Case Name:

Hollinger Inc. (Re)

IN THE MATTER OF the Companies Creditors Arrangement Act, R.S.C. 1985, C. C-36, as Amended
AND IN THE MATTER OF a proposed plan of compromise or arrangement with respect to Hollinger Inc., 4322525 Canada Inc. and Sugra Limited, Applicants

[2013] O.J. No. 3047

2013 ONSC 5431

3 C.B.R. (6th) 73

90 E.T.R. (3d) 116

229 A.C.W.S. (3d) 633

2013 CarswellOnt 9006

Court File No. 07-CL-7120

Ontario Superior Court of Justice
Commercial List

C.L. Campbell J.

Heard: June 13, 2013.
Judgment: June 24, 2013.

(43 paras.)

Bankruptcy and insolvency law -- Creditors and claims -- Secured creditors -- Solicitor's liens -- Claims -- Equitable claims -- Priorities -- Application by Catalyst for constructive trust dismissed -- Catylyst retained securities expert Voorheis to provide advice concerning its investment in Hollinger -- Voorheis took position as Hollinger director and Catalyst topped up director's fees paid by Hollinger -- Catalyst sought super priority status over repayment of these fees on basis of unjust enrichment and constructive trust and principles of oppression law -- Voorheis not supply

type of services over which solicitor's lien applied -- No basis for unjust enrichment or constructive trust claims -- Hollinger not unjustly enriched by Voorheis' services -- No wrongful act by Hollinger justified constructive trust.

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Claims -- Priority -- Application by Catalyst for constructive trust dismissed -- Catylyst retained securities expert Voorheis to provide advice concerning its investment in Hollinger -- Voorheis took position as Hollinger director and Catalyst topped up director's fees paid by Hollinger -- Catalyst sought super priority status over repayment of these fees on basis of unjust enrichment and constructive trust and principles of oppression law -- Voorheis not supply type of services over which solicitor's lien applied -- No basis for unjust enrichment or constructive trust claims -- Hollinger not unjustly enriched by Voorheis' services -- No wrongful act by Hollinger justified constructive trust.

Wills, estates and trusts law -- Trusts -- Constructive trusts -- Judicial recognition of constructive trust -- Circumstances when may be recognized -- Unjust enrichment -- Application by Catalyst for constructive trust dismissed -- Catylyst retained securities expert Voorheis to provide advice concerning its investment in Hollinger -- Voorheis took position as Hollinger director and Catalyst topped up director's fees paid by Hollinger -- Catalyst sought super priority status over repayment of these fees on basis of unjust enrichment and constructive trust and principles of oppression law -- Voorheis not supply type of services over which solicitor's lien applied -- No basis for unjust enrichment or constructive trust claims -- Hollinger not unjustly enriched by Voorheis' services -- No wrongful act by Hollinger justified constructive trust.

Application by Catalyst for a declaratory order of a constructive trust. Catalyst retained securities expert Voorheis to provide advice concerning its investment in Hollinger. As part of this arrangement, Catalyst arranged for Voorheis to become a director on Hollinger's board and Catalyst topped up the fees paid to Voorheis by Hollinger. Catalyst argued that it should be given super priority status over repayment of these top up fees on the basis of unjust enrichment and constructive trust and the principles of oppression law.

HELD: The application was dismissed. There was no basis to give Catalyst priority on the basis of the principles applicable to a solicitor's lien. Voorheis did not supply the type of services to which a solicitor's lien applied. His role was primarily as a businessman or manager rather than as a lawyer. There was no basis to award Catalyst super priority based on unjust enrichment or constructive trust. The contribution of Voorheis to the settlement of Hollinger's claims, and fact that Catalyst topped up his remuneration, did not mean Hollinger was unjustly enriched. There was also no wrongful act by Hollinger that would justify the imposition of a constructive trust. While a constructive trust could be imposed in a Companies Creditors Arrangement Act scenario, none of the four factors articulated by the Supreme Court were present. There was no equitable obligation on the part of Hollinger, no credible assertion of assets in Hollinger's hands that were in breach of

an equitable duty, no legitimate reason for Catalyst seeking a proprietary remedy and it would be unjust in the circumstances to interfere with the CCAA priority scheme.

Statutes, Regulations and Rules Cited:

Company Creditors Arrangement Act,

Counsel:

John Finnigan, Leanne M. Williams, for the Applicants.

David c. Moore, Karen Mitchell, for Catalyst Fund General Partner I Inc.

ENDORSEMENT

1 **C.L. CAMPBELL J.**:-- Catalyst Fund General Partner I Inc. (Catalyst), a significant creditor of Hollinger Inc. (Hollinger), seeks a declaratory order of constructive trust in respect of its "top up" payment to Wesley Voorheis (Voorheis) in respect of his director and other services performed which have not already been paid by Hollinger in respect of such services.

2 The history of litigation involving Hollinger and events involving the Company, its directors, financial and legal advisors and its former majority owner Conrad Black (directly or indirectly) are all detailed elsewhere and need not be repeated here.

3 Suffice to say the following facts for the purposes of this motion are largely uncontested:

4 Catalyst filed a Proof of Claim dated July 11, 2008 (the Catalyst Claim), pursuant to the Claims Procedure Order dated May 21, 2008, whereby Catalyst made an unsecured claim into the estate of Hollinger in the amount of $1,988,388.10. Catalyst subsequently advised Hollinger that it was asserting the Catalyst Claim on a priority basis. The Catalyst Claim arising from an alleged pre-*CCAA* filing obligation of Hollinger.

5 The Catalyst Claim seeks recovery of funds that Catalyst paid to Voorheis & Co. LLP between May 13, 2006 and April 16, 2007. Catalyst asserts that the proceeds derived from the avenues of litigation open to Hollinger (the Litigation Assets) should be subject to a priority claim by Catalyst, notwithstanding that it is a pre-filing claim against Hollinger. Catalyst claims that Hollinger is liable for these amounts based on the following: (a) The application of the principles of solicitors' liens;

(b) The equitable principles of unjust enrichment and constructive trust; and
(c) The principles of oppression law.

Background

6 Catalyst owns approximately eighty percent (80%) of the issued Series II Preference Shares of Hollinger and in excess of 883,000 Common Shares of Hollinger, which, at approximately $16.5 million, represents the largest arms-length shareholding position in Hollinger. Newton Glass (Glassman) is the President of Catalyst.

7 Voorheis is the Managing Partner of Voorheis & Co. LLP and the Managing Director of Voorheis & Co. Incorporated. Voorheis practiced corporate and securities law at Davies Ward, Phillips Vineberg LLP (Davies) until 1994. Since that time, Voorheis, through Voorheis & Co. LLP and Voorheis & Co. Incorporated, has acted as strategic advisor to institutional and other shareholders providing specialized strategic and other advice commonly directed at enhancing the value, performance or board oversight of Canadian public and private companies.

8 Voorheis was approached by Catalyst in 2003 to work jointly with Catalyst to enhance shareholder value at Hollinger. Initially, Catalyst proposed that VC&Co co-invest with Catalyst but such request was ultimately refused by Voorheis. In March 2004, Voorheis was retained and began acting as a strategic advisor to Catalyst in respect of its investment in Hollinger.

9 Newton Glassman of Catalyst was appointed to the Board of Directors of Hollinger (the Board) pursuant to an Order [of Mr. Justice Campbell] dated July 8, 2005. Shortly thereafter, Glassman, came to consider the Board to be dysfunctional and believed that part of the solution to the dysfunction was to have Voorheis appointed to the Board. Glassman thought that the appointment of Voorheis to the Board was in the best interest of Hollinger and all of its public stakeholders, which included Catalyst.

10 In his affidavit sworn April 30, 2008 at paragraph 29, Glassman deposed:

> I'm also of the view that the Board and management were timid and ineffective in asserting Inc.'s rights, both against Black and his associates and against Hollinger International. In retrospect, I have no doubt that I was perceived by fellow directors to be impatient and aggressive at times. I take responsibility for this ...

11 In early 2006, Glassman asked Voorheis to agree to be appointed to the Board and to take over as Chair of Hollinger's Litigation Committee from David Drinkwater. Voorheis advised Glassman that he anticipated that he would have to spend a significant amount of time to rectify the existing problems at the Hollinger Board level. Voorheis made it clear to Glassman that he would not accept an appointment to the Board if the only compensation for doing so was the normal director's fees paid by Hollinger.

12 Pursuant to the terms of the Voorheis Retainer dated May 8, 2006, Voorheis & Co was retained by Catalyst to provide advice and assistance in connection with its investment in Hollinger and, specifically, Voorheis was engaged by Catalyst to serve as director of Hollinger and Chair of

Hollinger's Litigation Committee. Catalyst agreed to compensate Voorheis & Co in accordance with his customary billing practices, which included compensation for the services of Voorheis in acting as a director of Hollinger and as the Chair of the Litigation Committee, net of any amounts Voorheis received from Hollinger as director's fees.

13 For the reasons that follow I conclude that Catalyst is not entitled to super priority status in respect of the claim of Voorheis and his company.

14 I accept the admission conceded by counsel for Hollinger that the work efforts of Voorheis did provide benefit to Hollinger.

15 I also accept that as of two months before the Application of Hollinger for relief under the *Companies' Creditors Arrangements Act* (*CCAA*), the then chairman of Hollinger Stanley Beck did undertake to engage in "good faith" further discussions with Catalyst with respect to remuneration to Catalyst in respect of its contractual agreement with Voorheis which exceeded the payments by Hollinger to Voorheis as a director.

16 The intervening event of the Initial Order under the *CCAA* prevented any further discussions with Catalyst outside of the *CCCA* process.

17 Catalyst seeks recovery of these funds on a super priority basis, advancing the following reasons:

(a) this Court should apply the principles applicable to Solicitors Liens to the circumstances of this case;
(b) recent jurisprudence affirms the application of equitable principles to CCAA proceedings and this is an appropriate case to apply constructive trust and unjust enrichment principles in Catalyst's favour.
(c) alternatively, this is an appropriate case to apply oppression law principles to grant the relief sought.

18 On the material before me I conclude that Voorheis did not perform the type of service that would come under the general principle to which a solicitor's lien would apply.

19 Although Voorheis is highly qualified and experienced as a lawyer his appointment to Hollinger was as a director. I accept that he did perform additional services to Hollinger beyond that of an ordinary director but that his role was in the context of a businessman or manager not as a lawyer.

20 In my view it was Mr. Voorheis' acumen as a lawyer/businessman that was employed, not that of a solicitor in the ordinary application of the term.

21 It is to be noted that Mr. Drinkwater another director was also a lawyer, as was Mr. Glassman

of Catalyst whom Mr. Voorheis replaced on the board. In addition at all times Hollinger was represented by various external counsel

22 Since business management acumen as opposed to legal services were involved, in my view there is no basis for the consideration of a solicitor's lien and the rights that might follow therefrom. Therefore, there is no basis for the awarding of relief in the nature of a Charging Order.

Do these circumstances justify the application of the equitable principles of constructive trust and unjust enrichment?

23 The suggestion here is that the actions of Voorheis directly resulted in significant settlements which were approved by this Court in 2011 and 2012 and that the proceeds of those settlements are at the moment the principal assets of Hollinger and that the company would be unjustly enriched without recognizing the important contribution of Voorheis in achieving those settlements.

24 Even if one accepts that there was a benefit to Hollinger, the contributions by Voorheis, just because he had a contract with Catalyst for a higher amount than the direct fees which were the only contribution committed to by Hollinger does not result in the conclusion that Hollinger was unjustly enriched for not making a greater payment to Catalyst or Voorheis.

25 In the first place there were a number of individuals in the four year period following Voorheis' departure including the current Litigation Trustee who were equally, if not more importantly, critical to the overall success of the settlements.

26 Secondly, none of the accepted criteria for the awarding of a constructive trust are present on these facts. The limited circumstances in which a constructive trust, whether or not regarded as creating a super priority, in a *CCAA* proceeding are simply not present here in any way.

27 I accept the basic statement of law urged by Mr. Moore for Catalyst as being applicable where required for a good conscience claim:

> It thus emerges that a constructive trust may be imposed where good conscience so requires. The inquiry into good conscience is informed by the situations where constructive trusts have been recognized in the past. Equitable remedies are flexible; their award is based on what is just in all the circumstances of the case.
>
> Good conscience as a common concept unifying the various instances in which a constructive trust may be found has the disadvantage of being very general. By any concept capable of embracing the diverse circumstances in which a constructive trust may be imposed must, of necessity, be general. Particularity is found in the situations in which judges in the past have found constructive trusts. A judge faced with a claim for a constructive trust will have regard not merely to

> what might seem "fair" in the general sense, but to other situations where courts have found a constructive trust. The goal is but a reasoned, incremental development of the law on a case-by-case basis.[1]

28 Chief Justice McLachlin went on to add in the next paragraph: The situations which the judge may consider in deciding whether good conscience requires imposition of a constructive trust may be seen as falling into two general categories. The first category concerns property obtained by a wrongful act of the defendant, notably breach of fiduciary obligation or breach of duty of loyalty. The traditional English institutional trusts largely fall under but may not exhaust (at least in Canada) this category. The second category concerns situations where the defendant has not acted wrongfully in obtaining the property, but where he would be unjustly enriched to the plaintiff's detriment by being permitted to keep the property for himself. The two categories are not mutually exclusive. Often wrongful acquisition of property will be associated with unjust enrichment, and vice versa. However, either situation alone may be sufficient to justify imposition of a constructive trust.

29 In my view neither is there a wrongful act in any sense of that word on the part of Hollinger either before or after the Initial *CCAA* Order nor an unjust enrichment of Hollinger for the reasons above.

30 Much of the impetus for this motion arises from the decision in February 2013 by the Supreme Court of Canada in *SunIndalex*[2] which considered the power of a Court in the context of a *CCAA* proceeding to award a constructive trust in favour of pension plan beneficiaries to whom a fiduciary duty had been breached.

31 I accept the basic premise urged by Mr. Moore that the Supreme Court recognized the potential for the remedy of constructive trust in a *CCAA* process.

32 The majority of the Supreme Court in the *Sun Indalex* case held that it would be inappropriate in those circumstances to award a remedy of constructive trust. I reach the same conclusion on the facts of this case.

33 As noted by majority in that decision at paragraph 239 "that imposing a constructive trust was wholly disproportionate to *Indalex's* breach of fiduciary duty"

34 At paragraph 240 on behalf of the majority on that issue it is said: A judicially ordered constructive trust, imposed long after the fact, is a remedy that tends to destabilize the certainty which is essential for commercial affairs and which is particularly important in financing a workout for an insolvent corporation. To impose a constructive trust in response to a breach of fiduciary duty to ensure for the plan beneficiaries some procedural protections that they in fact took advantage of in any case is an unjust response in all of the circumstances.

35 The majority who concluded both for and against the imposition of a constructive trust on the

facts of *Indalex* agreed on the conditions necessary for the awarding of such a remedy:

(i) the defendant was under an equitable obligation in relation to the activities giving rise to the assets in his or her hands;
(ii) the assets in the hands of the defendant were shown to have resulted from deemed or actual agency activities of the defendant in breach of his or her equitable obligation to the plaintiff;
(iii) the plaintiff has shown a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendants remain faithful to the duties; and
(iv) there are no factors which would render imposition of a constructive trust in all the circumstances of the case, such as the protection of the interests of intervening creditors.

36 In my view none of the four above conditions are met on the facts of this case.

37 Firstly, there is no equitable obligation on the part of Hollinger. Any expectation of a possible claim beyond the contractual obligation of Hollinger to a director ended with the Initial Order in the *CCAA* proceeding.

38 Secondly, there is no creditable assertion of there being assets in the hands of Hollinger that are in breach of any equitable duty. Mr. Voorheis was only one of many who contributed to the success and there is no relationship between that success and the amounts recovered by way of settlement.

39 Thirdly, there is no legitimate reason for the seeking of a proprietary remedy. To the extent if at all that there could be said to be a claim it would be in quantum *meruit* not constructive trust. The imposition of a trust is urged to simply to overcome a claim that would not succeed in *CCAA* to try to gain a super priority.

40 Fourthly, in my view it would be unjust to impose a constructive trust because the effect of doing so would interfere with the priority otherwise prevailing in *CCAA* which does touch a public interest.

41 I posed the following question rhetorically to Mr. Moore: "what financer in the same business as Catalyst would be prepared to advance funds in a distressed business if it could be exposed to claims of this kind"?

42 In my view it would present a practical uncertainty that would effectively destroy the flexibility and discretion that has been the hallmark of the operation of *CCAA* if such claims as advanced here could be raised to the level to provide a super priority without the agreement of all the creditors.

43 For the above reasons, the motion of Catalyst is dismissed. If it is necessary to deal with the issue of costs, Counsel may make submissions.

C.L. CAMPBELL J.

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1 Soulos v. Korkontzilas, 1997 CanLII 346 (SCC), [1997] 2 S.C.R. 217 at paras 34-35.

2 Sun Indalex v. United Steelworkers 2013 SCC 6.

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