

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

B E T W E E N :

**ONTARIO SECURITIES COMMISSION**

Applicant

- and -

**GO-TO DEVELOPMENTS HOLDINGS INC., OSCAR FURTADO, FURTADO HOLDINGS INC., GO-TO DEVELOPMENTS ACQUISITIONS INC., GO-TO GLENDALE AVENUE INC., GO-TO GLENDALE AVENUE LP, GO-TO MAJOR MACKENZIE SOUTH BLOCK INC., GO-TO MAJOR MACKENZIE SOUTH BLOCK LP, GO-TO MAJOR MACKENZIE SOUTH BLOCK II INC., GO-TO MAJOR MACKENZIE SOUTH BLOCK II LP, GO-TO NIAGARA FALLS CHIPPAWA INC., GO-TO NIAGARA FALLS CHIPPAWA LP, GO-TO NIAGARA FALLS EAGLE VALLEY INC., GO-TO NIAGARA FALLS EAGLE VALLEY LP, GO-TO SPADINA ADELAIDE SQUARE INC., GO-TO SPADINA ADELAIDE SQUARE LP, GO-TO STONEY CREEK ELFRIDA INC., GO-TO STONEY CREEK ELFRIDA LP, GO-TO ST. CATHARINES BEARD INC., GO-TO ST. CATHARINES BEARD LP, GO-TO VAUGHAN ISLINGTON AVENUE INC., GO-TO VAUGHAN ISLINGTON AVENUE LP, AURORA ROAD LIMITED PARTNERSHIP and 2506039 ONTARIO LIMITED**

Respondents

**RESPONDING FACTUM**  
(Returnable October 6, 2023)

October 2, 2023

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**TO: Service List in Court File No. CV-21-00673521-00CL**

**ONTARIO  
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Respondents

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## **PART I - NATURE OF THIS MOTION AND OVERVIEW**

1. This factum is filed by Oscar Furtado in response to the motion filed by KSV Restructuring Inc. (“**KSV**”) in its capacity as the Court-appointed receiver (in such capacity, the “**Receiver**”) of the assets and undertaking of twenty-three entities related to the business of Go-To Developments Holdings Inc. (the “**Receivership Respondents**”).
2. All terms capitalized but not defined in this factum are as defined in the Receiver’s Factum dated September 27, 2023 (the “**Receiver’s Factum**”).
3. The Receiver’s Motion seeks an order, among other things, compelling Oscar Furtado, the principal of the Receivership Respondents, to release to the Receiver various Identified Emails (as defined in the Receiver’s Factum).
4. Privilege is a personal right and a protection which must be zealously protected. Once privilege attaches to a document it need not be produced unless a governing statute says that it is subject to production whether or not privilege applies.
5. The Receiver has failed to demonstrate any basis for a court-sanctioned exception to privilege. There is no basis, either by the terms of the Receivership Order or otherwise at law, that permits a court-appointed receiver to unilaterally waive privilege on behalf of receivership respondents and obtain access to potentially privileged records.

## PART II - THE FACTS

6. KSV was appointed as Receiver in respect of the business, assets and undertaking of the Receivership Respondents pursuant to the Order of Justice Pattillo dated December 10, 2021 (the “**Receivership Order**”).
7. The Receivership Order provides as follows (*emphasis added*) at paragraph 7:

**THIS COURT ORDERS** that all Persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of any of the Receivership Respondents, or the Property, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "Records") in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto, **provided however that nothing in this paragraph 7 or in paragraph 8 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure.**

8. In light of the terms of the Receivership Order, the Receiver, through counsel, sought to negotiate a protocol (the “**Privilege Protocol**”)<sup>1</sup> to govern the process for the segregation of various documents and information on the Receivership Respondents’ servers to assist the Receiver with carrying out its powers under the Receivership Order and the Claims Procedure Order.<sup>2</sup>

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<sup>1</sup> Privilege Protocol, Appendix “Q” to the Seventh Report of the Receiver dated June 6, 2023 (the “**Seventh Report**”).

<sup>2</sup> Paragraph 3 of the Privilege Protocol, Appendix “Q” to the Seventh Report.

9. The Identified Emails to which the Receiver seeks access were segregated and marked, in accordance with the Privilege Protocol, as privileged.<sup>3</sup> Oscar Furtado advised the Receiver in various correspondence that the documents on the server were far too voluminous to review in detail to identify if each document and record on the server was in fact subject to privilege.<sup>4</sup> Oscar Furtado, through counsel, advised that due to the sheer volume of records (in the hundreds of thousands) such an exercise was both time and cost prohibitive, and made completion of the review under the Privilege Protocol close to impossible in the circumstances.
10. The Receiver was advised that certain of the documents and information marked as privileged may potentially be subject to common-interest privilege. Such documents, including the Identified Emails, were therefore marked as privileged in the review database.
11. The Identified Emails have not been withheld from the Receiver frivolously or absent merit. The Identified Emails have simply not been reviewed individually to establish whether or not common-interest privilege attaches to them.
12. The Receiver now seeks the Production Order which would entitle it to access to potentially privileged records of the Receivership Respondents. Oscar Furtado has not waived privilege in respect of the Identified Documents.

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<sup>3</sup> Seventh Report at paras 6-8.

<sup>4</sup> Letter from Miller Thomson LLP to Aird & Berlis LLP dated May 31, 2023, Exhibit "B" to Affidavit of Maureen McLaren sworn September 11, 2023.

### **PART III - ISSUE**

13. The only issue to be determined on this motion is whether a court-appointed receiver is entitled to access to documents of entities under receivership that are subject to privilege.
14. While the Receiver invites the Court to make a determination as to whether the Identified Emails are in fact subject to privilege, it is respectfully submitted that such an exercise is not the role of the Court on this motion. Rather, as a gating issue, the question is whether the Receiver may unilaterally waive privilege and obtain access to documents and information that are potentially privileged.
15. If the Receiver is not presumptively entitled to potentially privileged documents, then it is submitted that the correct approach is for the Court to implement a process for identifying the privileged documents among the Identified Emails through the appointment of an independent third party to review the documents at issue.

### **PART IV - THE LAW & APPLICATION**

#### **A. Solicitor-Client Privilege**

16. The sanctity of solicitor-client privilege has been widely recognized by the courts. Solicitor-client privilege is fundamental to the justice system; the integrity of the administration of justice depends on the unique role of the solicitor who provides legal advice to clients within the legal system.<sup>5</sup>

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<sup>5</sup> [\*R v McClure\*, 2001 SCC 14](#) at para 2.

17. Solicitor-client privilege is no longer simply a rule of evidence. It has evolved into a substantive, virtually sacrosanct legal right,<sup>6</sup> and now stands as a “principle of fundamental justice” under section 7 of the Canadian Charter of Rights and Freedoms.<sup>7</sup>
18. The Supreme Court of Canada (the “SCC”) has held that solicitor-client privilege must be “jealously guarded”<sup>8</sup>, and upheld as “close to absolute as possible to ensure public confidence and retain relevance.”<sup>9</sup>
19. The SCC confirmed that communications protected by privilege should be disclosed only where “absolutely necessary”, applying “as restrictive a test as may be formulated short of an absolute prohibition in every case.”<sup>10</sup> Privilege “should only be set aside in the most unusual of circumstances, such as a genuine risk of wrongful conviction.”<sup>11</sup>
20. Cases consistently hold that the court must tread cautiously when considering any violation of solicitor-client privilege. For instance, statutory interpretation of legislative language that may, if broadly construed, allow incursions on solicitor-client privilege must be interpreted restrictively.<sup>12</sup>

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<sup>6</sup> [\*Kaymar Rehabilitation Inc v Champlain Community Care Access Centre\*](#), 2013 ONSC 1754 at para 45.

<sup>7</sup> [\*Canada \(National Revenue\) v Thompson\*](#), 2016 SCC 21 at para 17.

<sup>8</sup> [\*Pritchard v Ontario \(Human Rights Commission\)\*](#), 2004 SCC 31 at para 17.

<sup>9</sup> [\*R v McClure\*](#), 2001 SCC 14 at para 35.

<sup>10</sup> [\*Goodis v Ontario \(Ministry of Correctional Services\)\*](#), 2006 SCC 31 at paras 20-21.

<sup>11</sup> [\*Pritchard v Ontario \(Human Rights Commission\)\*](#), 2004 SCC 31 at para 17.

<sup>12</sup> [\*Blood Tribe Department of Health v Canada \(Privacy Commissioner\)\*](#), 2008 SCC 44 at para 11.



21. This form of privilege is not to be abrogated because of relevance or fairness or following a balance of interests; rather, solicitor-client privilege will only yield in “certain clearly defined circumstances.”<sup>13</sup>

**B. Common Interest Privilege**

22. Common interest privilege provides a basis under which an otherwise privileged document may be shared with third parties without constituting a waiver of privilege, if the parties share a common interest. “In all such cases [...] the courts should, for the purposes of discovery, treat all the persons interested as if they were partners in a single firm or departments in a single company.”<sup>14</sup> Common interest privilege is often present in litigation contexts, but may also apply to counterparties in commercial transactions.<sup>15</sup>
23. Common interest privilege does not require perfect alignment. Parties may share a common interest even if they do not have identical interests. Further, the possibility that parties might at some future point in time become adverse in interest is insufficient to deny the existence of a common interest privilege at present.<sup>16</sup>
24. Where legal opinions are shared by parties with mutual interests in a commercial transaction, there is sufficient interest in common to extend common interest privilege to

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<sup>13</sup> [\*Ohlhauser v Kasian\*](#), 2021 BCSC 892 at para 51.

<sup>14</sup> [\*General Accident Assurance Co v Chrusz\*](#), [1999] OJ No 3291 at para 44.

<sup>15</sup> *CC&L Dedicated Enterprise Fund (Trustee of) v Fisherman*, [2001] OJ No 637 at para 29, Tab 1 to Respondents' Factum.

<sup>16</sup> [\*Barclays Bank PLC v Devonshire Trust \(Trustee of\)\*](#), 2010 ONSC 5519 at paras 11-12.

the disclosure of opinions obtained by one of them to the others in the group, even in circumstances where no litigation is in existence or contemplated.<sup>17</sup>

**C. Receivership Order: Carve-Out for Privileged Records**

25. It is settled law that a receiver derives its powers and authority wholly from the order of the Court appointing them.<sup>18</sup> A court-appointed receiver is an officer of the court appointed to discharge certain duties “prescribed by the appointment order.”<sup>19</sup>
26. The standard model receivership order approved by the Commercial List Users’ Best Practices Subcommittee issued widely, as tailored, in receivership applications in Ontario.<sup>20</sup> Similarly, other provinces have implemented model orders for use in receivership proceedings, including British Columbia<sup>21</sup>, Alberta<sup>22</sup>, Manitoba<sup>23</sup>, among others. All of these model receivership orders include the same carve-out as the Ontario model order in respect of privileged records. This is not an accident: as indicated and belaboured in the jurisprudence referenced, privilege must be jealously guarded. The absence of any such right or power, and the clear carve-out in the various model orders across all jurisdictions in Canada, supports the strong presumption that privilege ought to

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<sup>17</sup> [\*Maximum Ventures Inc v de Graaf\*](#), 2007 BCSC 1215 at para 51.

<sup>18</sup> [\*Royal Trust Co v Montex Apparel Industries Ltd.\*](#), [1972] 3 OR 132, at para 12.

<sup>19</sup> [\*Morden v Morden Construction Inc.\*](#), 2010 ONSC 4244 at para 11.

<sup>20</sup> [Model Receivership Order](#) (Ontario).

<sup>21</sup> [Model Receivership Order](#) (British Columbia).

<sup>22</sup> [Model Receivership Order](#) (Alberta).

<sup>23</sup> [Model Receivership Order](#) (Manitoba).

be safeguarded, despite the requirement to provide unfettered access to the court-appointed receiver of the debtor's records.

27. To grant complete and unfettered access to a court-appointed receiver of privileged records would be to completely displace the purpose and function of solicitor-client privilege, which is to protect all (i) communications between a lawyer and their client, (ii) for the purpose of seeking or giving legal advice, and (iii) which were intended to be confidential, from being disclosed without permission.

**D. The Case Law: No Support for Receiver's Power to Waive Privilege**

28. In its factum, the Receiver relies on the decision in *Ontario (Securities Commission) v. Greymac Credit Corp.*<sup>24</sup> ("**Greymac**") in support of its proposition that "where a receiver is appointed with general powers to manage the affairs of a corporation, included in those powers *"is the power to waive any solicitor and client privilege of the corporation"*.<sup>25</sup>
29. It is respectfully submitted that the Receiver has misinterpreted the Court's decision in *Greymac*, which does not provide a blanket entitlement at common law for a court-appointed receiver to waive privilege. *Greymac* was decided in the context of solicitors being used as a conduit for the transfer of funds. The central issue in that case was whether transactions in a solicitor's trust account were protected from disclosure by solicitor and client privilege.

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<sup>24</sup>[\*Ontario \(Securities Commission\) v Greymac Credit Corp.\*](#) [1983] OJ No 2986, 146 DLR (3d) 73.

<sup>25</sup> Receiver's Factum at para 41.

30. *Greymac* acknowledges that a receiver-manager holds powers of the board of directors, and “[p]owers which the receiver-manager is not authorized to exercise remain vested in the directors.”<sup>26</sup> The directors of the Receivership Respondents remain vested with the power to waive solicitor-client privilege.
31. Subsequent decisions interpreting *Greymac* have held that the decision does not allow a receiver to simply deny the validity of a claim of solicitor-client privilege in respect of particular records. The Court in *Russell & DuMoulin, Re* held as follows (**emphasis added**):<sup>27</sup>

[20] In *Greymac*, the receiver-manager was appointed for the purpose of preserving the undertaking and assets of the company pending completion of an investigation by the Ontario Securities Commission (see p. 61 of the report). There is no such limitation here. The order of Hinds J. vests complete management in Peat Marwick, including the power to take over all of the assets of the enterprise and to dispose of, protect, manage and preserve property, all under the control of the court. Waiver of the Victoria Mortgage solicitor-client privilege “in relation to the professional services rendered by Russell & DuMoulin” is a power exercisable for the purposes for which Peat Marwick was appointed. **However, that finding is not to be taken as denying in advance the validity of a claim of solicitor-client, privilege in respect of any particular documents or questions. It is not, and cannot be, more than a general guideline in response to a general question. In the event that solicitor-client privilege is raised on some ground other than those that are covered by the general guideline, it will be necessary to apply to have the matter determined by the court on the particular document or portion thereof, or the particular question, for which privilege is claimed.**

32. The finding in *Greymac* therefore does not grant a “carte blanche” to deny Oscar Furtado’s claim of privilege in respect of the Identified Emails.

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<sup>26</sup> [\*Maple Leaf Foods Inc v Markland Seafoods Ltd.\*](#), 2007 NLCA 7 at para 38.

<sup>27</sup> [\*Russell & DuMoulin, Re\*](#), 1986 CanLII 858, [1996] BCJ No 2034 at para 20 (BCSC).

33. The Receiver has failed to provide any legal support for its request to the Court in respect of the Production Order.

**PART V - ORDER REQUESTED**

34. It is respectfully submitted that the Receiver's motion for the Production Order be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2<sup>nd</sup> day of October, 2023.



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MILLER THOMSON LLP

Lawyers for the Respondents

**SCHEDULE “A”  
LIST OF AUTHORITIES**

1. [R v McClure](#), 2001 SCC 14
2. [Kaymar Rehabilitation Inc v Champlain Community Care Access Centre](#), 2013 ONSC 1754
3. [Canada \(National Revenue\) v Thompson](#), 2016 SCC 21
4. [Pritchard v Ontario \(Human Rights Commission\)](#), 2004 SCC 31
5. [Goodis v Ontario \(Ministry of Correctional Services\)](#), 2006 SCC 31
6. [Blood Tribe Department of Health v Canada \(Privacy Commissioner\)](#), 2008 SCC 44
7. [Ohlhauser v Kasian](#), 2021 BCSC 892
8. [General Accident Assurance Co v Chrusz](#), [1999] OJ No 3291
9. *CC&L Dedicated Enterprise Fund (Trustee of) v Fisherman*, [2001] OJ No 637
10. [Barclays Bank PLC v Devonshire Trust \(Trustee of\)](#), 2010 ONSC 5519
11. [Maximum Ventures Inc v de Graaf](#), 2007 BCSC 1215
12. [Royal Trust Co v Montex Apparel Industries Ltd](#), [1972] 3 OR 132
13. [Morden v Morden Construction Inc.](#), 2010 ONSC 4244
14. [Ontario \(Securities Commission\) v Greymac Credit Corp.](#) [1983] OJ No 2986, 146 DLR (3d) 73.
15. [Maple Leaf Foods Inc v Markland Seafoods Ltd](#), 2007 NLCA 7
16. [Russell & DuMoulin, Re](#), 1986 CanLII 858, [1996] BCJ No 2034 (BCSC).

**SCHEDULE “B”  
RELEVANT STATUTES**

N/A

# TAB 1



**Most Negative Treatment:** Check subsequent history and related treatments.

2001 CarswellOnt 514

Ontario Superior Court of Justice

CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman

2001 CarswellOnt 514, [2001] O.J. No. 637, [2001] O.T.C. 134, 103 A.C.W.S. (3d) 477, 6 C.P.C. (5th) 281

**Royal Trust Corporation of Canada, in its Capacity as Trustee of the CC&L Dedicated Enterprise Fund, Royal Trust Corporation of Canada, in Its Capacity as Trustee of the CC&L Balanced Canadian Equity Fund, Connor Clark & Lunn Investment Management Ltd., and Her Majesty the Queen in Right of the Province of Ontario, Plaintiffs and Igor Fisherman, Jacob G. Bogatin, Kenneth Davies, Michael Schmidt, Harry W. Antes, Frank Greenwald, R. Owen Mitchell, David R. Peterson, Daniel E. Gatti, Parente, Randolph, Orlando, Carey & Associates, Deloitte & Touche LLP, First Marathon Securities Limited, Griffiths McBurney & Partners, Scotia McLeod Inc., Canaccord Capital Corporation and HSBC James Capel Canada Inc., Formerly Carrying on Business as Gordon Capital Corporation, Defendants**

Roger Mondor and Amit M. Karia, Plaintiffs and Igor Fisherman, Jacob G. Bogatin, Kenneth Davies, Michael Schmidt, Harry W. Antes, Frank Greenwald, R. Owen Mitchell, David R. Peterson, Daniel E. Gatti, James J. Held, Guy R. Scala, Parente Randolph Orlando Carey & Associates and Deloitte & Touche LLP, Defendants

Cumming J.

Heard: February 5-7, 2001

Judgment: February 23, 2001

Docket: 00-CV-186800, 99-CL-3424, 98-GD-45452

Counsel: *Earl A. Cherniak, Q.C.*, for Plaintiffs, Royal Trust Corp. et al.

*Peter F.C. Howard*, for Receiver Ernst & Young YBM Inc. in respect of YBM Magnex International Inc.

*Bonnie Tough*, for Defendant, First Marathon Securities Limited, now National Bank Financial Inc.

*Donald Sorochan, Q.C., Suzanne Williams*, for Defendants, Canaccord Capital Corporation.

*M.W. Kerr*, for Defendant, Kenneth Davies.

*John Keefe*, for Defendant, Griffiths McBurney & Partners.

*David DiPaolo*, for Defendant, R. Owen Mitchell.

*Linda M. Plumpton*, for Defendant, HSBC Securities (Canada) Inc.

*Sherri A. Pinsler*, for Defendant, Scotia Capital Inc.

*David Bell and Steven Sofer*, for Defendant, Parente Randolph Orlando Carey & Associates.

*G. MacKenzie*, for Defendant, Michael Schmidt.

*J.L. McDougall, Q.C., Randy Bennett*, for Deloitte & Touche LLP.

*Craig J. Allen*, for Plaintiffs, Roger Mondor, Amit M. Karia.

Subject: Corporate and Commercial

**Related Abridgment Classifications**

Civil practice and procedure

[XII](#) Discovery

[XII.2](#) Discovery of documents

[XII.2.h](#) Privileged document

[XII.2.h.xiii](#) Miscellaneous

Civil practice and procedure

## XXII Judgments and orders

## XXII.15 Final or interlocutory

## XXII.15.a Interlocutory judgment or order

## XXII.15.a.i What constituting

## XXII.15.a.i.A For purpose of appeal

## Headnote

Practice --- Discovery — Discovery of documents — Privileged document — Miscellaneous privileges

Two class proceedings were brought on behalf of all persons in Canada who purchased or dealt in common shares in Company at particular times and suffered loss as result — Plaintiffs brought motion for order permitting Company's receiver to provide plaintiffs' counsel with copy of Report prepared pursuant to order of Alberta Court of Queen's Bench which was obtained with view to receiver obtaining legal analysis of possible claims by Company against its outside advisors — Plaintiffs sought declaration that they and other innocent shareholders shared common interest with receiver, that Report should be provided to counsel subject to any privilege in hands of Receiver, and that provision of Report would not constitute waiver of privilege because of common interest — Motion granted — Under [Rule 30.03 of Rules of Civil Procedure](#) time limit for serving affidavits of documents does not begin to run until close of pleadings — Defendants had not yet filed statements of defence and did not wish to do so until their motions under [Rule 21](#) to dismiss claim as not disclosing reasonable cause of action and under [Rule 25](#) for particulars had been determined — Plaintiffs were potentially prejudiced in responding to defendants' pending motions by not having all relevant information possible to develop their pleading — Motion was not premature — Report identified potential causes of action which Company might have against third parties — Some or all of those third parties were defendants in class actions — Plaintiffs in class actions had similar claims to those under consideration by receiver — Common interest privilege existed between receiver and plaintiffs with respect to provision of Report to plaintiffs' counsel — Common interest privilege was not restricted to co-parties — Principle of common interest privilege applies to legal opinions provided in context of corporate transaction — Possibility that parties may at some future point become adverse in interest is insufficient to deny existence of common interest privilege — [Rules of Civil Procedure](#), R.R.O. 1990, Reg. 194, R. 21, 25, 30.03.

## Table of Authorities

Cases considered by *Cumming J.*:

- Almecon Industries Ltd. v. Anchortek Ltd.* (1998), [1999] 1 F.C. 507, 85 C.P.R. (3d) 30, 164 F.T.R. 90 (Fed. T.D.) — applied
- Anderson Exploration Ltd. v. Pan-Alberta Gas Ltd.*, 61 Alta. L.R. (3d) 38, [1998] 10 W.W.R. 633, 229 A.R. 191 (Alta. Q.B.) — applied
- Archean Energy Ltd. v. Minister of National Revenue* (1997), 202 A.R. 198, [1998] 1 C.T.C. 398, 98 D.T.C. 6456 (Alta. Q.B.) — applied
- Buttes Gas & Oil v. Hammer (No. 3)*, [1980] 3 All E.R. 475, [1980] 3 W.L.R. 668, [1981] Q.B. 223 (Eng. C.A.) — followed
- Descôteaux c. Mierzewski*, [1982] 1 S.C.R. 860, 28 C.R. (3d) 289, 1 C.R.R. 318, 44 N.R. 462, 141 D.L.R. (3d) 590, 70 C.C.C. (2d) 385 (S.C.C.) — applied
- General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321, 124 O.A.C. 356, 180 D.L.R. (4th) 241, 38 C.P.C. (4th) 203 (Ont. C.A.) — applied
- Paraschos v. YBM Magnex International Inc.* (2000), 130 F. Supp.2d 642 (U.S. Dist. Ct. E.D. Penn.) — referred to
- Lessard (Guardian ad litem of) v. Canosa* (1995), 12 B.C.L.R. (3d) 78 (B.C. S.C. [In Chambers]) — applied
- Solosky v. Canada* (1979), (sub nom. *Solosky v. R.*) [1980] 1 S.C.R. 821, 105 D.L.R. (3d) 745, 16 C.R. (3d) 294, 30 N.R. 380, 50 C.C.C. (2d) 495 (S.C.C.) — applied
- Supercom of California v. Sovereign General Insurance Co.* (1998), 37 O.R. (3d) 597, 18 C.P.C. (4th) 104, 1 C.C.L.I. (3d) 305 (Ont. Gen. Div.) — applied
- United States v. American Telephone & Telegraph Co.* (1980), 642 F.2d 1285, 206 U.S. App. D.C. 317 (U.S. D.C. Ct. App.) — applied
- Western Canadian Place Ltd. v. Con-Force Products Ltd.* (1997), 50 Alta. L.R. (3d) 131, 31 B.L.R. (2d) 97, 202 A.R. 19, 9 C.P.C. (4th) 165 (Alta. Q.B.) — applied
- YBM Magnex International Inc., Re* (1999), 75 Alta. L.R. (3d) 99, 15 C.B.R. (4th) 140, (sub nom. *YBM Magnex International Inc. (Receivership), Re*) 252 A.R. 165 (Alta. Q.B.) — applied

*YBM Magnex International Inc., Re*, 2000 ABCA 284, 2000 CarswellAlta 1133, 9 B.L.R. (3d) 24, [2001] 2 W.W.R. 628, (sub nom. *YBM Magnex International Inc. (Receivership), Re*) 271 A.R. 123, (sub nom. *YBM Magnex International Inc. (Receivership), Re*) 234 W.A.C. 123 (Alta. C.A.) — applied

**Statutes considered:**

*Class Proceedings Act, 1992*, S.O. 1992, c. 6

Generally — considered

s. 12 — considered

s. 35 — referred to

*Courts of Justice Act*, R.S.O. 1990, c. C.43

s. 97 — referred to

*Securities Act*, R.S.O. 1990, c. S.5

s. 134(4) — referred to

**Rules considered:**

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

R. 21 — referred to

R. 25 — referred to

R. 30.03 — referred to

MOTION for declaration that production of document by receiver to plaintiffs' solicitors would not result in loss of privilege in respect of document.

**Cumming J.:**

**Background**

1 This motion arises in respect of two class proceedings under the *Class Proceedings Act, 1992, S.O. 1992, c. 6* ("*CPA*") being:

(1) *Royal Trust Corporation of Canada in its capacity as Trustee of the CC&L Dedicated Enterprise Fund et al. v. Igor Fisherman, Jacob G. Bogatin et al.* (Court File No.00-CV-186800) ("*Royal Trust Action*"). This is a class proceeding under the *CPA* on behalf of all persons in Canada who purchased or acquired common shares in YBM Magnex International, Inc. ("YBM") distributed by a prospectus dated November 17, 1997 and suffered a loss as a result thereof.

(2) *Roger Mandor and Amit M. Karia v. Jacob Bogatin et al.* (Court File No. 98-GD-45452) ("*Mandor Action*"). This is a proceeding under the *CPA* brought on behalf of the class of persons in Canada who dealt in shares of YBM Magnex between March 10, 1996 and May 14, 1998 and suffered a net loss as a result thereof.

2 Two of the four proposed representative plaintiffs in the *Royal Trust Action* are Connor Clark & Lunn Investment Management Ltd. ("Connor Clark") and The British Columbia Investment Management Corporation ("bcIMC").

3 A class action commenced by shareholders in the United States District Court for the Eastern District of Pennsylvania, *Paraschos v. YBM Magnex International Inc.* [130 F. Supp.2d 642 (U.S. Dist. Ct. E.D. Penn., 2000)], (5 December 2000) (E.D. Penn.) [unreported], has now been stayed upon motion by the defendants in that action on the basis of the principle of comity. A motion for reconsideration was denied. *John Paraschos et al. v. YBM Magnex International* (8 February 2001) (E.D. Penn.) [unreported]. The stay order is under appeal.

4 The plaintiffs seek an order through the motion at hand which will permit the Receiver of YBM, Ernst & Young YBM Inc. ("Receiver"), to provide a copy of a report (the "3(o) Report", having been prepared pursuant to paragraph 3(o) of the Order

of Madam Justice Paperny of the Court of Queen's Bench of Alberta dated December 8, 1998) to plaintiffs' counsel in these two Canadian class actions.

5 The Receiver has advised that it does not intend to waive the privilege which it asserts in respect of the 3(o) Report and that it will not provide a copy of the 3(o) Report to counsel for the plaintiffs in the class actions if the effect is the waiver of any existing privilege.

6 On June 7, 1999 YBM pleaded guilty in the United States to a multi-object conspiracy to commit fraud, including in respect of the purchase or sale of YBM securities and the filing of reports containing material misrepresentations and omissions during the period of approximately 1993 to 1998. Accordingly, YBM does not contest the claims of the "innocent shareholders" in respect of their rights in any distribution of corporate assets other than perhaps in respect of quantum. To the extent the plaintiffs are successful in recovering from the defendants through the class actions, the shareholders' claims against YBM in any distribution will be reduced accordingly.

7 YBM, an Alberta corporation, purported to be involved in the manufacture and global distribution of magnets and various products. Its shares were traded publicly. The Receiver was appointed December 8, 1998 by an Order (the "Receivership Order") of the Court of Queen's Bench of Alberta to protect YBM's existing assets. The Receiver identified as one potential asset derivative litigation by the shareholders against those alleged to have been involved in perpetrating the fraud.

8 The Receiver obtained an Order in Alberta permitting it to disclose the 3(o) Report, but it will not do so if the result would be a waiver of privilege.

9 The plaintiffs seek a declaration that they and other "innocent shareholders" (being the shareholders unconnected with YBM's fraud) who acquired shares in YBM share a "common interest" with the Receiver, that the 3(o) Report should be provided to counsel subject to any privilege in the hands of the Receiver and that the provision of the 3(o) Report does not constitute waiver of any such privilege because of the common interest. Counsel for the plaintiffs agree to be bound by a confidentiality undertaking through an "Acknowledgement of Privilege and Undertaking of Confidentiality" agreement.

10 Paperny J. determined in her Reasons for Judgment dated October 25, 1999 that the Receiver has a strong interest in common with certain "innocent shareholders". *YBM Magnex International Inc., Re* (1999), 15 C.B.R. (4th) 140 (Alta. Q.B.) By her order of October 25, 1999, individual representatives of Connor Clark and bcIMC, in their capacity as members of a committee of shareholders instructing the Receiver's counsel, have received copies of the 3(o) Report (subject to signing an Acknowledgment of Privilege and Undertaking in a prescribed form) for the purpose of instructing the Receiver in pursuing certain claims on behalf of YBM.

11 On the motion now before this court, these "innocent shareholders" seek to have a copy of the 3(o) Report provided to plaintiffs' counsel in the two class actions, on the basis that the common interest extends to their interest as plaintiffs in the class proceedings. They submit they are aligned with the Receiver on common issues against common adversaries who are the defendants in this action. Therefore, they submit, if the 3(o) Report is privileged in the hands of the Receiver, it will also be privileged in the hands of the "innocent shareholders" and their counsel, by virtue of their common interest.

12 The 3(o) Report was prepared with a view to the Receiver obtaining a legal analysis, which included an identification of potential causes of action of YBM and their merits, the compilation and organization of relevant YBM records and documents, the interviewing of third parties and the compilation of relevant third party documents. The 3(o) Report would presumably contain a legal analysis of possible claims by YBM against its outside advisors, including its underwriters and auditors.

13 The Receiver has disclosed that there is some overlap of the facts supporting YBM's causes of action and those advanced by the plaintiffs in the class actions. Therefore, the 3(o) Report would assist plaintiffs' counsel in understanding the very complex background underlying the claims advanced in the class actions.

14 By Order dated April 17, 2000 Paperny J. found that the class action plaintiffs are not adverse in interest to YBM since YBM is not a defendant in the class actions and, in any event, is protected by a stay pursuant to the Receivership Order. As

such, any claims against YBM are either latent or non-existent. As well, Paperny J. found that the class action plaintiffs share a common interest with the Receiver since they anticipate litigation against common adversaries and share a united front against common foes on the same issues. Finally, Paperny J. found that the defendants are adverse in interest to the Receiver since they have notified the Receiver that they intend to pursue rights of indemnity against YBM, and the Receiver is resisting these claims and anticipates litigation on this proof of claim issue.

15 Madam Justice Paperny's Order of April 17, 2000 was appealed to the Alberta Court of Appeal by the defendants Griffiths McBurney & Partners, First Marathon Securities Limited (now National Bank Financial Inc.), Parente, Randolph, Orlando, Carey & Associates and Canaccord Capital Corporation. The Alberta Court of Appeal allowed the appeal October 23, 2000 on the basis of jurisdiction, finding that the Alberta courts "should decline to provide advice and direction [to the Receiver]...when that advice and direction would substantively impact proceedings in another jurisdiction." *YBM Magnex International Inc., Re*, [2000] A.J. No 1231 (Alta. C.A.).

16 However, the Appellate Court upheld Paperny J.'s Order authorizing the release of the 3(o) Report by the Receiver if to do so would be in the best interests of YBM's estate. The ruling merely determined that Paperny J. had no jurisdiction to make a declaratory order that the class action plaintiffs are in a position of common interest privilege with the Receiver.

17 The Receiver is involved in an existing court action. In *YBM Magnex International, Inc. by its Receiver and Manager Ernst & Young YBM Inc. v. Jacob Bogatin, Igor Fisherman, Michael Schmidt, Kenneth Davies, Frank Greenwald, Guy Scala, Daniel Gatti, James Held, Robert Ventresca and Harry Antes* (Court File No. 99- CL-3424) ("YBM Action") the Receiver claims an accounting pursuant to s.134(4) of the *Securities Act* R.S.O. 1990, c. S.5. This action is founded upon accusations of unlawful insider trading by the defendants.

18 The Receiver has evidenced an intention to bring a further action against all or many of the defendants in the plaintiffs' class actions. Those defendants are former officers and directors of YBM (some of whom may be shareholders), auditors of YBM and underwriters of the YBM prospectus financing.

19 The Receiver and the plaintiffs in the class actions wish to explore arrangements as to how their actions might proceed in tandem, including the sharing of information and research for the purpose of advancing their common goals.

20 As well, the plaintiffs in the *Royal Trust Action* face rule 21 motions asserting that the plaintiffs' claim does not disclose a reasonable cause of action and rule 25 motions relating to demands for particulars. These motions are scheduled to be heard April 2, 2001. The plaintiffs anticipate that the information contained in the 3(o) Report will enable them to further amend their statement of claim and thus facilitate their response to the defendants' motions.

21 Under rule 30.03 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, the time limit for serving affidavits of documents does not begin to run until the close of the pleadings. The plaintiffs' class actions were commenced two years ago. However, none of the defendants have filed statements of defence as yet and do not wish to until the rule 21 and rule 25 motions are dealt with. The plaintiffs are potentially prejudiced in responding to the defendants' pending motions by not having all the relevant information possible to develop their pleading.

## Issues

22 The plaintiffs' motion for a declaration raises the issue:

Do the "innocent shareholder" plaintiffs in the class action share a "common interest" with the Receiver in respect of the contents of the 3(o) Report and the potential claims that arise out of the 3(o) Report such that: (a) provision of the 3(o) Report to the moving parties and their counsel is properly made subject to the privilege, if any, in the hands of YBM and/or the Receiver; and (b) such production does not constitute a waiver of any such privilege?

## The Law



23 The motion at hand does not determine the question of whether or not the 3(o) Report is privileged in the hands of YBM and its Receiver. All parties have left that possible issue for another day. The 3(o) Report will be listed as a privileged document in the affidavit of documents of the putative representative plaintiffs Connor Clark and bcIMC in the *Royal Trust Action*, as they have the document at present albeit in a restricted capacity. It is also probable that the Receiver will be named as a third party in the present class actions, as some defendants claim indemnity from YBM. As well, the 3(o) Report will be listed by the Receiver in its own affidavit of documents in the YBM Action brought by the Receiver and in any future action initiated by the Receiver as plaintiff. Therefore, the question of the Receiver's claimed privilege undoubtedly will be addressed in due course.

24 The motion at hand is advanced on the premise that there is privilege in respect of the 3(o) Report in the hands of YBM and its Receiver. The question then is: is there so-called "common interest privilege" between the Receiver and the moving parties with respect to the provision of the 3(o) Report to the moving parties and their counsel?

25 Privilege applies where parties with a common interest in anticipated litigation exchange facts, advice or other information regarding the litigation. Lord Denning M.R. set out the principles underlying the doctrine of common interest privilege in *Buttes Gas & Oil v. Hammer (No. 3)*, [1980] 3 All E.R. 475 (Eng. C.A.) ("*Buttes Gas*") at 483-484:

...There is a privilege which may be called a 'common interest' privilege. That is a privilege in aid of anticipated litigation in which several persons have a common interest. It often happens in litigation that a plaintiff or defendant has other persons standing alongside him who have the selfsame interest as he and who have consulted lawyers on the selfsame points as he but who have not been made parties to the action. Maybe for economy or for simplicity or what you will. All exchange counsels' opinions. All collect information for the purpose of litigation. All make copies. All await the outcome with the same anxious anticipation because it affects each as much as it does the others. Instances come readily to mind. Owners of adjoining houses complain of a nuisance which affects them both equally. Both take legal advice. Both exchange relevant documents. But only one is a plaintiff. An author writes a book and gets it published. It is said to contain a libel or to be an infringement of copyright. Both author and publisher take legal advice. Both exchange documents. But only one is made a defendant.

In all such cases I think the courts should, for the purposes of discovery, treat all the persons interested as if they were partners in a single firm or departments in a single company. Each can avail himself of the privilege in aid of litigation. Each can collect information for the use of his or the other's legal adviser. Each can hold originals and each make copies. And so forth. All are the subject of the privilege in aid of anticipated litigation, even though it should transpire that, when the litigation is afterwards commenced, only one of them is made a party to it.

26 The holding in *Buttes Gas*, *supra*, was cited with approval by Paperny J. in *YBM Magnex International, Inc. (Re)*, *supra*, at 143-144.

27 In *Supercom of California v. Sovereign General Insurance Co.* (1998), 37 O.R. (3d) 597 (Ont. Gen. Div.) at 612 Wilson J. stated that "Common interest privilege implies the dynamic of parties sharing a united front against a common foe". Parties may have a *common* interest even if they do not have *identical* interests. See generally J. Sopinka, S.N. Lederman, A.W. Bryant, *The Law of Evidence in Canada*, 2d ed. (Toronto: Butterworths, 1999) at 761.

28 Common interest is not restricted to co-parties. The Ontario Court of Appeal in *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (Ont. C.A.) ("*General Accident Assurance Co.* ") at 337-338 adopted the principles set forth in *United States v. American Telephone & Telegraph Co.*, 642 F.2d 1285 (U.S. D.C. Ct. App., 1980), (1980 S.C.C.A.) at 1299-1300:

...The existence of common interests between transferor and transferee is relevant to deciding whether the disclosure is consistent with the nature of the work product privilege. But "*common interests*" should not be construed as narrowly limited to co-parties. So long as the transferor and transferee anticipate litigation against a common adversary on the same issue or issues, they have strong common interests in sharing the fruit of the trial preparation efforts. Moreover, with common interests on a particular issue against a common adversary, the transferee is not at all likely to disclose the work

product material to the adversary. When the transfer to a party with such common interests is conducted under a guarantee of confidentiality, the case against waiver is even stronger. [Emphasis added.]

29 The principle of "common interest privilege" applies to legal opinions provided in the context of a corporate transaction. *Archean Energy Ltd. v. Minister of National Revenue* (1997), 202 A.R. 198 (Alta. Q.B.) at 203. Common interest privilege may attach to documents shared by parties with a common interest despite the fact they become adverse in respect of another related action. *Western Canadian Place Ltd. v. Con-Force Products Ltd.* (1997), 202 A.R. 19 (Alta. Q.B.) at 25 ("*Western Canadian*").

30 The possibility that parties might at some future point in time become adverse in interest is insufficient to deny the existence of a common interest privilege at present. *Almecon Industries Ltd. v. Anchortek Ltd.* (1998), [1999] 1 F.C. 507 (Fed. T.D.) at 512-513; *Lessard (Guardian ad litem of) v. Canosa* (1995), 12 B.C.L.R. (3d) 78 (B.C. S.C. [In Chambers]) at 81.

31 There must be a demonstrated clear intention to waive an existing privilege. *Anderson Exploration Ltd. v. Pan-Alberta Gas Ltd.* (1998), 229 A.R. 191 (Alta. Q.B.) at 199. As stated above in the quoted excerpt from *General Accident Assurance Co.*, *supra*, when persons having a common interest share information on the basis of confidentiality there is no intention to waive the privilege. Counsel for the class action plaintiffs has agreed to sign an "Undertaking" to preserve confidentiality. As well, the Undertaking confirms that the privilege of YBM and its Receiver cannot be unilaterally waived by counsel for the class action plaintiffs without the consent of YBM and its Receiver.

32 The class actions at hand involve many parties and very complex issues. Complex litigation of this nature requires that the parties and their counsel be able to share information and show their position to some but not all of the participants. This facilitates the refining and reduction of issues, achieves economy in research and expenses, is supportive of possible settlements or compromises and enables the litigation to progress with fairness and timeliness. Parties should be free of any asserted archaic strict rules of waiver. *Western Canadian*, *supra*, at 27. Solicitor-and -client privilege is a "fundamental civil and legal right". *Descôteaux c. Mierzwinski*, [1982] 1 S.C.R. 860 (S.C.C.), at 870, quoting from *Solosky v. Canada* (1979), [1980] 1 S.C.R. 821 (S.C.C.), at 839. If the 3(o) Report attracts such privilege, as claimed by the Receiver, there is a very strong presumption in favour of protecting confidentiality.

33 The defendants say that the motion at hand is premature, and that access to the 3(o) Report should be addressed at the time the affidavits of documents are served and production issues arise. The defendants claim that it is premature to declare that anyone has a "common interest" with the Receiver in respect of the 3(o) Report. I disagree.

34 In my view, the defendants are not prejudiced by the granting of this motion. The motions at hand do not relate to production from the defendants. The 3(o) Report was produced for the Receiver. No right of the defendants is affected. As stated above, the 3(o) Report will be listed; at the least, in the affidavit of documents of the plaintiffs in the *Royal Trust Action*. The defendants can, if so advised, then challenge the Receiver's claim for privilege and, if successful, gain production of the 3(o) Report.

35 The plaintiffs in the class actions have been seeking to gain access to the 3(o) Report for quite some time. They were opposed by the defendants before the Alberta courts and they are opposed here. In my view, the plaintiffs in the class actions suffer prejudice in not having timely access to all relevant information to prepare and advance their claims. There is a present interest to determine in a timely way the existence of the common interest privilege to allow a sharing of the 3(o) Report without a waiver of the Receiver's claimed privilege.

## Conclusion

36 The 3(o) Report identifies potential causes of action which YBM may have against third parties arising out of the operations of YBM. Some or perhaps all of those third parties are defendants in the class actions. The record establishes that the plaintiffs in the class actions have similar claims to those under consideration by the Receiver.

37 In my view, and I so find, the plaintiffs in the class actions and the Receiver share a common interest in the issues relating to the operations of YBM and in determining whether the former officers, directors, accountants or underwriters misconducted themselves, causing damages, thereby giving rise to causes of action. The Receiver, in its role of preserving the litigation assets

of the YBM estate, is adverse in interest to the defendants. The Receiver is resisting the claims for indemnification from YBM by the auditors and underwriters.

38 The Receiver and the plaintiffs in the class actions share a common interest and accordingly, the Receiver ought to be able to share the 3(o) Report with the class action plaintiffs without waiving privilege. The 3(o) Report may provide the class action plaintiffs with facts and legal analysis to assist them in their pleadings and conduct of the class actions. At the same time, allowing the class action plaintiffs to make use of the 3(o) Report will enable the "innocent shareholders" to assist the Receiver in determining what derivative action to bring on behalf of YBM. The shared, mutual interests of the Receiver and the class action plaintiffs should facilitate judicial economy through shared expenses and research.

39 In my view, and I so find, the 3(o) Report is subject to "common interest privilege" in respect of any privilege in the hands of the Receiver and YBM. Dissemination of the Report to counsel for the class action plaintiffs, in the manner contemplated, does not constitute a waiver of any privilege in respect of the 3(o) Report in the hands of the Receiver and YBM.

### Disposition

40 Section 12 of the *CPA* enables the court to make any order it considers appropriate respecting the conduct of a class proceeding "to ensure its fair and expeditious determination". In my view, the plaintiffs' motion is properly brought at this time. Moreover, the relief requested is appropriate and necessary at this time to ensure a fair and expeditious determination of the class actions.

41 The *CPA* is an enabling statute governing procedures rather than substantive rights. The rules of court apply to class proceedings except as modified by the *CPA*'s procedural regime: s.35 of the *CPA*. However, s.12 enables a court to determine the *timing* of steps in a class proceeding in the interests of fairness and timeliness. It is also noted that this court has the authority to make binding declarations of right, whether or not consequential relief is claimed, as recognized by s. 97 of the *Courts of Justice Act*, R.S.O. 1990, c.C.43.

42 The issue raised in the motion at hand ultimately relates to the *timing* of an interlocutory motion. The 3(o) Report would inevitably be listed in an affidavit as to documents and an interlocutory motion would then be brought to raise the question of common interest and any challenge to the claimed privilege. The defendants claim that the normal sequence for the production of documents and any determination of privilege is being accelerated. However, no defendant has requested a determination that the 3(o) Report is not privileged in the hands of YBM and the Receiver. The question of the Receiver's claim of privilege remains an open one.

43 The Receiver has indicated that it is prepared to share the 3(o) Report with the counsel for the class action plaintiffs, as authorized by the Alberta court, but only in the event that a court has determined that there is a common interest privilege and that there is no waiver of the Receiver's claimed privilege. The class action plaintiffs were placed in the position of being unable to gain access to the 3(o) Report unless they brought the motion now before the court for the requisite determination of common interest privilege and that there would be no waiver of the Receiver's claimed privilege.

44 In my view, it is appropriate to determine the issues raised by the motion at hand at this time and to make the appropriate disposition.

45 For the reasons given, the plaintiffs' motion is granted. An Order is to be issued to accord with these reasons for decision, permitting counsel for the plaintiffs in the class actions to obtain the 3(o) Report on the basis that the plaintiffs are in a position of common interest with the Receiver. The provision of the 3(o) Report pursuant to this Order is without waiver of any privilege which may attach to it in the hands of YBM and the Receiver.

46 I may be spoken to as to costs.

*Motion granted.*



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**ONTARIO SECURITIES COMMISSION**  
Applicant

and

**GO-TO DEVELOPMENTS HOLDINGS  
INC., et al.**  
Respondents

Court File No.: CV-21-00673521-00CL

***ONTARIO***  
**SUPERIOR COURT OF JUSTICE -  
COMMERCIAL LIST**

Proceeding commenced at TORONTO

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