

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

COMFORT CAPITAL INC., THE BANK OF NOVA SCOTIA TRUST COMPANY, E. MANSON INVESTMENTS LTD., FENFAM HOLDINGS INC., 593651 ONTARIO LTD. 1031436 ONTARIO INC., ALRAE INVESTMENTS INC., BARRY SPIEGEL, SHARON NIGHTINGALE, DAVID SUGAR, PHYLLIS SUGAR, NATIONAL TIRE LTD., 1119778 ONTARIO LIMITED, 1415976 ONTARIO LIMITED, ALRAE INVESTMENTS INC., BAMBURGH HOLDINGS LTD., BEVERLEY GORDON, DIANE GRAFSTEIN, RICHARD GRUNEIR, B. & M. HANDELMAN INVESTMENTS LTD., RIDGEWAY OCCUPATIONAL CONSULTANTS INC., YERUSHA INVESTMENTS INC., MIHAL TYLMAN, A. ELIEZER KIRSHBLUM, 593651 ONTARIO LIMITED, THE BANK OF NOVA SCOTIA TRUST COMPANY IN TRUST FOR BAILEY LEVENSON, THE BANK OF NOVA SCOTIA TRUST COMPANY IN TRUST FOR ROSEMONDE KELLY, ANNE HANDELMAN, YERUSHA INVESTMENTS INC., CELMAR INVESTMENTS CORP., BEVERLEY GORDON, PHILGOR INVESTMENTS LTD., BRILLIANT INVESTCORP INC., MAXOREN INVESTMENTS, 227046 ONTARIO LIMITED, DAST PROPERTIES LIMITED, TOVA MARKOVZKI, JOSEPH SUKONIC and B. & M. HANDELMAN INVESTMENTS LIMITED

Applicants

- and -

ANNIE YERETSIAN, TERRY WILSON, 2457674 ONTARIO INC., 2399029 ONTARIO INC. and MOSS DEVELOPMENT INC.

Respondents

APPLICATION UNDER SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990 C. c.43, AS AMENDED AND SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED

JOINT FACTUM OF THE HJLJ PARTIES AND THE STANBARR PARTIES

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PART I - NATURE OF THE MOTION

1. The moving parties, Canada Investment Corporation (“CIC”), Canada Capital Corporation Inc. (“CCC”), 2399029 Ontario Inc., 2457674 Ontario Inc. and Terry Wilson (collectively, the “Moving Parties”) bring this motion seeking to strike various statements and exhibits from the record.

2. The HJLJ Parties and the Stanbarr Parties (collectively “**These Parties**”) have each lost millions of dollars as a result of fraud. Their losses were occasioned by deceit and deception. These Parties allege that the fraud was caused by Arash Missaghi (“**Missaghi**”) and those individuals and corporations associated with him, including the Moving Parties.

3. The Moving Parties seek to sanitize the record by striking evidence filed by These Parties that is (a) relevant; (b) reliable; and (c) material to the adjudication of the claims process.

4. Ultimately, it the facts themselves that the Moving Parties find prejudicial, not the impugned evidence in the affidavits. The motion should be dismissed.

PART II - FACTS

5. On June 26, 2018, each of the HJLJ Parties and the Stanbarr Parties filed motion records seeking ‘mareva-like’ relief against the funds realized by the Receiver and otherwise payable to the Moving Parties.

*Motion Record of the HJLJ Parties, including June 26, 2018 Affidavit of Segal
Adler
Motion Record of the Stanbarr Parties, including June 26, 2018 Affidavit of
Harvey Margel*

6. The relief sought in those motions (namely, the freezing of the funds) has been superseded by Justice Dunphy, who has directed that a claims process be undertaken in respect of the funds.

Dunphy J. Endorsement

7. The June 26 Affidavits and Notices of Motion were prepared for a different purpose than they are now being used. Instead of a freezing order, These Parties are now relying on these materials for the purpose of establishing their entitlement to the frozen funds.

8. These Parties otherwise accept the recitation of the procedural history of this matter contained in the Moving Parties' factum.

PART III - ISSUES

9. Should the Court strike some or all of the allegations contained in the HJLJ Parties and Stanbarr Parties' materials?

PART IV - LAW AND ARGUMENT

Test for Motion to Strike Affidavit Materials

10. Rule 25.11 provides:

25.11 The court may strike out or expunge all or part of a pleading or other document with or without leave to amend, on the ground that the pleading or other document,

- (a) may prejudice or delay the fair trial of the action;
- (b) is scandalous, frivolous or vexatious; or
- (c) is an abuse of process of the court

Rule 25.11

11. The case law sets out three important principles for assessing whether material should be struck:

- (a) Absent special circumstances, issues regarding admissibility of affidavits should be dealt with by the judge hearing the matter on the merits;
- (b) The context of each case must be considered. What should be struck from one case may be entirely appropriate in a different case. The context drives the analysis; and
- (c) Nothing that is relevant can be scandalous or vexatious.

The Context Drives the Analysis

12. In *Neighbourhoods of Windfields Limited Partnership v. Death* the court emphasized that each case must be examined on its merits, and that the context in which the allegations arise must be considered in assessing whether the material should be struck:

I am inclined to the view that one cannot create many principles of general application in this area and that each case must be considered in its own context.

In the context of this Application, I start with the observation that we are not dealing with an attempt to strike a pleading but rather an attempt to remove from the record evidence which the moving parties claim should not be before the court on the hearing of the merits.

I accept the general view expressed above that evidence should not be struck on an interlocutory motion unless there is some special reason to do so. The underlying rationales for this view which I glean from the cases are applicable here:

- (a) To grant relief on such a motion will encourage more such motions and simply create extra cost and delay;
- (b) There is no need to make such rulings because the judge who will hear the merits will be in an equally good or better position to determine admissibility;
- (c) It is an inherent part of our judicial process that judges frequently learn of, but disregard, inadmissible evidence and are presumed not to take it into account;

(d) In addition, the judge hearing the merits can sanction any inappropriate introduction of evidence by disregarding it and awarding costs.

2007 CanLII 31756 (ONSC) at paras. 31-33

13. The Moving Parties seek to have the court exclude all contextual facts that describe the consequences of the fraud allegedly perpetrated by Missaghi. They seek to justify this exclusion by examining issues narrowly and devoid of context. Set out below is a summary of certain exclusions sought by the Moving Parties, and the response by These Parties.

Allegation	Moving Parties Argument	These Parties Response
Missaghi and others have been charged criminally	All references to criminal charges are improper and cannot be included in affidavits	Missaghi has been charged with fraud in respect of High Point, and as a result of the HJLJ Parties criminal complaints. The existence of the criminal charges are a necessary element of the narrative detailing the fraud, how it was uncovered, and how the HJLJ Parties have pursued their remedies.
Golnaz Vakili has had her law license revoked and has pleaded guilty and has been sentenced for her involvement in the Missaghi-directed fraud against the HJLJ Parties	All references to Vakili's sentencing and law society discipline proceedings are irrelevant and prejudicial.	Vakili has sworn an affidavit in support of the HJLJ Parties claim. Her acceptance of responsibility and her assertions to the sentencing court are directly relevant to her credibility and to the context of the fraud.
Bahram (Bob) Aziz Beiki has admitted his involvement in the fraud respecting High Point	This claim is hearsay and should be excluded	Segal Adler swears in her affidavit that Beiki has admitted his involvement in the fraud respecting High Point. She attaches the statutory declaration as support for her assertion in this regard. It is relevant and necessary.

14. If the Moving Parties approach is accepted, the Court will be left with an incomplete narrative relating to the alleged fraud. The Moving Parties, by seeking to strike paragraphs 27-31 of the June 26 S. Adler Affidavit (the “**1st Adler Affidavit**”), are seeking to expunge the fact that two of the main participants of the fraud relating to High Point have confessed.

15. A confession by a co-conspirator is of central relevance to the existence of the alleged fraud. Golnaz Vakili’s confession and Bob Beiki’s admissions are probative and relevant. As such they cannot be scandalous. If these facts are prejudicial, it is only because the facts themselves are damning.

16. Regarding paragraphs 32-36 of the 1st Adler Affidavit, these allegations relate to similar fact evidence, where it is alleged that Missaghi or his associates continued to make monthly payments to HJLJ on a mortgage that had already been discharged. As such, the evidence is relevant and should not be struck. In *Mackenzie v. Wood Gundy Inc.*, Justice Montgomery wrote:

The defendant Stephens seeks to strike out parts of the plaintiffs' pleading that refer to matters dealt with before the Toronto Stock Exchange and findings that Stephens, on other occasions, had handled discretionary accounts improperly. It may be that at trial this alleged similar fact evidence may be thought by the trial Judge to be important and relevant as similar fact evidence.

(1989) 35 C.P.C. (2d) 272 at para. 4

17. Regarding the June 26 H. Margel affidavit (the “**1st Margel Affidavit**”), the Moving Parties seek to strike allegations relating to, among other things, the Law Society proceedings involving Rasik Mehta. Mr. Mehta was the former counsel to CIC, and was the individual responsible for handling the Scollard power of sale transaction that forms the basis of the Stanbarr Parties claim.

18. Mehta's conduct in assisting Missaghi to carry out his fraudulent activities is relevant to the manner and method by the fraud was perpetrated.

19. The Moving Parties also take issue with various headings in the affidavits. In *Kouleles v. Diamond*, Master Albert wrote:

As to the use of the word "Illegal" in a heading within the affidavit, since it is taken from the evidence that follow it is not appropriate for the court to interfere. The headings are inserted merely to assist the reader in segmenting the affidavit into subject areas. The headings themselves are not evidence.

2005 CanLII 3387 (ONSC) at para. 37

Scandalousness and Relevance

20. In *876502 Ontario Inc. v. I.F. Propco Holdings (Ontario 10) Ltd.*, Dambrot J. examined the law relating to the question of whether affidavit material is scandalous:

The concept of scandalousness is well defined. Scandal refers to indecent or offensive matters or allegations made for the purpose of abusing or prejudicing the opposite party, allegations which are unbecoming of the court to hear, or unnecessary allegations bearing cruelly on the moral character of an individual...Relevance only enters the picture if the impugned material is otherwise scandalous. If material is relevant, it cannot be scandalous. [citations omitted]

1997 CanLII 12196 (ONSC) at pg. 7

21. Accordingly, the issue before the court is two-fold: whether the impugned material is (a) scandalous; and (b) if so, whether it is nonetheless relevant. These Parties contend that all of the impugned material is both not scandalous and relevant.

22. In *Belekon v. The Kyrgyz Republic*, Justice Matheson explained the standard by which a court should assess relevance on a motion to strike affidavit materials:

...the first question that must be addressed on this motion is whether the ...affidavit is clearly irrelevant to this application. If it is relevant, or not clearly irrelevant...it will not be struck out at this stage.

2015 ONSC 5918 at para. 29

23. For the reasons expressed above, the material sought to be expunged is not “clearly irrelevant”. Accordingly, it should not be struck.

It is the Motion to Strike that Unduly Lengthens the Proceeding

24. The Moving Parties argue that the proceeding will be unduly lengthened if they are required to respond to the allegations concerning Missaghi’s fraud.

25. However, it the Moving Parties who have failed to raise these issues in a timely basis. In fact, by August 3, 2018 all parties agreed to a schedule for the hearing of the Claims Process motion on November 27 – 28. At that time, the Moving Parties had been in possession of the HJLJ Parties and Stanbarr Parties’ June 26 affidavits for 5 weeks. There was no mention whatsoever of a motion to strike that material, and the schedule did not include time for this motion.

26. Similarly, the Moving Parties have been in possession of the B&M Handelman Materials since February, without any suggestion that the material ought to be struck.

27. Now, due to the late arising objection, the Moving Parties have imperiled the hearing of the Claims Process motion on November 27 – 28.

Hearsay and Rule 4.06

28. The Moving Parties have objected to the inclusion of hearsay evidence in the 1st Margel Affidavit and the 1st Adler Affidavit. They advocate for the application of Rule 4.06(2) of the *Rules of Civil Procedure* and seek to have the Court reject affidavit evidence filed on information and belief.

29. The claims process ordered by Justice Dunphy is not a trial. It is an abbreviated process intended to provide an efficient and timely resolution to the many claims to the frozen funds. As such, it is more analogous to a motion because *viva voce* evidence is not anticipated. Therefore Rule 39.01(4).

30. In the alternative, if hearsay evidence is not permitted, These Parties should be granted leave to file additional material.

PART V - ORDER SOUGHT

31. The HJLJ Parties and the Stanbarr Parties respectfully requests an Order dismissing the motion, and awarding them costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Date: October 16, 2018



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SCHEDULE "A" – CASES

1. *Neighbourhoods of Windfields Limited Partnership v. Death* 2007 CanLII 31756 (ONSC)
2. *Mackenzie v. Wood Gundy Inc.* (1989) 35 C.P.C. (2d) 272 (ONSC)
3. *Kouleles v. Diamond* 2005 CanLII 3387 (ONSC)
4. *876502 Ontario Inc. v. I.F. Propco Holdings (Ontario 10) Ltd.* 1997 CanLII 12196 (ONSC)
5. *Belekon v. The Kyrgyz Republic* 2015 ONSC 5918

SCHEDULE "B" – STATUTES, RULES AND OTHER MATERIALS

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Applicants

-and-

ANNIE YERETSAN AL.

Respondents

Court File No. CV-18-592103-00CL

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Proceedings commenced at TORONTO

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