Court File No.: 10-8619-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N :

SA CAPITAL GROWTH CORP.

Applicant

- and -

ROBERT MANDER and E.M.B. ASSET GROUP INC.

Respondents

APPLICATION UNDER Rule 14.05 (3)(g) of the *Rules of Civil Procedure* and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43, as amended

BRIEF OF AUTHORITIES
(Motion returnable May 9, 2012)

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LIST OF AUTHORITIES

Tab:	Cases:
1.	*Battery Plus Inc. (Re)*, (2002), 31 C.B.R. (4th) 196 (Ont. S.C.J.)
2.	*Lalonde v. Bona Building & Management Co.*, [2010] ONSC 5928 (Ont. S.C.J.)

Tab 1

Case Name:

Battery Plus Inc. (Re)

IN THE MATTER OF The Bankruptcy and Insolvency Act, R.S.C. 1985, c. B.3 Section 47.1, as amended
AND IN THE MATTER OF Battery Plus Inc. and 1271273 Ontario Inc.
APPLICATION UNDER The Bankruptcy and Insolvency Act, R.S.C. c. B.3 Section 47.1

[2002] O.J. No. 261

[2002] O.T.C. 55

31 C.B.R. (4th) 196

111 A.C.W.S. (3d) 213

Court File No. 01-CL-4319

Ontario Superior Court of Justice
Commercial List

Greer J.

Heard: January 14, 2001.
Judgment: January 23, 2002.

(23 paras.)

Bankruptcy -- Practice -- Evidence and proof -- Documents subject to production.

Motion by the debtors, Battery Plus Inc. and 1271273 Ontario, as well as its shareholder, Badr, requiring the interim receiver to provide access to the documents, books and records of the companies to November 2001. Within the framework of the debtors' bankruptcies, Badr, sought access to the documents, records and books of the companies up to the date that the interim receiver was appointed. Several of the documents included the companies emails, Badr's voice mails, computer records and data on the companies' hard drives and the time dockets for all of the receiver's employees. The companies also want the interim receiver held in breach of an order that required it to release certain documents. According to the interim receiver, Badr's request was oppressive and abusive and was made in furtherance of his continuous attempts to prevent the sale of the business.

HELD: Motion allowed in part. Badr was entitled to the documents that were relevant and that were related to a specific purpose. However, he was not entitled to go on a fishing expedition. The interim receiver was not in breach of an order that required it to release certain documents. Badr's request did not meet the criteria set by the judge.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 47.1.

Counsel:

Melvyn L. Solmon, for Battery Plus Inc. and 1271273 Ontario Inc.
Harvey Chaiton, for the Interim Receiver, Deloitte & Touche Inc.
Katherine McEachern, for the Laurentian Bank.
Bryan Skolnik, for Domenick Bellisario, a secured creditor.

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1 **GREER J.**:-- Battery Plus Inc. ("Battery") and 1271273 Ontario Inc. ("127") move, together with Antoine Chahine Badr ("Badr"), the owner of all the shares of 127, which in turn owns all the shares of Battery, requiring Deloitte & Touche Inc. as Interim Receiver ("Deloitte" or the "Interim Receiver") of Battery and 127 to provide access to any and all of the documents and books and records of the two companies to November 15, 2001, the date on which Deloitte was appointed the Interim Receiver. Deloitte's was, in August 2001, appointed a Monitor of the companies, and this later became an Interim Receivership at the behest of the major secured creditor, the Laurentian Bank. ("Laurentian"). Laurentian is owed approximately $6,660,000 by Battery. Battery and 127 also ask for copies of its own E-mails and voice mails for Badr that continued to come to the companies after the appointment. They also want all computer records and data on the companies' hard drives. They further asks the Court to order Deloitte to produce time dockets for all its employees who have worked on behalf of Deloitte as Monitor and Interim Receiver and all accounts rendered by it during the period to today's date. Badr asks the Court to personally let him be in attendance with his counsel or another representative of the law firm acting for him, when the examination of all such records takes place. He further wants to be able to take copies of any and all such documents.

2 Aside from the question of how documentary evidence is to be treated and what rights these companies and their owner have in this interim receivership, the companies want Deloitte held in breach of the Order of Mr. Justice Spence made January 3, 2002. Lastly, they ask the Court for leave to examine five persons as witnesses with respect to the documentation and information which the Interim Receiver has made available to Laurentian and to prospective purchasers of Battery and 127, but not to the two companies in the interim receivership.

Some background facts

3 It is clear from the tenor of the documents before me, on behalf of Battery and 127, and from the scope of the relief they are asking the Court to make, that they and Badr are unhappy about the interim receivership. They do not want Deloitte's to sell the companies, although I am told by Deloitte's that it shortly hopes to move before the Court for approval of the sale of the companies.

4 On December 19, 2001, the parties appeared before Mr. Justice Spence on a 9:30 a.m. appointment. He allowed them to schedule a Motion for directions for the first available date in January, 2002. In that Endorsement, Mr. Justice Spence said the following:

> Mr. Chaiton will seek to sort out the computer copies and information access matters with the Interim Receiver so that Mr. Solmon receives what he should have.

[The Court did not assign paragraph number 5.]

6 Later, on January 3, 2002, Mr. Justice Spence made a further Endorsement, which reads in part:

> 1. As to documents, BPI should advise the IR promptly which of the documents copied pre Dec. 19 are required for the affidavit for the motion to remove the power of sale, and IR is to release such of those documents as it approves for that purpose promptly. BPI may move for further release of documents.

7 There were documents, referenced in this part of the Endorsement, which were copied by Badr's assistant, Williams, in the presence of a representative of Deloitte's when the interim receivership took place. Such an examination of the documents, followed by the copying of them, I am told, took the better part of a day. For the reasons set out in the various affidavits filed, Badr never received these copies and claims only to have received his personal papers. He claims that he cannot produce proper affidavits in the various Motions he and his companies intend to bring on against the Interim Receiver, including a Motion to ask the Court to remove the power of sale given to the Interim Receiver in its appointment, without this documentation. At no time, however, has Badr ever specified in writing exactly what documents he requires for the period prior to November 15, 2001.

8 It is the position of Battery and 127 that they have not been provided with copies of any such documents, nor is there a list of which had been so copied. They say that Deloitte's has not co-operated in the least, in providing them with what they need. On the other hand, these companies insist that they are entitled to examine everything and basically have copies of whatever they want. It appears, on the surface of their Motion, that they are simply on a "fishing expedition" to see everything and create problems for the Interim Receiver.

The Interim Receiver's position

9 Despite the companies' position that they are not indebted to Laurentian and that they want an order discharging Laurentian's security, and despite all the Motions that they intend to bring before the Court, it must be remembered that the Interim Receiver is appointed by the Court on evidence provided by the secured creditor. Such appointments are not made lightly. Further, the Interim Receiver is an officer of the Court and, as such, must regularly report to the Court. Those Interim Reports set out all expenses of the Interim Receiver, steps taken by it to protect assets and to market these assets for sale. The first Report of Deloitte has been presented to the Court. That Report indicates that an "Inventory Theft" may have occurred the night before the interim receivership was ordered. There is also an issue as to whether cheques totalling approximately $290,000 were diverted and not deposited to credit of Battery when received. All of this is set out in detail in the Interim Report.

10 Michael Baigel ("Baigel") is a Senior Manager of Deloitte and has been involved almost on an exclusive basis since its appointment on November 15, 2001, pursuant to the Order of Mr. Justice O'Driscoll, in the management and supervision of Battery's interim receivership. Deloitte's takes the position that Badr's request for each and every of his own documents, E-mails and all pre- and post receivership documents is oppressive and abusive, and is made "in furtherance of Badr's continuous attempts to prevent the sale of the business which was expressly authorized by Order of this Honourable Court." It cannot be forgotten, that when Mr. Justice O'Driscoll made the appointment, he noted in his Reasons that the cheques of Battery were being turned back by the bank, that the rent was due and unpaid, that there was a payroll to meet and that Battery had no funds from which to pay it. The appointment was not one lightly entered into by the Court.

11 Very lengthy affidavits have already been filed for purposes of the aforementioned Motions being brought on. The Interim Receiver says that Badr is refusing to put any limitation on his request for

documentation. Badr has never provided the Interim Receiver with a limited list of documents he needs in order to complete his affidavits. Surely his accountant would have copies of the companies' financial statements for at least 6 years, if all other copies were on the business premises. Since Badr is the person who operated these companies, he must have some more specific idea of which documents it is necessary for him to have, in order to be able to complete the affidavits. The list attached to his counsel's letter of December 21, 2001, is so open-ended as to not have to be taken seriously. For example, counsel asks for the hard drives from the computers of 10 employees plus a copy of the main server for Battery's computer system plus nine other broad requests for information.

12 Baigel says, in his affidavit, that Deloitte has been receiving complaints from prospective purchasers that they have been receiving letters from counsel to Badr. Further, representatives of these prospective purchasers have received subpoenas to appear as witnesses on discovery, although there are no court orders authorizing this. Such tactics, in my view, are meant to discourage these prospective purchasers from bringing forward bona fide offers to the Interim Receiver. Further, Battery and 127 have steadfastly refused to inform the Interim Receiver as to how they obtained the information regarding who were prospective purchasers. That places the source of their knowledge under suspicion.

13 Baigel says in paragraph 35 of his affidavit, that the Interim Receiver changed the password to Badr's voicemail to restrict remote access to information, but that it has not intercepted or listened to Badr's voicemail or E-mail. Baigel says, contrary to Badr's position that a promise was made to him by the Interim Receiver to give him these electronic communications, the Interim Receiver made no such promise. Further, there is a dispute between the parties as to whether or not there was an agreement that the documents copied by Joanne Williams were to all be given to Badr or not. Finally, Deloitte says that there really is no need to give so many documents to Badr to help him prepare his affidavits, when any such Motions to be brought are premature, in the first place. The Interim Receiver did, however, agree in the letter of November 19, 2001 from Baigel to Badr that the Interim Receiver retained the hard drive of his computer because it contained proprietary information of Battery. The letter states that Badr told the Interim Receiver that this hard drive also contained personal information. The Interim Receiver undertook to provide him with a file listing of the contents, and to make copies "of the personal files" for him thereafter, presumably when the listing has been examined by the Interim Receiver. It appears that this did not take place, given the impossible demands for documentation, which Badr made thereafter.

14 On December 21, 2001, counsel for the Interim Receiver wrote to one of Badr's counsel to point out that Badr had no inherent right to everything he was asking for, given that the Interim Receiver, by Order of the Court, was given:

> ... the exclusive power of management, possession and control over the assets and operations of Battery Plus. Accordingly, your client's title provides him with no right to possession or access to any of the books, records or documents of Battery Plus.
>
> Having said that, if you legitimately require access to certain documentation in order to respond to the allegations made in the various court materials, I indicated to Mr. Justice Spence and counsel that copies of the documentation you reasonably require for that purpose would be provided. At no time, however, did I indicate that all of the documentation copied by Chahine's assistant would be released; it must be necessary for the purpose of responding to the allegations made in the court materials.

15 The problem facing the Court is that Badr has made no attempt to be "reasonable" in his requests and demands. That tactic has placed the Interim Receiver in a very difficult position, having been provided with no reasonable list of documents needed to help with the affidavits Badr plans to file in support of his various Motions to be brought on.

Legal Analysis

16 Frank Bennett in Bennett on Receiverships, 2nd ed., Carswell Publishing, 1998, notes at p. 167, that a court-appointed receiver, in its managerial capacity takes charge of the management of the debtor's assets. The directors of the company in receivership, do, however, have a continuous obligation to the shareholders and to the unsecured creditors to act honestly and in the best interests of the debtor to attain the best possible price for its assets. In the receivership before me, there is really only one shareholder. I am unsure how many unsecured creditors there are. Laurentian, however, is the key debtor. How can Badr be said, as director, to be acting in the best interests of the companies and the debtors by sending out letters to prospective purchasers to discourage them, and by subpoenaing their representatives as witnesses? This tactic is questionable. On the face of it, this appears to be both abusive and oppressive, given the circumstances of the interim receivership in question. See also, p. 180 for duties of the court appointed receiver.

> Bennett does say, at p. 181, supra, that:
>
> As a fiduciary, the receiver owes a duty to make full disclosure of information to all interested persons. The receiver is obliged to respond to requests for information consistent with the position of the person making the request. If the cost of responding is excessive in the circumstances, the receiver can fix a fee for that cost, or otherwise apply to the court for directions.

17 Who then, are these "interested persons", at law? Certainly, any prospective purchaser of the assets of the company in receivership, falls within that category. The information to be provided is financial information relating to the operations of the company, valuations such as prospective purchasers of assets and the company itself, tax information that may be relevant, information respecting leases, franchises and other matters affecting business operations. On the other hand, it is not reasonable to think that the receiver owes a duty to the owner of the shares or business in receivership, who was operating the business until the day before the interim receiver stepped in, to copy every single piece of paper that is now in the interim receiver's possession. That is an expensive folly not worth considering.

18 In Royal Bank of Canada v. Vista Homes Ltd. [1984] B.C.J. No. 2713, Vancouver Registry No. C832220, (BCSC), lien claimants in the receivership, wanted further input into the proposed sale or liquidation of the assets. The Court, there, noted that it would help these claimants better understand what was taking place, if they were to be given copies of all offers for the condominium project, if they received copies of the monthly reports of the receiver-manager, and if the receiver-manager had the services of independent counsel. In the case at bar, the only step not complied with, is that Badr be provided with copies of any offers received. The Court further points out at p. 2, para. 9 that the receiver-manager is obliged to respond to requests for information "... which are consistent with the position of the party making the request and the amount involved in the particular asset in question."

19 The Interim Receiver is acting in a fiduciary capacity to all parties in the proceedings. See: Ostrander v. Niagara Helicopters Ltd. et al. (1973), 1 O.R. (2d) 281. Therefore, the Interim Receiver must respond to reasonable requests for information from Badr, as well as from prospective purchasers. On the other hand, the position of the party making the request, must be taken into account. No one knows more about how he operated the companies than Badr, himself. If he cannot prepare a reasonable list of specific documents, as opposed to broad sweeping categories, in order to assist him to prepare his affidavits, he is not acting in a reasonable fashion. Mr. Justice Ground speaks to the relevancy of such documents in Nash v. C.I.B.C. Trust Corp. [1996] O.J. No. 1833, D.R.S. 96-13495. He notes at p. 2, para. 6, that investors are to receive the same information as the other parties in the litigation. The

Motion before Ground J., however, was a Motion to remove the solicitors of record for the Receiver, and was not a Motion on what documentation the Receiver must provide to the parties and to the owner/director.

20 In Hat Dev. Ltd., Re (1988), 71 C.B.R. (N.S.) 264 (Alta. Q.B.), the Court points out that the directors of the company in receivership, did not have the residual power to interfere with the ability of the receiver to manage the company. Therefore, Badr had no right to cause his counsel to write directly to any of the prospective purchasers of Battery that the Interim Receiver was dealing with. Further, in SLP Resources Inc. v. Sorrel Resources Ltd. (1987), 65 C.B.R. (N.S.) 288 (Alta. Q.B.), the Court pointed out that the fiduciary relationship created in such situation between the receiver-manager and with the people involved in the receivership:

> ... does not in my view automatically entitle creditors or people in the position of SLP Resources and Societe Generale access to all of the documents which come into the hands of the receiver-manager and, in particular, legal opinions relating to the receiver's position and the validity, or otherwise, of various securities.

21 To allow all people involved in this Interim Receivership to automatically be entitled to access to all of the documents which came into the Interim Receiver's hands could cause the interim receivership to waste untold hours for no purpose. I am satisfied that, while there is a right of an interested party to certain relevant documents, these documents must relate to a specific purpose. That right does not entitle Badr to go on a fishing expedition.

Conclusion

22 The following Orders shall issue:

1. The Interim Receiver shall produce a list to Badr of the documents on the hard drive of his personal computer, and provide him with a copy of all his personal documents found therein.
2. Badr shall provide the Interim Receiver with a list of specific documents from the ones that were copied by Joanne Williams, or elsewhere, which are required by him to assist in him completing his affidavits. Badr shall provide a clear description of the document and state why it is relevant, and for which Motion the affidavit is being prepared in support of.
3. The Interim Receiver shall check the messages left on Badr's voicemail after November 14, 2001 and any E-mail messages that may still be on Badr's computer to determine if any are personal to him, and not business-related messages. A copy of such personal voicemail and personal E-mail messages shall be given to Badr, if any. If there is an issue as to which may be personal, and which may be business-related, I may be spoken to.
4. The Interim Receiver shall provide Badr with copies of all Offers received by it for the purchase of the business.
5. I refuse to order any of the so-called witnesses to appear on the subpoenas served on each of them by Badr. In my view, it is an abuse of the process, in the receivership, to subject non-parties, and persons with no knowledge about the receivership, other than what the terms of an arm's length offer is being made by the company he or she works for, to have to attend on discovery.
6. All other requests for Badr for any further information from the hard drives of company employees/executives, from the Interim Receiver about its own records, time spent and documentation involving prospective purchasers, is hereby dismissed.

The companies are entitled to receive copies of all Interim Reports prepared by the Receiver.

7. The Interim Receiver is not in breach of the Order of Spence J. made January 3, 2002. Spence J. made it clear that documents to be released must relate to the affidavit in support of the Motion to remove the power of sale from the Interim Receivership's Order. The letter of Bradr's counsel dated December 21, 2001, with its all-encompassing broad list of requests, did not meet the criteria set by Spence J.
8. The balance of relief requested by Badr is hereby dismissed.

23 Given the nature of the Orders made by me respecting documentation, in my view the ordering of Costs is not appropriate.

GREER J.

cp/d/qlrme/qlkjg

Tab 2

2010 CarswellOnt 8156, 2010 ONSC 5928

2010 CarswellOnt 8156, 2010 ONSC 5928

Lalonde v. Bona Building & Management Co.

Carole Lalonde (Plaintiff / Moving Party) and Bona Building and Management Company Limited, Thyssenkrupp Elevators and John Doe Corporation (Defendants / Responding Parties) and The Attorney General of Canada (a non-party on notice of this motion)

Ontario Master

Master Pierre E. Roger

Heard: October 14, 2010
Judgment: October 26, 2010
Docket: 06-CV-36132

Counsel: Marc Binavince for Plaintiff

Craig A. O'Brien for Defendants

No one for Defendant, TKE

David Aaron for AG

Subject: Civil Practice and Procedure

Civil practice and procedure --- Discovery — Discovery of documents — Scope of documentary discovery — Documents in possession of non-party — Miscellaneous.

Civil practice and procedure --- Discovery — Examination for discovery — Who may be examined — Non-party — Miscellaneous.

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 1.04 — considered

R. 30.10 — referred to

R. 30.10(1) — referred to

R. **30. 10(5)** — referred to

R. 31.10(2)(b) — considered

R. 34.14(1) — considered

***Master Pierre E. Roger*:**

1 Leave is hereby granted to the Plaintiff to issue an Amended-Amended Statement of Claim in the form attached as Exhibit B to the Affidavit of Richard Nishimura sworn September 21, 2010, which is attached to the Supplementary Motion Record of the Plaintiff dated September 21- order to go as such. This was not opposed at this motion, terms were not sought and I was not made aware of any prejudice that could not be dealt with under the rules such that this most recent amendment to the S/C is allowed.

2 TKE did not appear at the motion, relying on an exchange of emails with the Plaintiff and making its submission by way of that email chain which, at their request, was provided to me by the Plaintiff. I would have preferred to have been presented with an order on consent or with some more formal document clearly outlining their position. In any event, further to this agreement between the Plaintiff and TKE, the Plaintiff adjourned the requests made at paragraph 4 of the Amended-Amended Notice of Motion dealing with undertakings and instead indicated that the Plaintiff would proceed as per the agreement with TKE that it answers outstanding undertakings with this relief to be adjourned and brought back if the parties can't resolve outstanding undertakings issues. I would have ordered that any outstanding undertakings of TKE to be answered as quickly as possible prior to December 1, 2010.

3 Prior to December 1, 2010, TKE is to produce to the Plaintiff copies of the licenses of Mr. O'Rourke and Mr. Smith that are in its possession or control and if any of these licenses are not available, TKE is then to advise the Plaintiff. Further, TKE is to advise the Plaintiff of the identity of who serviced the elevator at issue for a period starting one year prior to the accident to three months after and provide to the Plaintiff a copy of the licenses of the mechanics who serviced the elevator at issue during that period with TKE listing the licenses of these mechanics in its Affidavit of Documents. If any of these licenses are not available to TKE, TKE is to advise the Plaintiff which licenses are not available and why. TKE agreed to answer this request and indicated that it would do so within the time ordered by the court. This is relevant information that I would in any event have ordered answered as outlined above.

4 I was informed that TKE agreed to provide this information and, therefore, order to go that prior to December 1, 2010, TKE produce all documents sought at paragraphs 5 and 9 of the Amended-Amended Notice of Motion, to the extent that such documents are in its possession, control or power, as per the agreement between these parties.

5 The Plaintiff requests an order to compel Robert Voicsano, a representative of Bona, to re-attend examinations for discovery. The Plaintiff examined a Mr. Fernandes for Bona on October 11, 2007 and adjourned very quickly on the basis indicated in the transcript that Mr. Fernandes had no knowledge of the activities at Bona to ensure that the obligations of TKE were met under the contract between the parties (question 79). I reviewed the transcript and note that Mr. Fernandes attempted to answer questions as best he could. Bona eventually agreed to produce another representative, Mr. Voicsano produced on May 14, 2010. This gentleman was produced at the specific request of the Plaintiff despite warnings by Bona's counsel that he would have limited information. Again, following a very brief examination, this examination was adjourned by the Plaintiff after a disagreement over a question with Plaintiff counsel indicating that Mr. Voicsano was not a suitable witness as he did not know the significance of the content of a letter written by a deceased employee of Bona. Both these examinations for discovery were adjourned too quickly by the Plaintiff. The Plaintiff should have attempted to complete her examination by asking undertakings and adjourned only when faced with conduct amounting to conduct described at Rule 34.14 (1). During this motion, coun-

sel for the Plaintiff indicated that he could complete the examination of Bona very quickly and likely within about one hour. Considering the circumstances of this case, proportionality principles as well as the general principles outlined at Rule 1.04, a reasonable and fair disposition of this issue is to allow the Plaintiff a maximum of two hours to complete her examination for discovery of the Defendant Bona despite the fact that the examination of Bona was adjourned too quickly on two previous occasions. As a result and as sought at paragraph one of the Notice of Motion, the Plaintiff may examine a representative of Bona, Mr. Voicsano, which the Plaintiff by this motion seeks to examine despite earlier comments that he was not a satisfactory witness. Therefore, order to go that Mr. Robert Voicsano, a representative of the Defendant Bona re-attends examinations for discovery for a maximum of two hours to answer questions put to him by the Plaintiff with the costs of this examination to be in the cause. The Plaintiff is not, in the circumstances, presently entitled to the costs thrown away preparing for and attending the aborted examination for discovery of Mr. Voicsano and that relief, sought at paragraph 10 of the Amended-Amended Notice of Motion is dismissed. The Plaintiff shall complete this examination by asking relevant questions and undertakings where appropriate and these undertakings shall be answered within 30 days after the examination. The Plaintiff has already asked Mr. Voicsano questions about his understanding of the contents of a letter dated March 12, 2004 (question 53) and this question has been answered. The Plaintiff shall not ask this question again and on this topic can ask other questions such as whether this letter was answered by Thyssen, what remedial steps were taken if any, questions about how this was followed up by Mr. Neilson and Bona and by TKE and can ask for production of any relevant documents to these answers and follow-up.

6 The Plaintiff seeks an order to compel a representative of a non-party, Public Works Canada to appear at an examination to answer questions relating to the installation date of the elevator at issue. This request is premature and therefore dismissed. This information is likely available from Bona, the owner of the building or/and from the TSSA. PWC was never the owner but a tenant. The Plaintiff is to request this information from Bona when the examination for discovery of Bona is to be completed by seeking documents relevant to the installation, repair and replacement or refurbishing of this elevator, which questions should expeditiously answer this question about the date. Furthermore, the Plaintiff should attempt to obtain this information from the TSSA which keeps information about elevators. Only after attempting the above could the Plaintiff make this request. In this case, however, there is no evidence that PWC or the AG of Canada as a tenant would have this information and the factors outlined at Rule 31.10(1)(b) are also on the evidence now available not made out by the Plaintiff.

7 The Plaintiff also seeks an order compelling a non-party, Public Works or the AG Canada, to produce a copy of the lease between the Defendant Bona (the owner) and PWC. This agreement has now recently been produced by Bona. As a result, this request is dismissed. Whether or not the Crown's copy contains handwritten notes is not sufficient to justify production from a non-party (under Rule 30.10) of a document disclosed by Bona in the circumstances of this case. It could not be unfair to the Plaintiff to require that they proceed to trial without the Crown's copy of lease when Bona does not dispute its obligations.

8 Finally, the Plaintiff seeks an order compelling a non-party, Public Works or the AG Canada, to disclose PWC-Bona correspondence that deals with elevators between 2000 and 2006. The accident at issue occurred on March 4, 2003 and the expert retained by the Plaintiff has sought as relevant certain information for the period one year before to three months after. Such correspondence is relevant to a material issue in the action and it would be unfair to require the Plaintiff to proceed to trial without having discovery of such documents. These documents were possibly produced by Bona however, without production from the non-party, we cannot ascertain whether Bona kept in its records a full set of the correspondence exchanged with its tenant about elevators at this building. For whatever reasons, two parties corresponding about an issue may keep different documents such that a complete copy of the correspondence may, in some instances, only be obtained from the disclosure of the files of both parties corresponding on this issue. It is certainly proportional to the issues in this matter that such correspondence be produced from the non-party albeit for a more limited period. As a result, I am convinced that in these circumstances, the requirements of Rule 30.10 (1) are met. Consequently, order to go compelling a non-party, the Attorney General of Canada to produce a copy of any Public Works Canada (or AG Canada) and Bona Building and Management Company Limited correspondence dealing with elevators at 355 North River Road Tower B for the period from March 1, 2002

to June 30, 2003 with the Plaintiff responsible to the non-party for the reasonable cost incurred or to be incurred by the non-party to produce such documents. No evidence is before the court as to the cost of this or as to why the court should order otherwise under Rule **30**. **10**(**5**). In any event, these costs will eventually be costs that the Plaintiff can seek to recover if she is successful.

9 Additional documents produced by the parties are to be listed appropriately in their affidavit of documents.

10 This leaves the issue of costs of this motion. In the circumstances of this case, there should be no costs to any party for this motion. The Plaintiff's success was divided with some requests being premature and others resulting from the Plaintiff's action such as failing to obtain information from other sources and early adjournment of the examinations for discovery of Bona. The position of Bona on this motion was not unreasonable in the circumstances such that although they were not successful in resisting further discovery, they should not have to pay costs for this motion in the circumstances of this case. The AG had divided success and their positions were not unreasonable. TKE took reasonable positions on the motion and although their conduct might have required that a motion be brought for some parts of this motion, the evidence is not at all clear for which parts and whether or not some of these requests had already been answered. Overall, no costs to any party for this motion is the reasonable result on costs.

END OF DOCUMENT

SA CAPITAL GROWTH CORP. Applicant	and	ROBERT MANDER et al Respondents	Court File No: 10-8619-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

BRIEF OF AUTHORITIES

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