <p>parts [5] - 10:20, 22:38, 24:46, 24:47, 25:1</p> <p>party [7] - 7:5, 25:21, 25:39, 28:17, 32:33, 36:25, 38:20</p> <p>path [2] - 30:28, 30:29</p> <p>patlent [1] - 34:20</p> <p>pay [3] - 12:1, 16:20, 39:17</p> <p>payables [1] - 2:2</p> <p>paying [1] - 2:2</p> <p>payment [1] - 11:35</p> <p>pays [1] - 35:36</p> <p>people [1] - 28:1</p> <p>per [1] - 35:35</p> <p>percent [1] - 15:3</p> <p>perfect [1] - 29:19</p> <p>perhaps [2] - 10:23, 21:7</p> <p>period [4] - 18:5, 18:9, 18:15, 20:21</p> <p>permit [1] - 37:16</p> <p>permits [1] - 14:33</p> <p>person [2] - 28:43, 39:5</p> <p>personal [2] - 18:7, 23:14</p> <p>persuade [2] - 26:7, 27:33</p> <p>Peter [1] - 8:30</p> <p>petitioners [1] - 13:42</p> <p>petitioners' [1] - 14:22</p> <p>petitioners' [1] - 14:14</p> <p>picture [2] - 26:37, 37:18</p>	<p>piece [1] - 7:36</p> <p>pile [1] - 29:7</p> <p>pling [1] - 29:8</p> <p>pillars [2] - 37:13, 37:27</p> <p>pin [1] - 38:38</p> <p>plain [1] - 29:46</p> <p>plan [7] - 2:22, 33:6, 33:14, 34:37, 35:20, 35:26</p> <p>play [2] - 21:15, 34:7</p> <p>plus [1] - 25:38</p> <p>PM [8] - 1:7, 1:19, 7:47, 9:35, 9:37, 9:38, 40:7, 40:8</p> <p>point [27] - 10:15, 12:17, 12:26, 12:31, 12:34, 17:7, 18:23, 26:27, 27:5, 28:9, 29:13, 31:39, 32:21, 32:43, 33:27, 33:28, 34:13, 34:21, 35:22, 35:28, 37:4, 37:28, 37:38, 38:25, 38:29, 38:41, 39:25</p> <p>pointed [2] - 2:18, 4:44</p> <p>points [5] - 18:3, 18:18, 24:28, 31:21, 34:18</p> <p>policy [3] - 28:29, 28:34, 39:29</p> <p>pops [2] - 10:10</p> <p>position [9] - 11:26, 12:32, 18:31, 26:44, 33:34, 34:8, 34:23, 37:1, 39:46</p> <p>positions [2] - 30:3, 30:33</p> <p>positive [4] - 25:15, 25:30, 25:31, 27:20</p> <p>power [6] - 1:31, 1:46, 2:5, 4:41, 4:45, 37:20</p> <p>powers [1] - 33:29</p> <p>practical [2] - 30:12, 30:16</p> <p>practice [2] - 31:29, 33:19</p> <p>preceding [1] - 38:45</p> <p>preference [1] - 35:41</p> <p>prejudice [2] - 25:7, 26:23</p> <p>prejudiced [1] - 11:12</p> <p>prejudicial [1] - 13:23</p> <p>present [4] - 8:30, 12:6, 21:45, 39:46</p> <p>presented [1] - 27:34</p> <p>preserving [1] - 12:12</p> <p>press [1] - 36:29</p>	<p>pretty [4] - 3:35, 32:5, 38:32, 38:33</p> <p>preview [1] - 40:1</p> <p>prima [12] - 11:4, 15:36, 16:23, 16:28, 16:32, 17:8, 17:28, 18:42, 24:40, 26:16, 26:34, 36:2</p> <p>principle [1] - 15:47</p> <p>principles [1] - 29:20</p> <p>priority [2] - 2:4, 11:24</p> <p>problem [3] - 8:26, 32:26, 34:46</p> <p>problems [2] - 31:34, 35:20</p> <p>proceed [2] - 10:8, 19:47</p> <p>proceeding [3] - 11:8, 11:9, 16:17</p> <p>proceedings [6] - 6:25, 16:1, 25:8, 40:17, 40:18, 40:20</p> <p>PROCEEDINGS [7] - 1:4, 1:6, 7:46, 7:47, 9:37, 9:38, 40:8</p> <p>proceeds [1] - 11:23</p> <p>process [6] - 1:32, 1:34, 2:42, 4:6, 5:41, 11:36</p> <p>profit [1] - 11:26</p> <p>prohibiting [2] - 14:35, 25:42</p> <p>prohibitory [3] - 25:15, 25:46, 27:47</p> <p>projected [1] - 35:15</p> <p>projection [1] - 35:9</p> <p>prominent [1] - 38:2</p> <p>prongs [3] - 10:45, 37:13</p> <p>proper [2] - 25:6, 33:5</p> <p>properly [2] - 13:22, 26:13</p> <p>property [4] - 7:36, 25:27, 34:24, 39:17</p> <p>proposal [1] - 1:18</p> <p>propose [2] - 5:44, 18:26</p> <p>proposed [3] - 19:37, 19:42, 36:15</p> <p>proposition [2] - 12:35, 32:25</p> <p>protections [1] - 38:16</p> <p>protects [2] - 7:20, 23:9</p> <p>provide [2] - 11:21, 31:3</p> <p>provided [1] - 40:18</p> <p>Province [1] - 40:14</p> <p>provision [1] - 37:45</p>	<p>provisions [4] - 17:37, 18:20, 31:44, 31:45</p> <p>pulling [1] - 38:38</p> <p>puppet [1] - 38:26</p> <p>purchase [2] - 14:21, 15:27</p> <p>purpose [3] - 11:17, 32:34, 37:44</p> <p>pursuant [1] - 13:8</p> <p>push [2] - 18:38, 32:17</p> <p>put [10] - 2:13, 3:5, 23:41, 25:39, 27:40, 29:47, 34:6, 36:13, 38:44, 39:2</p> <p>putting [2] - 2:35, 16:45</p>
R				
<p>radical [1] - 27:9</p> <p>radically [1] - 27:35</p> <p>rail [1] - 6:42</p> <p>raise [1] - 12:8</p> <p>raised [4] - 6:34, 27:44, 31:15, 31:35</p> <p>rare [1] - 28:37</p> <p>rather [1] - 18:35</p> <p>reach [1] - 32:21</p> <p>reacting [1] - 29:27</p> <p>read [5] - 24:19, 24:21, 24:22, 24:28</p> <p>real [1] - 4:34</p> <p>reality [1] - 29:46</p> <p>realized [1] - 31:9</p> <p>realizing [1] - 11:17</p> <p>really [6] - 4:38, 10:14, 18:33, 35:7, 38:28, 38:30</p> <p>reason [5] - 21:26, 29:5, 32:36, 32:37, 33:10</p> <p>reasonable [3] - 11:11, 11:15, 33:22</p> <p>reasoning [1] - 34:39</p> <p>reasons [2] - 33:26, 33:29</p> <p>received [1] - 19:40</p>	<p>15:8, 18:14, 39:20, 39:21</p> <p>partners [6] - 18:11, 28:39, 35:37, 37:3, 39:6, 39:18</p> <p>partnership [30] - 12:13, 13:10, 13:20, 13:46, 14:10, 14:12, 14:13, 14:22, 14:27, 14:37, 14:38, 15:7, 15:9, 16:2, 18:11, 18:27, 23:1, 28:41, 31:27, 31:46, 32:20, 33:11, 34:11, 35:36, 38:38, 38:39, 39:12, 39:16</p> <p>Partnership [2] - 39:7, 39:23</p> <p>partnership's [1] - 18:35</p> <p>partnerships [7] - 12:33, 12:37, 15:5, 15:17, 15:42, 16:19, 33:34</p> <p>parts [5] - 10:20, 22:38, 24:46, 24:47, 25:1</p> <p>party [7] - 7:5, 25:21, 25:39, 28:17, 32:33, 36:25, 38:20</p> <p>path [2] - 30:28, 30:29</p> <p>patlent [1] - 34:20</p> <p>pay [3] - 12:1, 16:20, 39:17</p> <p>payables [1] - 2:2</p> <p>paying [1] - 2:2</p> <p>payment [1] - 11:35</p> <p>pays [1] - 35:36</p> <p>people [1] - 28:1</p> <p>per [1] - 35:35</p> <p>percent [1] - 15:3</p> <p>perfect [1] - 29:19</p> <p>perhaps [2] - 10:23, 21:7</p> <p>period [4] - 18:5, 18:9, 18:15, 20:21</p> <p>permit [1] - 37:16</p> <p>permits [1] - 14:33</p> <p>person [2] - 28:43, 39:5</p> <p>personal [2] - 18:7, 23:14</p> <p>persuade [2] - 26:7, 27:33</p> <p>Peter [1] - 8:30</p> <p>petitioners [1] - 13:42</p> <p>petitioners' [1] - 14:22</p> <p>petitioners' [1] - 14:14</p> <p></p>			

<p>receiver[29] - 1:26, 1:29, 1:30, 1:35, 2:8, 2:23, 2:26, 3:2, 3:8, 3:34, 3:41, 4:46, 5:14, 5:15, 5:17, 5:27, 7:3, 7:6, 11:47, 12:23, 18:26, 19:37, 19:42, 25:40, 31:2, 33:29, 34:2, 34:42, 39:13</p> <p>receiver's [8] - 2:1, 2:3, 2:14, 2:23, 4:16, 5:29, 34:2, 34:36</p> <p>receivership[8] - 5:2, 5:8, 5:10, 5:28, 5:47, 6:10, 17:36, 23:42</p> <p>receiverships [1] - 5:8</p> <p>recess [1] - 40:5</p> <p>RECESSED [2] - 7:46, 9:37</p> <p>recognizes [1] - 26:13</p> <p>recommendation [3] - 1:36, 32:41, 34:3</p> <p>recommendations [1] - 31:4</p> <p>recommends [1] - 34:42</p> <p>RECONVENED [2] - 7:47, 9:38</p> <p>record [9] - 1:10, 8:3, 8:30, 8:33, 9:41, 22:40, 24:11, 30:24, 39:6</p> <p>recorded [1] - 40:18</p> <p>recourse [1] - 13:26</p> <p>redemption [3] - 18:5, 18:9, 18:15</p> <p>refer [1] - 1:39</p> <p>reference [1] - 24:12</p> <p>referred [1] - 23:36</p> <p>refers [1] - 14:6</p> <p>refinancing [1] - 37:17</p> <p>reflected [1] - 11:18</p> <p>reflects [1] - 22:36</p> <p>refused [2] - 37:15, 37:16</p> <p>regarded [1] - 13:15</p> <p>regime [1] - 13:11</p> <p>Registrar [2] - 8:19, 24:4</p> <p>regrettably [1] - 35:45</p> <p>regulation [1] - 25:33</p> <p>reinvested [1] - 11:33</p> <p>reiterate [1] - 18:23</p> <p>relating [2] - 7:36, 15:40</p> <p>relation [1] - 13:43</p> <p>relationship [2] - 13:16, 13:21</p> <p>relatively [1] - 12:30</p>	<p>relayed [1] - 22:39</p> <p>Relief [2] - 12:45, 13:8</p> <p>relief [15] - 10:36, 12:18, 12:23, 14:25, 15:30, 15:33, 15:44, 15:45, 16:15, 16:18, 25:20, 28:13, 31:43, 36:21, 36:26</p> <p>remain [1] - 4:39</p> <p>remains [1] - 6:12</p> <p>remedies [3] - 15:39, 15:40, 28:11</p> <p>remedy [2] - 12:21, 39:11</p> <p>remember [3] - 1:27, 32:29, 35:7</p> <p>remind [1] - 10:34</p> <p>reminded [1] - 6:22</p> <p>removed [1] - 26:1</p> <p>removing [1] - 15:24</p> <p>renew [1] - 37:34</p> <p>repaid [3] - 12:3, 18:34, 34:15</p> <p>repayment [1] - 11:22</p> <p>repeatedly [3] - 28:10, 32:44, 33:8</p> <p>replace [1] - 11:39</p> <p>report [5] - 1:33, 2:6, 2:28, 4:10, 4:11</p> <p>REPORTER [1] - 40:11</p> <p>Reporter [2] - 40:13, 40:31</p> <p>require [6] - 5:23, 12:3, 17:36, 23:24, 28:1, 28:25</p> <p>required [3] - 11:34, 11:42, 33:15</p> <p>requires [3] - 16:30, 25:31, 25:32</p> <p>requiring [1] - 25:44</p> <p>reservoir [1] - 32:11</p> <p>residents [1] - 35:10</p> <p>resolution [1] - 30:16</p> <p>resolved [2] - 8:23, 22:18</p> <p>resort [3] - 1:27, 15:7, 18:27</p> <p>resorts [1] - 2:3</p> <p>respectful [5] - 26:42, 27:21, 30:27, 35:44, 36:17</p> <p>respond [1] - 20:36</p> <p>respondents [1] - 14:21</p> <p>response [1] - 19:43</p> <p>responsibility [1] - 11:21</p> <p>rest [1] - 18:2</p> <p>restrictions [1] - 32:34</p>	<p>retain [1] - 7:31</p> <p>retired [1] - 18:34</p> <p>retreat [2] - 30:12, 30:17</p> <p>retreating [1] - 30:40</p> <p>revised [1] - 19:34</p> <p>rid [1] - 17:18</p> <p>rightly [1] - 2:18</p> <p>rights [5] - 7:32, 14:11, 14:14, 14:16, 27:37</p> <p>rise [1] - 39:8</p> <p>rising [1] - 37:10</p> <p>risk [3] - 26:20, 26:23, 28:35</p> <p>risks [1] - 28:22</p> <p>RJR [1] - 10:44</p> <p>ROBERTS [48] - 1:9, 1:11, 1:15, 1:18, 1:21, 1:25, 1:40, 1:42, 1:44, 1:46, 2:1, 2:8, 2:12, 2:16, 2:20, 2:22, 2:25, 3:13, 3:16, 3:22, 3:28, 6:21, 6:25, 6:41, 6:46, 7:1, 7:8, 7:24, 8:5, 8:8, 8:11, 8:15, 8:18, 8:28, 8:37, 8:43, 20:16, 20:18, 20:21, 20:24, 20:29, 20:32, 20:37, 20:39, 20:43, 21:12, 21:15, 21:19</p> <p>Roberts [9] - 8:4, 9:9, 19:43, 20:11, 21:36, 22:28, 29:18, 29:33, 36:20</p> <p>role [1] - 15:41</p> <p>room [1] - 22:41</p> <p>Rubin [2] - 3:38, 8:30</p> <p>rubric [1] - 27:18</p> <p>rule [1] - 28:47</p> <p>running [4] - 22:21, 36:12, 36:14, 36:21</p>	<p>35:41, 37:14, 37:29, 38:11, 38:19</p> <p>Sanovest's [2] - 11:21, 37:1</p> <p>satisfy [1] - 26:14</p> <p>save [1] - 24:9</p> <p>saw [1] - 32:10</p> <p>schedule [1] - 23:21</p> <p>second [1] - 29:13</p> <p>section [3] - 14:26, 14:33, 39:24</p> <p>secured [6] - 2:4, 5:34, 5:41, 6:1, 34:8, 34:23</p> <p>Security [1] - 32:22</p> <p>security [2] - 6:3, 38:17</p> <p>see [19] - 5:7, 5:37, 6:35, 7:4, 10:28, 12:13, 15:22, 15:37, 17:12, 21:2, 29:38, 30:43, 32:45, 33:6, 33:8, 34:19, 36:44, 37:39, 38:18</p> <p>seek [1] - 15:44</p> <p>seeking [9] - 12:22, 15:22, 15:40, 16:13, 16:16, 18:30, 31:43, 35:27, 36:26</p> <p>seem [1] - 35:29</p> <p>sees [2] - 2:9, 2:10</p> <p>seized [1] - 4:6</p> <p>selective [1] - 37:24</p> <p>self [2] - 30:47, 32:25</p> <p>self-interested [2] - 30:47, 32:25</p> <p>sell [6] - 7:10, 7:14, 12:4, 16:19, 36:23</p> <p>selling [1] - 34:47</p> <p>sense [4] - 7:4, 14:2, 20:35, 31:40</p> <p>sensible [4] - 30:16, 33:30, 34:45, 39:5</p> <p>sent [1] - 20:18</p> <p>separate [1] - 2:41</p> <p>September [2] - 1:1, 40:25</p> <p>serious [6] - 10:46, 16:36, 24:38, 27:43, 27:45, 31:35</p> <p>set [7] - 3:14, 3:40, 8:16, 11:13, 12:39, 12:40, 16:7</p> <p>sets [1] - 21:8</p> <p>settle [2] - 19:32, 39:16</p> <p>settling [1] - 20:6</p> <p>several [1] - 23:36</p> <p>shape [1] - 27:10</p> <p>share [1] - 37:23</p>	<p>shareholder [3] - 13:44, 13:45, 14:9</p> <p>shareholders [2] - 14:4, 14:15</p> <p>shares [4] - 13:47, 14:1, 15:3, 15:27</p> <p>shift [1] - 33:11</p> <p>shotgun [1] - 15:27</p> <p>show [15] - 15:35, 26:36, 28:29, 31:26, 33:15, 33:20, 35:19, 35:40, 36:43, 37:27, 37:39, 38:8, 38:29, 39:30, 40:2</p> <p>showed [2] - 34:28, 37:44</p> <p>showing [3] - 15:39, 16:11, 26:7</p> <p>shown [3] - 16:37, 17:18, 32:11</p> <p>sic [1] - 15:24</p> <p>side [4] - 7:21, 20:36, 21:9, 21:11</p> <p>slides [4] - 12:12, 12:17, 27:44, 32:17</p> <p>sight [1] - 3:36</p> <p>sign [1] - 32:17</p> <p>significance [1] - 28:22</p> <p>significant [1] - 16:25</p> <p>simplicity [1] - 30:35</p> <p>simply [5] - 6:13, 12:24, 13:15, 16:42, 17:37</p> <p>sit [1] - 22:13</p> <p>sitting [2] - 3:30, 20:6</p> <p>situation [2] - 18:39, 20:1</p> <p>sized [1] - 35:13</p> <p>skill [1] - 40:21</p> <p>sky [1] - 15:14</p> <p>slightly [2] - 29:14, 29:15</p> <p>small [3] - 6:28, 19:29, 26:22</p> <p>smaller [1] - 10:20</p> <p>Smith [3] - 13:32, 13:39, 14:19</p> <p>soak [1] - 35:7</p> <p>sold [2] - 25:40, 34:24</p> <p>sole [1] - 13:45</p> <p>someone [1] - 21:24</p> <p>sometime [1] - 3:41</p> <p>sometimes [1] - 30:25</p> <p>son [2] - 31:41, 32:6</p> <p>sorry [1] - 3:21, 6:21, 19:22, 21:5, 24:35, 24:44, 26:28, 29:7, 35:46, 37:31, 39:41</p> <p>sort [6] - 11:25, 15:11,</p>
--	--	--	---	---

S

sale [4] - 2:42, 11:23, 12:24, 34:33

sales [11] - 1:32, 1:34, 11:18, 11:31, 12:9, 25:40, 31:30, 32:47, 33:41, 36:23, 37:16

Sanovest [24] - 11:22, 11:25, 11:35, 12:1, 12:14, 12:20, 12:31, 12:44, 15:4, 15:10, 16:20, 18:25, 18:33, 29:20, 31:42, 32:21, 34:19, 34:22, 35:39,

15:14, 15:16, 36:40 sought [1] - 10:36 source [1] - 33:21 specific [1] - 3:14 speed [1] - 30:39 stand [4] - 6:47, 7:42, 16:46, 23:40 standard [5] - 11:10, 17:1, 17:11, 26:17, 26:36 standing [2] - 9:1, 13:43 start [6] - 3:10, 10:26, 12:27, 22:25, 24:13, 25:1 starting [1] - 12:34 statements [1] - 33:12 statute [1] - 10:17 statutory [3] - 13:8, 13:11, 13:27 step [1] - 21:36 stepped [1] - 31:9 steps [2] - 31:8, 37:35 still [2] - 9:46, 13:27 stood [1] - 7:44 stop [1] - 38:37 stops [1] - 22:45 story [1] - 33:45 straightforward [1] - 12:31 strange [1] - 6:36 strategy [5] - 28:35, 28:40, 33:3, 33:5, 39:30 strong [13] - 11:3, 16:22, 16:28, 16:32, 17:20, 18:42, 24:40, 26:16, 26:18, 26:34, 33:23, 36:2, 37:5 struck [1] - 35:8 stymied [2] - 12:8, 12:9 subdivide [1] - 35:4 subject [2] - 32:33, 38:3 submission [11] - 1:12, 25:36, 26:42, 27:21, 29:6, 30:27, 31:16, 35:44, 36:2, 36:18, 37:24 submissions [10] - 5:31, 8:24, 9:6, 10:38, 21:28, 22:19, 23:33, 24:14, 29:36, 37:6 submit [1] - 33:24 subordinating [1] - 38:19 subscribed [1] - 40:24 substance [3] - 25:17,	25:20, 25:36 substantial [1] - 26:43 substantially [1] - 26:38 substantive [1] - 21:12 subtle [1] - 37:38 succeed [1] - 27:21 succeeded [1] - 17:32 sue [3] - 31:42, 31:47 suffering [1] - 12:7 sufficient [2] - 1:31, 2:5 suggest [2] - 2:47, 21:35 suggestion [1] - 4:17 sulted [1] - 29:3 summary [4] - 16:26, 30:22, 37:26, 39:33 supported [1] - 27:10 supposed [2] - 3:19, 31:32 supposedly [1] - 3:10 Supreme [1] - 25:13 suspense [1] - 39:39	third-party [2] - 32:33, 38:20 thousand [1] - 35:30 three [11] - 2:15, 10:45, 28:7, 32:44, 37:12, 37:27, 37:36, 38:36, 38:45, 39:20 three-part [1] - 28:7 throw [1] - 33:2 Thursday [1] - 23:15 Tian [11] - 11:38, 15:24, 18:25, 18:33, 31:7, 31:34, 32:46, 34:7, 35:23, 36:45, 39:47 timing [1] - 10:5 today [2] - 19:44, 26:13 together [1] - 11:32 Tom [3] - 11:39, 32:16, 33:18 tomorrow [2] - 21:43, 39:22 took [4] - 17:14, 32:29, 34:20, 37:35 top [1] - 28:27 tough [1] - 32:5 town [1] - 35:13 transactions [2] - 32:10, 32:26 transcribed [1] - 40:17 transcript [1] - 40:20 treatise [1] - 30:41 trial [12] - 3:10, 3:20, 3:29, 18:44, 19:8, 19:9, 25:7, 26:12, 26:15, 27:2, 28:14 tried [6] - 10:46, 11:42, 16:36, 24:38, 27:44, 27:45 trope [1] - 35:22 true [6] - 12:35, 33:33, 35:18, 35:21, 38:15, 40:19 trustee [1] - 31:2 try [5] - 7:14, 11:25, 11:26, 21:38, 24:14 trying [3] - 20:46, 26:7, 35:23 turn [2] - 14:1, 31:1 turned [1] - 33:40 turns [2] - 9:16, 35:20 two [15] - 2:27, 10:45, 15:5, 15:41, 24:5, 24:8, 27:6, 27:34, 28:39, 29:14, 30:3, 30:32, 32:38, 34:22, 38:11 two-volume [2] - 24:5, 24:8	U ultimate [1] - 19:8 unblock [1] - 34:45 unblocked [1] - 34:33 under [17] - 10:16, 10:36, 10:43, 14:20, 14:25, 17:37, 17:39, 27:17, 27:25, 27:26, 31:44, 33:15, 35:26, 37:15, 37:29, 39:7, 39:23 underlying [1] - 21:13 understood [1] - 7:38 unduly [1] - 11:26 unexpected [1] - 5:31 unfair [2] - 13:12, 37:25 unfairly [1] - 11:12 unfortunately [2] - 21:42, 24:4 unhindered [1] - 32:41 unique [1] - 22:39 units [1] - 14:22 unreliable [1] - 17:20 untoward [1] - 7:34 unusual [1] - 5:19 up [12] - 4:10, 9:7, 10:10, 15:16, 17:45, 22:42, 23:38, 23:40, 28:23, 36:39, 39:15 update [1] - 9:45 urgency [1] - 2:19 urgent [2] - 4:26, 30:19	39:36 wants [3] - 33:17, 34:24, 34:25 waterfall [1] - 35:40 wave [1] - 26:29 Wednesday [4] - 22:13, 23:14, 23:15, 23:17 week [2] - 3:20, 9:30 weigh [1] - 16:30 WHEREOF [1] - 40:23 whole [6] - 6:39, 26:37, 31:46, 33:44, 35:22, 35:45 win [2] - 26:18, 26:19 wind [1] - 39:15 wipe [1] - 34:9 wishes [1] - 22:24 WITNESS [1] - 40:23 word [2] - 35:23, 37:14 words [2] - 31:26, 37:17 worth [3] - 6:28, 18:28, 33:3 write [3] - 19:1, 30:18, 30:40 writes [1] - 13:40 written [2] - 24:13, 33:24 wrote [2] - 13:5, 38:31
	T tab [3] - 12:42, 13:3, 13:33 table [1] - 23:35 tabs [1] - 24:8 tap's [1] - 33:40 taps [1] - 33:37 tax [1] - 33:33 temperature [1] - 37:10 tens [1] - 33:3 term [2] - 32:36, 32:37 terminate [2] - 25:23, 25:24 terms [19] - 1:34, 17:34, 17:38, 19:29, 19:33, 20:6, 20:27, 20:30, 20:33, 20:37, 20:38, 20:46, 21:9, 21:10, 22:34, 22:39, 27:15, 27:23, 33:15 terrible [1] - 38:43 test [11] - 10:16, 10:43, 10:44, 11:6, 16:35, 19:3, 19:5, 19:9, 24:37, 25:4, 36:4 themselves [2] - 12:22, 28:36 they've [2] - 12:7, 12:8 thin [1] - 30:23 third [4] - 25:39, 32:33, 33:10, 38:20		V value [4] - 11:19, 12:13, 12:16, 22:47 Vancouver [1] - 1:2 vendor [1] - 34:15 ventilated [1] - 31:36 view [10] - 8:22, 15:30, 15:31, 18:13, 23:1, 23:24, 25:2, 25:14, 37:25 views [1] - 31:4 violate [1] - 25:26 violated [1] - 11:40 vultus [1] - 32:24 Volume [1] - 13:3 volume [2] - 24:5, 24:8	Y years [7] - 31:28, 34:20, 34:22, 37:37, 38:37, 38:45, 39:21 yellow [2] - 24:7, 24:8 yellow-ish [2] - 24:7, 24:8 yesterday [1] - 37:6 yourself [1] - 17:7
			Z zone [1] - 13:35	
			'	
			'complainant' [1] - 13:25	
			"	
			"affairs" [2] - 14:7, 14:8 "not [2] - 14:3, 14:16	
		W wait [1] - 39:38 waiting [2] - 7:42,		

—
—{t} - 13:43