No. S-194717
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*, [S.B.C. 2002] c. 57 and *THE BUSINESS CORPORATIONS ACT*, R.S.A 2000, c. B-9

-AND-

IN THE MATTER OF THE LOUIS RACZ CO. LTD.

-AND-

Between

1012109 B.C. Ltd. and LISA MADDESS

Petitioners

and

ETHEL MARY RACZ a/k/a ETUS MARIA RACZ and MICHAEL SIWIK

Respondents

NOTICE OF APPLICATION

Name of applicant:	1012109 B.C. Ltd. and Lisa Maddess (the "**Applicants**")
To:	Ethel Mary Racz and Michael Siwik (the "**Respondents**")
And To:	MNP Ltd. ("**MNP**")
And to:	The Office of the Comptroller General for British Columbia, as represented by the British Columbia Unclaimed Property Society
And to:	The Minister for Revenue for Quebec, in its capacity as provisional administrator of unclaimed property
	(collectively, the "**Application Respondents**")

TAKE NOTICE that an application will be made by the Applicant to the presiding judge at the courthouse at 800 Smithe Street, Vancouver, British Columbia on **Wednesday, June 17, 2020,** at 9:45 a.m. for the orders set out in Part 1 below.

Part 1: ORDER(S) SOUGHT

1. An Order that MNP, in its capacity as liquidator of the Company (the "**Liquidator**"), pay any monies (the "**Disclaimed Payments**") that:

   (i) would otherwise be payable by the Louis Racz Co. Ltd. (the "**Company**") to the Respondents Ethel Racz and Michael Siwik pursuant to paragraphs 1-5 and 8(f) of this Court's prior Order of July 29, 2019, in this proceeding (either for the redemption of Class D shares or on account of dividends payable in respect of Class C shares);

   (ii) have been tendered to the Respondents (either to the date of the Oder or in such additional manner as the Court may direct); and

   (iii) have been disclaimed by the Respondents Ethel Racz and Michael Siwik,

   to the Petitioners in proportion to their own Class C shareholdings in the Company.

2. An Order that

   (i) any Disclaimed Payments that, but for their disclaimer, would otherwise have been paid to and received by the Respondents Ethel Racz and Michael Siwik as capital dividends on their Class C shares in the Company, be paid to the Petitioners as capital dividends on their Class C shares; and

   (ii) any Disclaimed Payments that, but for their disclaimer, would otherwise have been paid to and received by the Respondents Ethel Racz and Michael Siwik as non-capital dividends on their Class C shares in the Company, be paid to the Petitioners as non-capital dividends on their Class C shares;

   (iii) any Disclaimed Payments that, but for their disclaimer, would otherwise have been paid to and received by the Respondent Ethel Racz for the redemption of her Class D shares, be paid to the Petitioners as non-capital dividends on their Class C shares.

3. An Order that the Liquidator take such steps as may be appropriate, having regard to the delivery of the Disclaimed Payments to the Petitioners, to (i) notify the Canada Revenue Agency of this Order and (ii) cancel any T5 Statements of Investment Income issued to the

Respondents.

4. An Order that Burns Fitzpatrick LLP shall have to further obligation to deliver cheques or make payments to the Respondents.

5. An Order that the Applicants shall have their costs of this application, on a full indemnity basis, payable by the Company.

Part 2: FACTUAL BASIS

Background

1. The detailed factual background to this matter is set out in the Petition, to which the Applicants will refer at the hearing of this Application.

2. Briefly, the Respondents and the Petitioners (or, in the case of the corporate Petitioner, its principal) are all members of the Racz family, by marriage or descent.

3. The Company was originally established by the late Louis Racz in 1967.

4. In 1998, the share capital of the Company was reorganized as part of an "estate freeze" transaction. Prior to the freeze, the shareholders of the Company were Rozilia Racz (the late Louis Racz's surviving spouse), Ernest Racz (his son) and the Respondent Ethel Racz (his daughter).

5. After the freeze, the share capital of the Company consisted of Class B non-participating voting shares, Class C non-participating common shares and Class D preferred shares. All prior outstanding Class A shares were cancelled.

6. The shares issued in 1998 were held (in different classes and amounts), by Rozilia, Ernest and Ethel Racz, and by a newly created trust (the "**Racz Family Trust**"), of which Rita Racz (the spouse of Ernest Racz), Lisa Maddess (Rita and Ernest Racz's daughter) and Michael Siwik (Ethel Racz's son) were the beneficiaries.

7. The Racz family Trust was settled by Rozalia Racz. It was issued 70 Class C shares in the Company. This was, essentially, a gift to the beneficiaries.

8. By March 2019, most of the Class D preferred shares issued in 1998 had been redeemed by the Company. Only 415 of those shares remained. They were held by the Respondent Ethel Racz, who had refused to tender the shares for redemption.

9. As well, Rozilia and Ernest Racz had passed away and the Racz Family Trust had been wound up. The remaining shares of the Company were held as follows:

101 Co. (Rita Racz)	50 Class B Common 32.5 Class C Common
Ethel Racz	50 Class B Common 15 Class C Common 415 Class D Preferred
Michael Siwik	35 Class C Common
Lisa Maddess	17.5 Class C Common

10. In early 2019, the Company sold its last remaining asset, an apartment building in West Vancouver. After payment of mortgage debt and taxes, the Company was left with more than $11,000,000 in cash for distribution to its shareholders.

11. Because the Respondent Ethel Racz had, for a number of years, refused to participate in the affairs of the Company, and because she had, during the same time, refused to allow the Company to redeem her Class D shares and refused to accept dividends declared by the Company on her Class C shares, the Petitioners commenced these proceedings, seeking orders that most of the Company's cash assets be paid out to the shareholders and that, thereafter, (i) the Liquidator be appointed, (ii) any remaining cash assets of the Company be transferred to the Liquidator for (A) payment of expenses and (B) subsequent distribution to the shareholders, and (iii) the Company be liquidated and dissolved.

The July 29, 2019 Order

12. On July 29, 2019, the Court granted the relief sought by the Petitioners (the "**July 29 Order**"), in the following terms:

    1) The Louis Racz Co. Ltd. (the "**Company**"), may redeem the 415 Class D shares of the Company held as of the date of this Order by the Respondent Ethel Mary Racz, also known as Etus Maria Racz ("**Ethel Racz**"), by paying the said Ethel Racz the sum of $415,000 (the "**Redemption Amount**"), being the sum of $1,000 per Class D share held by Ethel Racz, without further notice to Ethel Racz;

2) Payment of the Redemption Amount may be made by cheque drawn on the account of Burns Fitzpatrick LLP, payable to the order of Ethel Racz and delivered to Ethel Racz at her residence at 715 Saraguay Street East, Pierrefonds QC.

3) Upon the Company exercising its right to redeem the Class D shares of Ethel Racz in accordance with paragraph 1 of this Order, the said Ethel Racz shall be deemed to have sold, assigned and transferred the said Class D Shares to the Company, effective on the date of exercise.

4) Rita Racz, being the sole director of the Company (the "**Director**"), is authorized to:

   a. Cause the Company to file its income tax return for the fiscal year ended June 30, 2019, and pay such income and capital gains taxes as may be due and payable by the Company to the Canada Revenue Agency on or before August 31, 2019;

   b. Declare a capital dividend of $57,000 per Class C common share of the Company (the "**Capital Dividend**") and cause the Company to pay the same;

   c. Declare a further non-capital, taxable dividend of $43,000 per Class C common share of the Company (the "**Taxable Dividend**") and cause the Company to pay the same; and

   d. Cause the Company to pay any costs awarded to the Petitioners pursuant to this Order.

5) Payment to the Respondents of their respective shares of the Capital Dividend and the Taxable Dividend may be made by cheque drawn on the account of Burns Fitzpatrick LLP, payable to the orders of Ethel Racz and Michael Siwik, respectively, and delivered to their residence at 715 Saraguay Street East, Pierrefonds QC. Payment to the Petitioners may be made in such manner as the Director shall determine.

6) As of the date the transactions contemplated by paragraphs 1-5 of this Order are completed (the "**Liquidation Date**"), the Company be liquidated pursuant to s. 324 of the *Business Corporations Act*, [SBC 2002], c. 57 (the "**Act**").

7) Effective as of the Liquidation Date, MNP Ltd. ("**MNP**") be appointed as liquidator of the Company pursuant to the Act (the "**Liquidator**"), with all of the powers of a liquidator as set out in the Act.

8) Without limiting the generality of paragraph 7, upon its appointment the Liquidator is empowered and directed to:

a. take possession of the assets of the Company;

b. pay the creditors of the Company;

c. engage outside accountants to prepare financial statements for the Company, as necessary;

d. file tax returns for the Company;

e. take possession of any tax refunds payable to the Company; and, thereafter,

f. distribute any remaining assets to the Class C shareholders of the Company, *pro rata* in accordance with their shareholdings; and, thereafter,

g. apply for an Order dissolving the Company.

[Emphasis added]

13. Clause 8(f) of the July 29 Order was included because the Company has no issued or outstanding Class A shares. The Petitioners were aware, at the time the July 29 Order was made, that there would likely be substantial residual assets in the Company after the payment of the capital and non-capital dividends authorized by clauses 4(b) and (c) of the Order.

14. In this regard, the Petitioners were aware that (i) the Liquidator would be retaining a holdback of more than $700,000, which far exceeded the anticipated debts and liquidation costs of the Company and (ii) the Company likely will be entitled to a tax refund of more than $1,650,000 when it files its income tax return for the fiscal year ended June 30, 2020. Accordingly, the Petitioners asked that clause 8(d) be included in the Order, to ensure that all of the assets of the Company are paid out to the Class C shareholders prior to dissolution.

15. The Respondents, Ethel Racz and Michael Siwik were provided with copies of the July 29 Order as soon as it was entered.

16. On August 26, 2019, Ethel Racz faxed to counsel for the Petitioners a letter dated August 23, 2019, in which she said:

> "Dear Mr. Turner,
>
> **RE: 1012109 B.C. LTD. V RACZ...**
>
> The unlawful sale of Cedar Terrace is the result of the failed Counterclaim (2013). Had the Counterclaim been successful, as the lawyers planned, there would have been a sale of Cedar Terrace and a 2 million dollar payment to the Gidney Estate.
>
> The next plan involved an invalid resolution (2014) declaring dividends, an unlawful 2 million dollar loan from Vancity, an invalid resolution redeeming Rita's shares, the unlawful creation of 1012109 B.C. LTD. and the unlawful sale of Cedar Terrace and a 2 million dollar payment to the Gidney Estate.
>
> Any cheque sent to me will be returned, as was the cheque ($22,500) relating to the invalid resolution (2014). This resolution affects my personal tax returns (Revenue Quebec and CRA) and it affects the Racz Family Trust tax returns (Revenue Quebec and CRA). The unlawful laon ($2 million) affected the Louis Racz Company's tax returns for years ended 2014, 2015, 2016, 2017 and most probably 2018. CRA and Revenue Quebec have been advised of these false returns.
>
> I do not accept Justice Adair's decision. No action can be founded on unlawful transactions.
>
> Yours truly,
>
> Etus Maria Racz"

Attempts to Pay the Respondents

17. On August 26, 2019, notwithstanding Ms. Racz's statement that she would refuse the redemption and dividend amounts payable to her pursuant to the July 29 Order, counsel for the Petitioners delivered to her three cheques payable to "Ethel Maria Racz" in the following amounts:

(i) $415,000 on account of the redemption of her Class D shares of the Company;

(ii) $855,000 on account of the capital dividend in respect of her Class C shares in the Company; and

(iii) $645,000 on account of the ordinary dividend declared on the Class C shares.

18. On the same date, counsel for the Petitioners delivered two cheques to the Respondent Michael Siwik, for the following amounts:

(i) $1,995,000 on account of the capital dividend declared in respect of the Class C shares; and

(ii) $1,505,000 on account of the ordinary dividend declared in respect of the Class C shares.

19. On August 30, 2019, the Respondent Ethel Racz advised counsel for the Petitioners that she would return the cheques that had been delivered to her, which she did on or about September 3, 2019.

20. On September 4, 2019, the Respondent Michael Siwik returned the two cheques that had been delivered to him by the counsel for the Petitioners. In his letter of that date, Mr. Siwik said:

> "For reasons stated in Etus Racz's letter of August 23, 2019, I am returning the two cheques which I received yesterday via registered mail."

Funds Held by the Liquidator

21. On September 3, 2019, counsel for the Petitioners delivered to Liquidator the remaining funds in its possession, after payment of corporate taxes and the redemption and dividend amounts stipulated by the July 29 Order. The amount transferred was $713,694.24.

22. The Liquidator has been holding this and other amounts recovered directly from the Company as a holdback pursuant to the terms of the July 29 Order. As of the date of this Notice of Application, the amount being held by the Liquidator, not including the amounts that have been refused by the Respondents, is approximately $750,000.

23. The Petitioners expect, as well, that the Liquidator will recover a substantial tax refund after it files the Company's tax returns for the year ended June 30, 2020.

24. **Further Attempts to Pay the Respondents**

25. At the request of the Liquidator, and out of concern that they would become stale-dated, counsel for the Petitioners cancelled the cheques it had issued

to the Respondents in August 2019, and issued new cheques in the same amounts.

26. On February 21, 2020, the Liquidator made a further attempt to deliver the amounts payable to the Respondents pursuant to the July 29 Order. In an accompanying letter of that date, the Liquidator said:

> "As part of our duties as Liquidator, we will be arranging for a T5 slip to be addressed to you and filed with the Canada Revenue Agency prior to February 28, 2020. The T5 slip is required to report investment income pertaining to the prior calendar year. Accordingly, we strongly encourage you to address the Re-issued Trust Cheques and the associated tax liabilities."

27. On February 24, 2020, the Respondents jointly wrote to the Liquidator and said:

> "We received your letter dated February 21, 2020, with accompanying cheques today. The cheques will be returned to MNP Ltd. and for the same reasons they were previously returned to Burns Fitzpatrick."

28. On February 27, 2020, the Liquidator did issue T5 slips and delivered them to the Respondents.

29. On March 6, 2020, the Respondent Ethel Racz wrote to the Liquidator and said:

> "Dear Ms. Wood:
>
> **RE: 2019 Dividends distributed by Louis Racz Co. Ltd. (the "Company")**
>
> Justice Adair's decision is based on the belief that Rita Racz is the sole director of the Company. In regard to the T5 slips (RE: DIVIDENDS) you will have to prove not only that Rita Racz is the sole director but that she is, in fact, a director. I believe that the last election was in 2013. If this cannot be proved, then all company transactions executed by Rita alone are null and void.
>
> The PLAN to sell Cedar Terrace is the result of the failed PLAN (RE: COUNTERCLAIM). The PLAN dates to 2006 in preparation for the Trial on the 1993 Will. The PLAN for the Trial on the 1993 Will is the result of Justice Loo's decision on the fabricated committeeship, 2001.
>
> All Court decisions since 2001 have been based on false evidence. Justice Adair's decision is just more of the same.

With this letter, I have enclosed the five cheques (RE: DIVIDENDS) #14817, 14818, 14819, 14820, 14821. I have also included a letter dated May 21, 2019 to Scott Turner (2 pages). I am also returning the T5 and Releve 3 tax slips which were received today.

Yours truly,

Etus Maria Racz"

30. All of the Respondents' correspondence has been copied to their counsel. However, counsel have not sought to appear on behalf of the Respondents in this proceeding.

31. In light of this correspondence, counsel for the Petitioners has cancelled the cheques payable to the Respondents and transferred the money to the Liquidator.

The Articles of the Company

32. The Articles of the Company provide:

PART 20
DIVIDENDS AND RESERVE

20.1 The Directors may declare such dividends, if any, as they may deem advisable and need not give notice of such declaration to any member. No dividend shall be paid otherwise than out of funds properly available for the payment of dividends and a declaration by the Directors as to the amount of such funds available for dividends shall be conclusive. ....

20.2 Any dividend declared on shares on any class by the Directors may be made payable on such date as is fixed by the Directors.

20.3 Subject to the rights of persons (if any) entitled to shares with special rights as to dividends, all dividends on shares of any class shall be declared and paid according to the number of such shares held.

20.4 The Directors may, before declaring any dividend, set aside out of the funds properly available for the payment of dividends such sums as they think proper as a reserve or reserves, which shall, at the discretion of the Directors, be applicable for meeting contingencies, or for equalizing dividends, or for any other purpose to which such funds may, at the like discretion either be employed in the business of the Company or be invested in such investments as the Directors may

from time to time think fit. The Directors may also, without placing the same to reserve, carry forward such funds, which they think prudent not to divide.

...

20.6 No dividend shall bear interest against the Company. ...

20.7 Any dividend, interest or other monies payable in cash in respect of shares may be paid by cheque or warrant sent through the post directed to the registered address of the holder, or in the case of joint holders, to the registered address of that one of the joint holders who is first named on the register, or to such person or to such address as the holder or joint holders may direct in writing. Every such cheque or warrant shall be made payable to the order of the person to whom it is sent. The mailing of such cheque or warrant shall, to the extent of the sum represented thereby (plus the amount of any tax required by law to be deducted) discharge all liability for the dividend, unless such cheque or warrant shall not be paid on presentation.

...

RIGHTS AND RESTRICTIONS ATTACHING TO SHARES

26.4 In the event of liquidation, dissolution or winding-up of the Company, whether voluntary or involuntary, or upon distribution of the assets of the Company among its members for the purpose of winding-up its affairs or upon a reduction or return of its capital the holders of the following classes of shares shall be entitled to receive the following amounts in the following order of priority:

Classes of Shares	Priority	Entitlement
Class D Preferred	1	Redemption amount only
Class E Preferred	2	Redemption amount only
Class C Common	3	Par Value only
Class B Common	4	Paid up capital only
Class A Common	5	All declared and unpaid dividends, and all remaining profits and assets of the Company

Unclaimed Property

33. Each Canadian province has enacted legislation to deal with unclaimed property. Here, if the dividends and redemption amounts that would otherwise be payable to the Respondents Ethel Racz and Michael Siwik are "unclaimed property" within the meaning and ambit of that legislation (the Applicants say that they are not), then the disposition of that unclaimed property falls to be determined in accordance with either British Columbia's *Unclaimed Property Act,* [SBC 1999] c. 48, or the Quebec *Unclaimed Property Act,* CQLR c. B-5.1.

34. The British Columbia *Unclaimed Property Act* is administered by the Office of the Comptroller General for British Columbia, which has in turn delegated the function of holding unclaimed property, and attempting to locate its owners, to the British Columbia Unclaimed Property Society.

35. The Quebec *Unclaimed Property Act* is administered by The Minister for Revenue for Quebec, in its capacity as provisional administrator of unclaimed property.

Part 3: LEGAL BASIS

1. The Petitioners apply pursuant to Rule 8-1 and paragraph 15 of the July 29 Order, which gives liberty to apply.

2. Pursuant to clause 8(f) of the July 29 Order, the Liquidator is required to distribute any remaining assets of the Company to the Class C shareholders of the Company, *pro rata* in accordance with their shareholdings.

3. It is submitted that the "remaining assets" of the Company include moneys refused or disclaimed by the Respondents (defined above as the Disclaimed Payments).

Unclaimed Dividends

4. Once declared, a dividend becomes a debt obligation of a company for which a beneficiary shareholder can sue as creditor: *Canada Tea Company Ltd., Re,* 1959 CarswellOnt 246, 21 D.L.R. (2d) 90 ("*Canada Tea*"), at para. 24; *Re Northern Ontario Power Company*, [1954], 1 D.L.R. 627 at p. 631; *Fund of Funds Ltd., Re,* 2004 CarswellOnt 2483 (Sup. Ct. of J.), at para 9.

5. In *Canada Tea*, the liquidator of an Ontario company sought directions regarding the disposition of certain unclaimed dividends of the company. The dividends had been declared more than 6 years prior to the application, and any debt claims by the shareholders who would otherwise have been entitled to sue for payment of the dividends had therefore been extinguished by operation of Ontario's then *Limitation Act.* The court held that the money therefore formed part of the assets of the company available for distribution to shareholders on winding-up. The court said (at paras. 29-30):

> 29. The dividends payable before June 25, 1952, the limitation of time for recovery (6 years) has passed, and these dividends, in my view, now form part of the assets of the estate available to shareholders on winding-up. Mr. Marriott, in the *Northern Ontario* case, also decided that the effective date of the winding-up was the date for determining the 6-year limitation period and that time did not run after that date. The resolution to wind up the Canada Tea Co. Ltd. was passed by the shareholders on June 25, 1958. The dividends payable subsequent to June 25, 1952, are therefore not outlawed by the limitation period of 6 years.
>
> 30. There will, therefore, be an order that the unclaimed dividends in the hands of the liquidator which have been declared on the preference shares, payable on a date 6 years or more prior to June 25, 1952, now form part of the assets of the estate available to shareholders on winding-up.

6. The result in *Canada Tea* is analogous to those in a number of estate cases, where the disclaimer of gifts is perhaps more common than in the corporate context. As the court in *Grund Estate, Re*, 1998 CarswellBC 242 (S.C.), explained, at paras 11-12:

> 11. ... A beneficiary need not accept a testamentary gift and, if he declines it, the gift falls into the residue. In *Montreal Trust Co. v. Matthews* (1979), 11 B.C.L.R. 276 (B.C. S.C.) the Court accepts the proposition at p. 282 that:
>
> > ... a disclaimer is a refusal to accept an interest which has been bequeathed to the disclaiming party. The effect is to void the gift *ab initio*. Where an interest is disclaimed, it is as if it had never been acquired by the disclaiming party. Gifts which fail, or are undisposed of, are captured by the residuary gifts. ...

> This right to disclaim is based on the view that nobody should be forced to accept a gift that he does not want: *Moss, Re* (1977), 77 D.L.R. (3d) 314 (B.C. S.C.). Further, *Dunkley v. Sullivan* (1929), [1930] 1 Ch. 84 (Eng. Ch. Div.) provides that even where a beneficiary takes greater benefit from an estate as a result of a disclaimer, that is no argument against the effectiveness of a disclaimer.
>
> 12 In *Townson v. Tickell* (1819), 3 Barn. & Ald. 31, 106 E.R. 575 (Eng. K.B.), Abbott C.J. stated at pp. 576-577:
>
> > The law is not so absurd as to force a man to take an estate against his will. Prima facie, every estate, whether given by will or otherwise, is supposed to be beneficial to the party to whom it is so given. Of that, however, he is the best judge, and if it turns out that the party to whom the gift is made does not consider it beneficial, the law will certainly, by some mode or other, allow him to refuse or renounce the gift.

7. The Petitioners acknowledge that, in the case of the Company in this proceeding, there are no "residual" shares, as there appear to have been in the case of the company in issue in *Canada Tea*. Under the Articles of the Company here, all unpaid dividends and all remaining profits and assets of the Company are payable to the holders of any Class A shares. However, there are no Class A shareholders.

8. Recognizing the absence of any Class A shareholders, the Company, prior to its liquidation, passed resolutions to ensure that the net profits from the sale of its remaining asset, after payment of taxes and expenses, as well as "all other cash and investment assets of the Company" be paid out to its Class C shareholders, *pro rata* in accordance with their shareholding entitlement.

9. This Resolution was later captured in the July 29 Order, which directs the Liquidator to

> distribute any remaining assets to the Class C shareholders of the Company, *pro rata* in accordance with their shareholdings.

10. In light of this provision, it is submitted that the dividends which have been paid to, but refused by, the Respondents should be treated as "remaining assets" of the Company, for distribution to those Class C shareholders who will accept them.

11. Because the Respondents are also Class C shareholders, it is submitted that it makes little sense to distribute half of the remaining assets to them, only to have them refuse again. Instead, it is submitted that the Respondents should be provided with one final notice and opportunity to accept payment, failing which all remaining assets would be paid by the Liquidator to the Petitioners, *pro rata* in accordance with their respective shareholdings – that is, 65% to the Petitioner 1012109 B.C. Ltd. and 35% to the Petitioner Lisa Maddess.

Amounts in Respect of Share Redemption

12. Similar reasoning should apply to the amounts payable to the Respondent Ethel Racz for the redemption of her Class D shares. Pursuant to the terms of the July 29 Order, the Company was authorized to redeem the 415 Class D shares of the Company held as of the date of the Order by the Respondent Ethel Racz, for the sum of $415,000. Payment was directed to be made by cheque delivered to the Respondent Ethel Racz at her residence. The Order then provides:

> Upon the Company exercising its right to redeem the Class D shares of Ethel Racz in accordance with paragraph 1 of this Order, the said Ethel Racz shall be deemed to have sold, assigned and transferred the said Class D shares to the Company, effective on the date of exercise.

13. In accordance with the terms of the Order, the Petitioners, through their counsel, did deliver a cheque in the amount of $415,000 to the Respondent Ethel Racz's residence. However, she refused to accept payment of the cheque and returned it, as described above.

14. In those circumstances it is submitted that, notwithstanding the refusal to accept payment, payment should be deemed to have been made and the unclaimed funds returned to the Company for distribution as "remaining assets".

Unclaimed Property Legislation

15. The legislatures of both British Columbia and Quebec have passed legislation regarding "unclaimed" property and the terms on which it is held by the Crown in right of those provinces, how it can be claimed and when is escheats to the Crown. In both British Columbia and Quebec, the

legislation is called the "*Unclaimed Property Act*". (*Unclaimed Property Act,* [SBC 1999] c. 48; *Unclaimed Property Act,* CQLR c. B-5.1.)

16. In British Columbia, Section 337 of the *Business Corporations Act* requires that, before distributing the residual assets of a company in liquidation, a liquidator must pay any amounts that would otherwise be payable to a shareholder of the company to the administrator of the *Unclaimed Property Act*, "if the whereabouts of ... [the] shareholder ... is unknown".

17. The Quebec *Business Corporations Act* [SQ c. S-31.1] does not contain a provision similar to section 337 of the British Columbia *Business Corporations Act*. However, section 3 of the Quebec *Unclaimed Property Act* defines "unclaimed property" to include "amounts due on the ... redemption of ... stocks, shares or any other form of participation in a legal person", as well as "dividends ...attaching to the securities or other form of participation", if the person entitled to those amounts or dividends is domiciled in Quebec and "no claim or transaction has been made and no instructions have been given by the right-holder in respect of the amounts or the income in the three years following the date on which they became due or payable".

18. In the Applicants' submission, the money in issue here is not "unclaimed" property within the meaning of either the British Columbia or the Quebec statutes. Rather, they say that it is *disclaimed* property, ownership of which remains with the Company, subject to the terms of the July 29 Order that it be distributed to the Class C shareholders. Nevertheless, at the request of the Liquidator, the Applicants will notify the administrators of the British Columbia and Quebec legislation, in case they may wish to take a contrary position.

19. In *Confederation Financial Services (Canada) Ltd. v. Confederation Treasury Services Ltd.,* 2003 CarswellOnt 1104 (Sup. Ct. of J.) ("*Confederation Financial*"), the court considered the common law of *bona vacantia,* or escheat, which underlies unclaimed property legislation. The facts giving rise to the decision were that the trustee of a bankrupt company, CTSL, sought an order that it be permitted to pay certain surplus funds in respect of certain "Residue Certificates" of CTSL to certain interested parties. Some of the surplus funds were made up of unclaimed dividends payable to holders of the Residue Certificates, some

of whom could not be located and others of whom had not cashed their dividend cheques. The Public Guardian and Trustee for Ontario (the "PGT") opposed the trustee's application and cross-moved for an order that the surplus funds be paid to the Crown in right of Ontario, as unclaimed residual property of a corporation. The PGT relied on both the provisions of the Ontario *Business Corporations Act* (the "OBCA") and the common law of escheat.

20. The court dismissed the PGT's application. It said:

> 39 The PGT asserts that apart from specific statutory provisions such as are found above in the OBCA, the issue of forfeiture and the issue of escheat or *bona vacantia* in Ontario are governed by the common law and, particularly the law of England as constitutionally confirmed in Ontario. ...
>
> 40 In *Wells, Re*, [1932] All E.R. Rep. 277 (Eng. C.A.), Romer LJ at p. 287 observed:
>
> > In my opinion, it is established law that the Crown is entitled to all personal property that has no other owner. The property to which this law is most commonly applied is that of an intestate dying without leaving a widow or next of kin.
> >
> > . . . . .
> >
> > The Privy Council [in *Dyke and Walford* (1848), 5 Moo. P.C. 434] in fact accepted the argument put forward by Mr. Parker in that case (5 Moo P.C. at p. 471) that the rule at common law is that property must belong to somebody, and where there is no other owner, not where the owner is unknown, that is the distinction, it is the property of the Crown. (emphasis added).
>
> 41 The PGT provided me with passages from Noel D. Ing, Bona Vacantia (London, Butterworths; 1971). At p. 6, this text observes:
>
> > (iii) *Bona vacantia* consists of property which has no owner other than the Crown - i.e. property which would have no owner unless claimed by the Crown - and does not include property the owner of which is merely unknown. *Bona vacantia* is not a prerogatival "lost property office", to which can be attributed items of personal property having no

traceable owner. As will be shown, the present categories of *bona vacantia* are well defined.

42 Ing goes on at pp. 11-12 to state:

> It may be that, in the future, other species of property will be classed as *bona vacantia* and even that some of the present categories will cease to be so regarded; as will appear from the chapter concerned, the position as regards *bona vacantia* arising by reason of a disclaimer or of a rule of public policy is by no means settled. Possibly the categories can never be considered closed. On one view, whenever there are species of property which have no owner unless the Crown claims them, and this situation creates a possibility of mischief or leaves problems to be solved (even the problem of an asset holder being unable to obtain a good discharge), so it may be the duty of the Crown to remedy the situation by claiming such property as bona vacantia. (This situation, however, does not arise where there is an owner, known or unknown, of the property, or a person in existence with a more substantial interest in dealing with the problem, for example, a creditor in an insolvent estate; in these circumstances, there is no property which ought to be regarded as *bona vacantia*. (emphasis added).

43 At pp. 17-18 Ing cites *Dyke*, *supra* [*Dyke v. Walford* (1846), 5 Moo. P.C. 434 (England P.C.)] as follows:

> The matter was well summed up in *Dyke v. Walford*: "The origin of this right shows that, if it existed at all, it must have existed from the foundation of the Monarchy; it is the right of the Crown to '*bona vacantia*'; to property which has no other owner".

44 He went on at p. 18 to observe:

> As regards more recent developments, reference has previously been made to the introduction of statutory provisions relating to bona vacantia of two categories: the property of persons dying intestate and without known kin, and the property of dissolved companies. The right to bona vacantia of the latter category first became statutory by virtue of the Companies Act 1929.
>
> ...

47 The position of the PGT is that at common law, *bona vacantia* can arise by intestacy without heirs, dissolution of corporation, and by disclaimer citing in support Ing at 207-211; 216; *Paradise Motor Co., Re*, [1968] 2 All E.R. 625 (Eng. C.A.); In *Higginson, Re*, [1899] 1 Q.B. 325 (Eng. Q.B.); *Cunnack v. Edwards*, [1896] 2 Ch. 679 (Eng. C.A.). However, I would note that the court in *Ontario v. Mar-Dive Corp.* (1996), 141 D.L.R. (4th) 577 (Ont. Gen. Div.) at p. 586 appeared to accept without question the submission made to it about abandonment. However, query whether that conclusion is correct in light of the views of Ing at chapter 1, especially at pp 6-8 and Halsbury's Laws of England (4th ed) Vol 12, Crown Property at p. 90 where at para 235 it is observed:

> It is also clear that *bona vacantia* does not include goods lost or designedly abandoned, the property in which is vested in the first finder and is good against all, except the true owner in the case of goods lost: 1 Bl Con (14th Ed.) 298; and see eg. *Armory v. Delamirie* (1722), 1 Str. 505.

Funds that are being held that remain unclaimed cannot be treated as bona vacantia as there may be a discoverable owner: see *Winding-Up Act, Re*, [1943] S.C.R. 370 (S.C.C.) where Hudson J for the Court referred at p. 379-80 to the 2nd edition of Halsbury at Vol. 6, p. 827 and cited: " . . . but not goods lost or designedly abandoned, the property in which is vested in the first finder and is good against all, except the true owner in the case of goods lost." There does not appear to be any cogent evidence that any of the Residue Certificate Holders have died intestate without heirs, are corporations which have been dissolved with shareholders or creditors which have been unable to be located or have disclaimed their interest in such certificates.

...

50 I find that the doctrine of *bona vacantia* has no application here on this record in this case. The Plan, the Trust Indenture as amended pursuant to court order and the order of Blair J dated September 26, 2000 provide that all remaining funds are to be paid to the Residue Certificate Holders including the unclaimed funds to go to the Residue Certificate Holders who did come forward. There does not appear to be any gap. The Residue Certificate Holders are the beneficial owners. What is happening is that the Trust Indenture, not the Plan is being amended and in doing so it would in effect exclude those Residue Certificate Holders who have not

> come forward. There is no evidence as to their status, location or capacity except to say that it is highly unlikely that they would be Ontario residents, or if any were, they would only be an extremely small percentage.
>
> 51 The best it seems that the PGT can say is that some of the Residue Certificate Holders are unknown. But that does not result in a *bona vacantia* conclusion; there has to be "no owner" before the Crown steps in as "owner of last resort". See Romer L.J. in *Wells, Re* cited with approval in *British Columbia (Attorney General) v. Royal Bank*, [1937] 3 D.L.R. 393 (S.C.C.) at p. 396 by Kerwin J.

21. Similar reasoning should apply here. There is no "gap". The original resolutions passed by the Company prior to the July 29 Order clearly contemplated that all residual funds would be distributed to Class C shareholders. That resolution is captured in clause 8(c) of the Order. The fact that two of the Class C shareholders are disclaiming or refusing their dividends should not affect the analysis. There is no evidence of any intention that monies should escheat to the Crown. On the contrary, the Disclaimed Payments were always intended as gifts and so should revert to the Company for distribution to its Class C shareholders, who are the beneficiaries of those gifts.

Delivery of Funds to Liquidator

22. The July 29 Order provided that payment of the amounts due to the Respondents on account of the Redemption and Dividend Ammounts could be made by cheques drawn on the account of Burns Fitzpatrick LLP, counsel for the Petitioners (the "Firm"). Those cheques were drawn and delivered to the Respondents, who returned them uncashed. The original cheques were on the point of becoming stale-dated, and so the Firm issued new cheques.

23. The expiry of a cheque as a result of the effluxion of time or the failure of a payee to present a cheque for payment does not discharge the drawer of the cheque in respect of the underlining obligation with respect to which the cheque was issued: *Fund of Funds Ltd., Re,* 2004 CarswellOnt 2483 (Sup. Ct. of J.), at para 12.

24. In light of the Respondents refusal to accept the cheques, the Firm has cancelled the cheques and delivered the underlying funds to the

Liquidator. There should be an Order relieving the Firm of any further liability on the cheques or otherwise to make payment to the Respondents.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Lisa Maddess sworn April 15, 2019;
2. Affidavit #2 of Lisa Maddess sworn April 20, 2020;
3. Affidavit #2 of Patty Wood sworn April 24, 2020
4. Affidavit # 1 of Anna Lee sworn April 14, 2020;
5. The Petition

The applicants estimate that the application will take 2 hours.

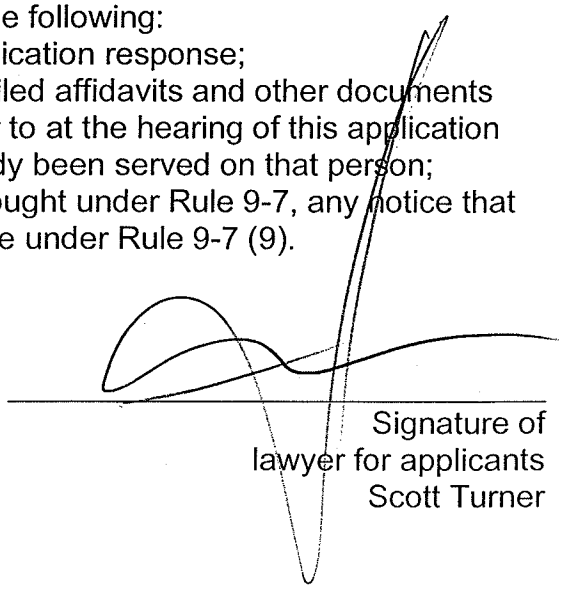
[ ] This matter is within the jurisdiction of a master.

[X] This matter is not within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

(a) file an application response in Form 33,
(b) file the original of every affidavit, and of every other document, that
  (i) you intend to refer to at the hearing of this application, and
  (ii) has not already been filed in the proceeding, and
(c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
  (i) a copy of the filed application response;
  (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
  (ii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7 (9).

Date: April 24, 2020



Signature of
lawyer for applicants
Scott Turner

To be completed by the court only:

Order made

[ ] in the terms requested in paragraphs _____ of Part 1 of this notice of application

[ ] with the following variations and additional terms:

_____

_____

_____

Date: _____ _____

Signature of [ ] Judge [ ] Master

Appendix

[The following information is provided for data collection purposes only and is of no legal effect.]

THIS APPLICATION INVOLVES THE FOLLOWING:

[Check the box(es) below for the application type(s) included in this application.]

[ ] discovery: comply with demand for documents
[ ] discovery: production of additional documents
[ ] other matters concerning document discovery
[ ] extend oral discovery
[ ] other matter concerning oral discovery
[ ] amend pleadings
[ ] add/change parties
[ ] summary judgment
[ ] summary trial
[ ] service
[ ] mediation
[ ] adjournments
[ ] proceedings at trial
[ ] case plan orders: amend
[ ] case plan orders: other
[ ] experts