IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION

Citation: *61839 Newfoundland & Labrador Limited v. Philpott's Realty Co. Limited*, 2024 NLSC 15
Date: January 26, 2024
Docket: 201104G0319

BETWEEN:

61839 NEWFOUNDLAND & LABRADOR LIMITED

PLAINTIFF

AND:

PHILPOTT'S REALTY CO. LIMITED

DEFENDANT

Before: Justice Thomas J. Johnson

Place of Hearing: Corner Brook, Newfoundland and Labrador

Dates of Hearing: May 24, 2023 and May 25, 2023

Summary:

On a summary trial application brought by the Plaintiff (Applicant), the Court made a determination as to the admissibility of documents presented by the Applicant. The Court then proceeded to determine the summary trial application. The Court found that the factual issue of whether dividends had been issued by Humber Valley Resort Corporation to Canex Development Corporation Limited could be determined on the record before the Court and

that it was not unjust to do so. The Court decided the factual issue in favour of the Defendant and ordered the proceeding to proceed to trial in the normal course. Costs were awarded against the Applicant on a party and party basis.

Appearances:

J. Michael Collins and Graham C. Watton, K.C.	Appearing on behalf of the Plaintiff
Kevin F. Stamp, K.C.	Appearing on behalf of the Defendant

Authorities Cited:

CASES CONSIDERED: *Noton Enterprises Limited v. Philpott's Realty Co. Limited*, 2022 NLCA 38; *Brook Construction (2007) Inc. v. North Atlantic Cement and Construction Ltd.*, 2020 NLCA 42; *Marco Ltd. v. Newfoundland Processing Ltd. et al* (1995), 130 Nfld. & P.E.I.R. 317, 55 A.C.W.S. (3d) 477 (Nfld. S.C.(T.D.)); *Traders Group Ltd. v. Carroll* (1979), 2 N.S.R. (2d) 321, Carswell 128 (N.S. S.C. (C.A.)); *Compton v. Toyota Canada Inc.*, 2019 NLCA 79; *Labrador Community Development Corp. v. Goose Bay Lumber Ltd.*, 2005 NLTD 151; *R. v. J.-L.J.*, [2000] 2 S.C.R. 600, 148 C.C.C. (3d) 487; *Beazley v. Suzuki Motor Corporation*, 2010 BCSC 681; *R. v. Schwartz*, [1988] 2 S.C.R. 443; *R. v. C.B.*, 2019 ONCA 380; *K.F. v. J.F.*, 2022 NLCA 33; *Ault v. Canada (Attorney General)*, 2007 CanLII 55395, 162 A.C.W.S. (3d) 619 (Ont. Sup. Ct.); *R. v. Khelawon*, 2006 SCC 57; *R. v. Mapara*, 2005 SCC 23; *R. v. Monkhouse*, 1987 ABCA 227; *R. v. F.(W.J.)*, [1999] 3 S.C.R. 569; *R. v. Baldree*, 2013 SCC 35; *R. v. Furey*, 2022 SCC 52; *R. v. Bradshaw*, 2017 SCC 35; *R. v. Schneider*, 2022 SCC 34; *Airia Brands Inc. v. Air Canada*, 2011 ONSC 4003; *Drummond v. Cadillac Fairview Corporation Limited*, 2019 ONCA 447; *Banner Pharmacaps NRO Ltd. v. Canada*, 2003 FCA 367; and *O'Connor v. Nolan*, 2024 NLSC 5

STATUTES CONSIDERED: *Bills of Exchange Act*, R.S.C. 1985, c. B-4; and *Corporations Act*, R.S.N.L. 1990, c. C-36

RULES CONSIDERED: *Rules of the Supreme Court, 1986,* S.N.L. 1986, c. 42, Sch. D

ARTICLES CONSIDERED: David Paciocco, "*The Principled Use of Hearsay in Civil Cases: A Technical Guide to Avoiding Technicality*" (2008) Vol. 87:2 Canadian Bar Review 277

REASONS FOR JUDGMENT

JOHNSON, J.:

INTRODUCTION

[1] 61839 Newfoundland & Labrador Limited ("61839") filed a Rule 17A summary trial application for judgment against Philpott's Realty Co. Limited ("Philpott's") for $1,300,000 and interest.

[2] Boiled down, the claim of 61839 is that Philpott's is liable to it for $1,300,000 under a promissory note Philpott's gave to Humber Valley Resort Corporation ("HVRC") in December 2005 (the "PRL Note") to pay the purchase price for Lot 83 at Humber Valley Resort in western Newfoundland. 61839 claims it acquired all right, interest, title and ownership to the PRL Note and that all money owed pursuant to the PRL Note was assigned unto and purchased by 61839. 61839 alleges that the PRL Note was not repaid. Philpott's denies liability to 61839. Philpott's says that its debt to HVRC in the amount of $1,300,000 has been repaid in full.

[3] While this is the boiled down version of the claim and defence, the facts underlying the dispute are rather more involved.

BACKGROUND TO THE DISPUTE

[4] The background to the dispute was recently discussed by the Court of Appeal in *Noton Enterprises Limited v. Philpott's Realty Co. Limited*, 2022 NLCA 38. In *Noton*, the dispute was about the ownership of Lot 83 at Humber Valley Resort which Philpott's acquired by deed of conveyance from HVRC and purchased with the PRL Note. Noton Enterprises Limited ("Noton") applied for summary trial

seeking judgment against Philpott's by way of a declaration of ownership of Lot 83. The applications judge was not comfortable proceeding on the basis of the record before him and was not prepared to take the risk of ignoring relevant context that he concluded would only come from a conventional trial (*Noton*, para. 62).

[5] On appeal by Noton, the Court of Appeal upheld the applications judge and dismissed the appeal. In describing the background, the Court of Appeal stated:

> [4] While Noton described the question it had proposed to be addressed at summary trial as "simple", it arose from a complicated set of circumstances and events occurring over the 11 year period between March 1999 and April 2010.
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> [5] Humber Valley Resort Corporation ("HVRC") was incorporated on March 22, 1999. Subsequent to its incorporation, HVRC acquired freehold and leasehold interests in large parcels of land on Deer Lake in Western Newfoundland in order to develop a four season resort (the "Resort").
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> [6] Rex Philpott was involved in the Resort's development. He owned Philpott's Realty Co. Limited ("PRL"); he was a director of HVRC (and remained so until 2006); he was also a director of Humber Valley Construction Limited ("HVCL") and Canex Development Corporation Limited ("Canex"). Canex owned all the common shares issued in HVRC, and PRL owned 50% of the common shares in Canex.
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> [7] In 2004 a chalet was built on Lot 83 of the Resort to Rex Philpott's specifications. PRL asserts that it acquired the lot and chalet from HVRC on December 31, 2005 at a purchase price of $1,300,000.00.
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> [8] PRL asserts that the consideration was initially by promissory note and that the debt secured by the promissory note was satisfied by transactions associated with a corporate merger. Mr. Philpott's Affidavit described PRL's purchase of Lot 83 as arising from a "complicated restructuring" involving "highly complex details of the re-organization, restructuring and merger and acquisition arrangements …advised and guided by skilled specialist advisors in the fields of mergers and acquisitions, corporate accounting,…" (Appeal Book of the Appellant, Volume 8, Tab 11, at paras. 4-8).
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> [9] The deed of conveyance to PRL was not registered until April 12, 2010.
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> [10] The merger described in Mr. Philpott's Affidavit resulted in the creation of a new corporation ("Newfound NV") incorporated on August 1, 2006 under the laws of the Netherlands.

> [11] Through a series of transactions that are set out in detail in the Statement of Claim, Newfound NV became the sole shareholder of HVRC.
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> [12] On July 3, 2008, Newfound NV entered into a finance agreement with Equity Trust Trustee & Agency Services B.V., as trustee for the benefit of Jayne McGivern and Agilo Limited, acting as delegate investment manager for Agilo Master Fund Limited (the "Secured Parties"), under which the Secured Parties agreed to advance up to £15,000,000.00 of secured loans to Newfound NV (the "Secured Loans").
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> [13] Various subsidiaries of Newfound NV, including HVRC, agreed to be guarantors for the secured loans on July 3, 2008. The guarantors, including HVRC, executed various security documents, including a Collateral First Realty Mortgage, wherein the Secured Parties acquired a first, fixed ranking security and charge over all of the personal and real property assets in the various subsidiaries, including HVRC. . . .
>
> [14] On December 5, 2008, HVRC and related entities filed an Assignment in Bankruptcy pursuant to the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3. On the same day, Ernst & Young Inc. ("Ernst & Young") was appointed bankruptcy trustee. The parties agree that the Secured Parties authorized Ernst & Young to sell the assets secured by the above referenced collateral mortgage.
>
> [15] 61839 Newfoundland & Labrador Limited ("61839") was incorporated on February 11, 2010 for the purpose of purchasing the Resort's assets. The shareholders of 61839 are Noton and Oke Consultants Ltd. One of the directors is Kathleen Watton. At all material times, Graham Watton, Q.C. was counsel to both 61839 and Noton.
>
> [16] Between December 23, 2009 and March 11, 2010, Graham Watton on behalf of 61839 negotiated for the purchase of the assets of HVRC and related entities from Ernst & Young and the Secured Parties.

[6] Here, I will take up the narrative. 61839 purchased assigned assets and received an assignment of same on March 11, 2010. Amongst the assigned assets, claims 61839, was the right, title and interest of HVRC in and the right to be paid monies under the PRL Note. As stated, 61839 says the PRL Note was never paid.

[7] Philpott's says the PRL Note was paid. It says that subsequent to its giving the PRL Note to HVRC for Lot 83, HVRC declared and paid dividends to Canex Development Corporation Limited ("Canex"), with the dividends being paid by the issuance of three demand promissory notes issued by HVRC to Canex on August

26, 2006 in the amounts of $900,000, $1,100,000 and $200,000, respectively. Canex, on August 29, 2006, assigned the $1,100,000 and $200,000 notes to Philpott's in return for its acquisition of Philpott's common shares in Canex for cancellation. HVRC was a party to the assignment as borrower on the two assigned notes. Then, also on August 29, 2006, HVRC and Philpott's entered into an Offset and Release Agreement wherein HVRC returned the PRL Note to Philpott's in exchange for the return of the $1,100,00 and $200,000 promissory notes HVRC had issued to Canex. The result of this transaction, says Philpott's, was that Philpott's debt to HVRC under the PRL Note was paid in full. These material facts were pleaded in Philpott's Amended Defence and the affidavit of Rex Philpott was provided to the Court as evidence in support of these pleaded facts.

THE POSITION OF THE PARTIES ON THE SUMMARY TRIAL

[8] As will be discussed, the parties disagreed over the admissibility of the evidence put forward by 61839 in support of the summary trial application.

[9] During submissions, the parties agreed that it was appropriate for the Court to hear the summary trial application. I also agree. In *Brook Construction (2007) Inc. v. North Atlantic Cement and Construction Ltd.*, 2020 NLCA 42, the Court of Appeal discussed the issue of appropriateness to hear a summary trial application. As the parties have agreed, I will not comment further.

[10] At the hearing, 61839 submitted that Philpott's defence depends on the factual issue of whether or not HVRC had actually authorized and issued the alleged dividends to Canex in the first place. 61839 conceded that Philpott's, through the affidavit of Rex Philpott, had established that this issue was a genuine issue for trial. As to the genuine issue, so framed, 61839 submitted that the Court had a sufficient record before it to decide the issue and the Court should decide the issue against Philpott's by finding that HVRC had not authorized and had not issued the dividends to Canex.

[11] 61839 also submitted that even if the Court determined, contrary to its submission, that HVRC had authorized and issued the dividends to Canex, the issue of whether HVRC had the capacity to do so still remained and this issue of capacity was, on reflection, a matter that was too complex for a summary trial and would require evidence from others, including accountants.

[12] During its submissions, Philpott's position was that the record enabled the Court to decide both issues and that the Court should determine the issues against 61839 and dismiss its action.

[13] During the hearing and in its Brief, Philpott's also sought to advance a further defence to the action based on the *Bills of Exchange Act*, R.S.C. 1985, c. B-4. Philpott's sought to claim that on August 29, 2006 it became a holder in due course of the PRL Note under the *Bills of Exchange Act* and to challenge that 61839 had been duly assigned the PRL Note upon which it was suing Philpott's. These defences were not pleaded. The issues that may be dealt with on a summary trial under Rule 17A must fall within the pleadings. Accordingly, whether a defence exists on these bases is not a genuine issue for trial (see *Brook Construction*, paras. 14 – 16, 33, and 119).

FRAMING THE ISSUES

[14] The issues on a summary trial application are determined by the legal principles applicable to the merits of the underlying dispute as pleaded, the parties' positions as to what is and is not in dispute, and the oft-cited principles applicable to Rule 17A applications as set down in *Marco Ltd. v. Newfoundland Processing Ltd. et al* (1995), 130 Nfld. & P.E.I.R. 317, 55 A.C.W.S. (3d) 477 (Nfld. S.C.(T.D.)) at para. 76 and applied and discussed in decisions since.

[15] As regards the legal principles applicable to the merits of the underlying dispute, these include the principles determining which party has the ultimate burden of proof on the merits of the action. The parties did not specifically address the burden in an action on a promissory note.

[16] In actions on a promissory note, all the payee is required to do is produce the note and prove that it was signed by the defendant. It is a matter of defence to be pleaded and proved by the defendant that the note has been discharged by payment or otherwise (*Traders Group Ltd. v. Carroll* (1979), 2 N.S.R. (2d) 321, Carswell 128 (N.S. S.C. (C.A.)), at paras. 130 – 131). There is no dispute that the PRL Note has been produced and that it was duly signed by Philpott's. Therefore, the onus is upon Philpott's to plead and prove that the PRL Note has been discharged by payment or otherwise. As noted, Philpott's has pleaded the material facts in support of this defence.

[17] Thus, the substantive issue on the merits is whether Philpott's has established on the evidence that the PRL Note has been discharged by payment or otherwise. However, in light of the position of the parties on this application, this substantive issue has been further narrowed. 61839's position is that in order for Philpott's to avoid liability under the PRL Note, the Court has to be satisfied that HVRC issued the dividends to Canex. During the hearing, Philpott's also approached the dispute as focusing on the narrow issue of whether HVRC authorized and issued the dividends to Canex. As I have said, the burden of proof on this issue rests with Philpott's.

[18] I turn next to the parties' positions on the applicability of Rule 17A principles. As noted, the parties agree that 61839's application is appropriate for a summary trial application. The parties also agree that the issue of whether HVRC authorized and issued the dividends to Canex is a genuine issue for trial. Both parties also submit that the record before the Court enables it to find the facts necessary to decide that genuine issue for trial and it would not be unjust to do so. It is, of course, for the Court to determine whether the genuine issue for trial identified by the parties can and should be determined on a summary trial application.

[19] The parties are at odds regarding the admissibility of evidence. Dealing with this dispute will involve a significant detour before I can return to the analysis of the summary trial application in light of the evidence found to be admissible.

THE ISSUES TO BE DETERMINED

[20] In light of the foregoing issue framing discussion, I have concluded that the following issues need to be determined:

1. What evidence sought to be introduced by 61839 through the affidavit of Kathleen Watton is admissible?

2. Am I, on the whole of the admissible evidence before the Court, able to find the facts necessary to decide the factual issue of whether HVRC authorized and issued dividends to Canex?

3. If yes, would it be unjust to decide this issue on this summary trial application?

Analysis of Issue 1 – What evidence sought to be introduced by 61839 through the affidavit of Kathleen Watton is admissible?

Background to the Issue

[21] 61839's application for summary trial is supported by the affidavit of Kathleen Watton, director of 61839. Kathleen Watton's affidavit references and attaches 29 documentary exhibits. The exhibits are contained in three bound volumes.

[22] At paragraph 2 of her affidavit, Kathleen Watton deposes:

> 2. That 61839 NL entered into a number of transactions, completed on March 11, 2010, in which it purchased, for money, property, property that included, as I understand it on advice, the right to acquire payment of financial

> obligations due to a company known as Humber Valley Resort Corporation. I have directed, on behalf of 61839 NL, that such obligations be fulfilled on behalf of 61839 NL, including by legal action where necessary and appropriate, including by means of this court action brought by 61839 NL against Philpott's Realty Co. Limited ("PRL").

[23] At paragraph 3 she deposes about a database as follows:

> 3. That 61839 NL acquired on March 11, 2010, amongst other things, a database of electronically stored information portions of which, converted into document form, I enter into Court on this Interlocutory Application within the paragraphs below in this my Affidavit as business records. Other documents, as the case may be, I enter into Court below in this my Affidavit are business records, and other records I have directed to be acquired from government databases for the purpose of, amongst other things, the payment of the financial obligations 61839 NL is entitled to the benefit of.

[24] 61839 in its Brief (at paragraph 68) acknowledges that it ". . . does not have any personal knowledge of the matters in dispute. It has only HVRC's records." Its Brief states, "An affidavit expressing information and belief is the most the applicant could reasonably provide." I note that no discoveries have taken place in this proceeding.

[25] Kathleen Watton next states at paragraph 4 of her affidavit that she has been advised by Graham C. Watton, K.C. and she does verily believe that, with the exception of a copy of one mortgage acquired from the Registry of Deeds, copies of all other documents that she is entering in Court in her affidavit were personally served on Philpott's solicitors on April 18, 2017 and no notice had been given by Philpott's stating that any of the 337 documents in 61839's List of Documents in this legal action were not true copies.

[26] No other substantive statements of fact are made in Kathleen Watton's affidavit. The remaining paragraphs of her affidavit from paragraph 5 to and including paragraph 32 each go on to reference and attach an exhibit to her affidavit.

Categorization of the exhibits

[27] I have attempted to put the various exhibits into categories.

A. Publicly available records and deeds

[28] Certain of the exhibits contain copies of publicly available records and deeds from government registries. These are exhibits 1, 5, 6, 22, 23, 24 and 27. Philpott's consents to the admission into evidence of documents that have been registered in a public registry. A brief description of each of the exhibits in this category follows:

- Exhibit 1 consists of corporate documentation pertaining to HVRC obtained from the Registry of Companies and Deeds.

- Exhibit 5 consists of a copy of a deed dated March 11, 2010 of various realty from Ernst & Young Inc. as Trustee of the Estates of HVRC and Newfoundland Travel and Tourism Corporation into 61839.

- Exhibit 6 is a copy of an Assignment made March 11, 2020 by and between Equity Trust Trustee & Agency Services B.V. as trustee for the benefit of Jaye McGivern and Agilo Limited acting as delegate investment manager for Agilo Master Fund Limited and 61839 which is registered at the Registry of Deeds as Registration No. 383864.

- Exhibit 22 is a copy of a deed dated July 1, 2002 from HVRC unto Newfoundland Travel and Tourism Corporation, registered in the Registry of Deeds as Registration No. 258186.

- Exhibit 23 is a copy of a mortgage dated January 18, 2006 between HVRC as Mortgagor and Sonya Suzanne Jones as Mortgagee for

$2,000,000 USD which is registered in the Registry of Deeds as Registration No. 108565.

- Exhibit 24 is a copy of a mortgage dated June 16, 2006 between HVRC as Mortgagor and Nettec PLC as the Lender, registered in the Registry of Deeds as Registration No. 132319.

- Exhibit 27 consists of corporate filings of HVRC, Newfoundland Travel and Tourism Corporation and Humber Valley Wireless Communications Inc. at the Registry of Companies of March 30, 2006.

B. Non-registered instruments to which 61839 is a party

[29] One of the exhibits, exhibit 7, consists of a non-registered instrument to which 61839 is a party. A brief description of this exhibit follows:

- Exhibit 7 is a copy of a Bill of Sale dated March 11, 2010 between Ernst & Young as Trustee of the Estates of HVRC and Humber Valley Construction Limited as seller and 61839 as buyer.

C. Instruments to which Philpott's is a party

[30] These are exhibits 8 and 29. A brief description of each follows:

- Exhibit 8 contains a copy of a Promissory Note for $1,300,000 from Promisor, Philpott's and Promisee, HVRC dated December 2005. It also contains, among other things, draft unsigned copies of a Promissory Note for $1,300,000 from Promisor, Philpott's and Promisee, HVRC.

- Exhibit 29 is another copy of the Promissory Note for $1,300,000 from Promisor, Philpott's, to HVRC, Promisee dated December 2005.

D. HVRC resolutions, by-laws, et cetera

[31] Certain of the exhibits contain corporate resolutions, by-laws and statements and reports of HVRC. These are exhibits 12, 14, 19, 20, 21, 25 and 26. A brief description of each of the exhibits in this category follows:

- Exhibit 12 is a copy of an unsigned Resolution of the Board of Directors of HVRC bearing the date August 26, 2006.

- Exhibit 14 is a copy of a Resolution of Shareholders of HVRC dated June 16, 2006, signed by Keith Smith on behalf of Newfound Developers Company Limited and Brian Dobbin on behalf of Canex Development Corporation Limited.

- Exhibit 19 is a copy of By-Law No. 1 of HVRC dated March 22, 1999, signed by an unidentified person as Director.

- Exhibit 20 is a copy of an Officer's Certificate of HVRC signed by Keith Smith dated September 1, 2006 to Laurmax Developments Inc. and French, Noseworthy & Associates.

- Exhibit 21 contains a copy of the Auditor's Report to shareholders of HVRC as at December 31, 2004, dated September 12, 2005, and a copy of the Auditor's Report at December 31, 2005, dated June 20, 2006 – prepared by Grant Thornton LLP.

- Exhibit 25 is a copy of a Resolution of Directors of HVRC effective June 16, 2006, signed by Brian Dobbin, Rex Philpott, Derrick White and Keith Smith.

- Exhibit 26 is a copy of a Concurrent Resolution of Shareholders and Directors of HVRC dated July 21, 2005 and signed by Brian Dobbin.

E. Agreements amongst entities other than the parties to this proceeding

[32] A number of exhibits contain copies of agreements made between or amongst entities other than the parties. These are exhibits 2, 4, 16 and 18. A brief description follows:

- Exhibit 2 is a copy of an agreement dated October 7, 2003 amongst Newfound Developers Company Limited, HVRC and Derrick White Law.

- Exhibit 4 is a copy of a General Security Agreement dated July 3, 2008 between HVRC as Security Provider and Equity Trust Trustee & Agency Services B.V. as trustee for the benefit of the secured parties.

- Exhibit 16 is a copy of a Service Agreement dated September 11, 2006 between Justin Robert Ladha and Newfound Canada Inc.

- Exhibit 18 is a draft agreement dated August 22, 2006 amongst several entities for the sale and purchase of the extra share capital of Newfound Canada Inc.

F. Communications between Noton and Philpott's

[33] Certain of the exhibits contain communication between Noton and Rex Philpott/Philpott's. These are exhibits 10 and 11. Philpott's consented to the admission of these exhibits. A brief description follows:

- Exhibit 10 consists of correspondence from Philpott's solicitor to Graham Watton, Q.C. dated April 13, 2010; and

- Exhibit 11 consists of correspondence from Graham Watton, Q.C. to Rex Philpott dated April 9, 2010.

G. Financial data

[34] Exhibit 15 consists of a financial spreadsheet for an unnamed entity.

H. Emails

[35] Certain of the exhibits contain copies of email communications between or amongst HVRC representatives as well as communications between HVRC representatives and others. I set the following out to give a sense of the breadth of communications 61839 seeks to admit into evidence. These are exhibits 3, 8, 9, 13, 17 and 28:

- Exhibit 3 is an email dated November 21, 2006 from lawyer, Don Anthony, to other lawyers and persons.

- Exhibit 8 consists of:

— an email from Keith Smith sent June 8, 2006 to Derrick White, Dale Park, Charlene Woodford, Gary Parsons, J. Sharpe and copied to others;

— an email from Don Anthony sent June 8, 2006 to Derrick White and Keith Smith;

— an email from Keith Smith sent June 8, 2006 to Don Anthony and Derrick White;

— an email from Don Anthony sent June 8, 2006 to Keith Smith;

— an email from Keith Smith sent to Allison Saunders and Philpott's on June 22, 2006;

— an email from Allison Saunders to Keith Smith on June 22, 2006;

— an email from Keith Smith sent to Don Anthony on June 22, 2006;

— an email from Derrick White sent to Don Anthony on June 22, 2006;

— an email from Derrick White to Keith Smith on June 22, 2006;

— an email from Don Anthony sent to George Whey on June 23, 2006;

— an email from George Whey to Don Anthony sent on June 23, 2006;

— an email from Don Anthony to Justin Ladha and Keith Smith sent June 23, 2006;

— an email from Justin Ladha to Don Anthony dated June 23, 2006;

— an email from Derrick White to Don Anthony dated June 8, 2006;

— an email from Derrick White to Keith Smith dated June 8, 2006;

— an email from Keith Smith to Don Anthony dated June 8, 2006;

— an email from Derrick White to Dale Park, Keith Smith, Charlene Woodford, Gary Parks and J. Sharpe dated June 9, 2006;

— an email from Keith Smith to Derrick White dated June 21, 2006;

— an email from Don Anthony to Justin Ladha dated June 23, 2006;

— an email from Janice Pridie to Don Anthony dated June 23, 2006;

— an email from Bill Budgell to Keith Smith, Gary Fogler, Connie Dolomount and Mitchell Thaw dated June 2, 2006;

— an email from Janice Pridie to Don Anthony dated June 23, 2006;

— an email from Justin Ladha to Jeff Sharpe, Dale Park, Derrick White and Keith Smith dated June 19, 2006;

— an email from Don Anthony to Derrick White and Keith Smith dated June 22, 2006;

— an email from Keith Smith to Don Anthony dated June 22, 2006; and

— an email from Terri McCarthy to Don Anthony dated June 22, 2006.

- Exhibit 9 consists of:

— an unsigned letter from Keith Smith dated June 23, 2006;

— an email from Keith Smith to Justin Ladha dated June 25, 2006;

— an email from Ken Young to Terri McCarthy dated August 27, 2006;

— an email from Ken Young to Derrick White, Dale Park, Keith Smith and Justin Ladha dated May 11, 2006;

— an email from Derrick White to Ken Young, Dale Park, Keith Smith and Justin Ladha dated May 12, 2006;

— an email from Connie Dolomount to Gary Fogler dated June 2, 2006;

— an email from Derrick White to Ken Young and Don Anthony dated February 9, 2007;

— correspondence from Kenneth J. Young to Rex Philpott c/o George Whey dated April 13, 2007;

— an email from Ken Young to Terri McCarthy dated August 27, 2006;

- Exhibit 13, in part, consists of emails from Justin Ladha to Derrick White dated November 5 and November 9, 2006.

- Exhibit 17 is correspondence from Nettec plc of London, U.K. to Brian Dobbin and William Thompson dated February 16, 2006.

- Exhibit 28 consists of:

  — an email from Derrick White to Ken Young and Don Anthony dated February 9, 2007;

  — an email from Derrick White to Brian Dobbin dated July 6, 2006;

  — an email from Bill Budgell to Gary Fogler dated July 2006;

  — an email from Derrick White to Ken Young and Don Anthony dated February 9, 2007;

  — an email from Don Anthony to Dale Park dated January 18, 2007;

  — an email from Keith Smith to Dale Park dated January 18, 2007;

  — an email from Derrick White to Ken Young dated February 9, 2007;

  — an email from Dale Park to Keith Smith dated January 18, 2007; and

— an email from Derrick White to Ken Young and Don Anthony dated February 9, 2007.

Position of 61839 on admissibility

[36] In support of the admissibility of the exhibits, 61839 makes several arguments.

[37] First, it submits that Rule 17A summary trial applications dispense with many of the formalities of proof and that if they did not, the resultant proceedings would be as lengthy and expensive as conventional trials. In support of this submission, 61839 refers to Rule 17A.02(4) of the *Rules of the Supreme Court, 1986,* S.N.L. 1986, c. 42, Sch. D, which allows affidavits to introduce evidence based on the affiant's information and belief. Rule 17A.02(4) states:

> (4) An affidavit for use on an application under this rule may be made on information and belief as provided in rule 48.02.(1), but on the hearing of the application, an adverse inference may be drawn, if appropriate, from the failure of a party to provide the evidence of persons having personal knowledge of contested facts.

[38] Rule 48.02 states:

> 48.02. (1) An affidavit used on an application may contain statements as to the belief of the deponent with the sources and grounds thereof.
>
> (2) Unless the Court otherwise orders, an affidavit used on a trial shall contain only such facts as the deponent is able of his or her own knowledge to prove.

[39] 61839 submits that the right to introduce evidence on information and belief is subject to three limitations that it says it satisfies.

[40] The first limitation is the deponent must provide the sources and grounds for their belief. 61839 cites Rule 48.02(1) which states, "An affidavit used on an application may contain statements as to the belief of the deponent with the sources and grounds thereof." 61839 submits that Kathleen Watton has explained the sources of the documents and the grounds for her belief in them.

[41] The second limitation, says 61839, is that the Court may draw an adverse inference if a party fails to provide the evidence of persons having personal knowledge of contested facts. 61839 in this regard again refers to Rule 17A.02(4). 61839 states that it does not have any personal knowledge of the matters in dispute. It has only HVRC's records. It says that an affidavit expressing information and belief is the most 61839 can reasonably provide. Accordingly, 61839 argues that there is no basis for drawing an adverse inference against it.

[42] The third limitation, according to 61839, is that the Court will reject evidence when the record shows the evidence will be inadmissible at trial. 61839 cites *Compton v. Toyota Canada Inc.*, 2019 NLCA 79 as being an example of a case where the Court refused to consider opinion evidence that would be inadmissible at trial. 61839 states there is no reason to doubt that the documents will be admissible at trial. 61839 submits in its Brief that "[M]any of the documents are admissible as business records, party admissions, and under the principled approach to hearsay." It says, at trial, HVRC's correspondence and records (exhibits 1 - 3, 8, 9, 12 – 16 and 19 – 29), including the documents associated with the takeover of HVRC (exhibits 17 and 18), can be proved through the evidence of HVRC's principals and Philpott's advisors.

[43] 61839 also submits that Philpott's is not entitled to deny the authenticity of any of the documents or their meaning. 61839 states that the documents in question were listed in its List of Documents and that pursuant to Rule 32.04 a party receiving a list of documents, unless it denies same in a notice, shall be deemed to admit that any documents listed as in the possession, custody or control as a copy is a true copy and any document described as an original document is an original and were printed, written, signed or executed as it purports to have been.

[44] 61839 further states that Philpott's principal, Rex Philpott, in his affidavit did not object to the admissibility, authenticity or significance of any of the documents.

[45] Next, 61839 submits that all of the exhibits objected to were within the knowledge of Philpott's advisors, Derrick White Law Office and Price Waterhouse Coopers, neither of whom filed an affidavit on the application.

[46] Finally, 61839 submits that the Court of Appeal's decision in *Noton* is a binding and indistinguishable precedent. 61839 states that in *Noton*, Philpott's objected to the admissibility of HVRC documentation from the same electronic database based on Kathleen Watton's affidavit. 61839 argues that while the summary trial in *Noton* was dismissed because it raised complex and intertwined questions about fraud and good faith, the applications judge accepted that the applicant had put forward an appropriate evidentiary basis for its argument and the Court of Appeal upheld him.

Position of Philpott's on admissibility

[47] Philpott's counters 61839's assertion that Kathleen Watton's affidavit satisfied the requirement that it be based on information and belief and that it provided the sources and grounds for the belief. Philpott's states that 61839 has acknowledged that it does not have any personal knowledge of the matters in dispute and that it only has HVRC's records. This acknowledgment recognizes, says Philpott's, that neither Kathleen Watton nor her husband, Graham Watton, on whom she relies for her information and belief, has any personal knowledge of the matters in dispute. In essence, the situation is a deponent without personal knowledge grounding her sources and grounds for belief in another person who, like the deponent, lacks any personal knowledge about the matters in dispute.

[48] Philpott's submits that Kathleen Watton's affidavit and the exhibits attached can only be received into evidence in this proceeding if it satisfies admission as business records which would allow their admission as an exception to the hearsay rule.

[49] Philpott's rejects 61839's argument that the challenged documentation will be admissible at trial and therefore must be admissible for the summary trial process. Philpott's submits that these purported business records will not be admissible at a conventional trial without proper proof of their authenticity.

[50] Philpott's submits that the onus rests with 61839 to prove that the challenged documents are business records and therefore qualify as an exception to the hearsay rule and are admissible. Philpott's says that it is not for it to prove that the purported business records do *not* constitute business records. Philpott's submits that 61839 has offered no proof that the documents are business records that qualify as an exception to the hearsay rule. According to Philpott's, 61839 has simply obtained access to an electronic database, which is not proof of business records.

[51] Philpott's submits that the admissibility of business records in Newfoundland and Labrador civil matters is governed by common law. Philpott's cites the decision of Fowler, J. in *Labrador Community Development Corp. v. Goose Bay Lumber Ltd.*, 2005 NLTD 151.

[52] Philpott's submits that a pre-condition to admissibility is some "guarantee of reliability" but 61839 has not offered anything to show why any records relating to HVRC are admissible. The position of Philpott's is that each document upon which 61839 intends to rely will need to be individually proven.

[53] Philpott's submits that one of the conditions to admissibility of the records is that they were made by a disinterested person. Philpott's states that records of HVRC have been in possession of 61839 since March 11, 2010 and 61839 has provided no assurances that integrity of the records kept by HVRC, if such existed, has been maintained.

[54] Philpott's also takes issue with 61839's assertion that it has not objected to the authenticity or completeness of the documents, which is said to be within the means of Rex Philpott to do as Philpott's principal, as he is said to have had personal knowledge of many of the exhibits as a Director of HVRC and Canex. To this,

Philpott's submits that it is not for Mr. Philpott on behalf of Philpott's to raise admissibility issues in his affidavit. Philpott's states that its objection to the purported business records being admitted into evidence is clearly an issue of law which it was appropriate for Philpott's to deal with in its Memorandum of Fact and Law filed under Rule 17A.02(6).

[55] In addition, Philpott's takes issue with 61839's assertion that it was for Philpott's to produce affidavits from its advisors, Derrick White Law and PricewaterhouseCoopers, who were said to have personal knowledge of the exhibits, if Philpott's wished to deny the authenticity or meaning of the documents. Philpott's states that Rex Philpott has been removed from the operation of HVRC since at the latest November 2006 and the suggestion that Mr. Philpott had influence or control over these persons or others previously with HVRC and could have compelled affidavits from them is without foundation. Philpott's says these individuals would have been as available to 61839 as they were to Philpott's to offer evidence for the summary trial.

The evidentiary principles applicable to the admission of the exhibits

[56] Before moving to the principles of evidence applicable to the case, I will first deal with 61839's submission that the Court of Appeal's decision in *Noton* is a binding and indistinguishable precedent. I reject this submission. Neither the applications judge nor the Court of Appeal ruled on or dealt with the admissibility of the exhibits attached to the affidavits of Kathleen Watton and Graham Watton that formed the evidence in that case.

[57] In the application before me, admissibility of evidence is in issue. As Fowler, J. stated in *Labrador Community Development Corp.* at para. 53:

> [53] When a party to an action intends to introduce business records into court, in the absence of any admission of documents or agreement among the parties, the common law dictates that the documents must still be proven to meet the necessary standard of admissibility. This is so, notwithstanding S. 32.04(1) of the *Rules of the Supreme Court* of this Province.

[58] I would add that Rule 32.04(3) expressly provides that nothing in Rule 32.04(1) "shall be deemed to prejudice the right of a party to object to the admissibility in evidence of any document."

[59] The principles I will discuss are:

- relevance;
- authentication;
- hearsay;
- the business records exception;
- principled approach to the admissibility of hearsay evidence; and
- party admissions.

Relevance

[60] To be admissible, evidence must be relevant to the facts in issue and not subject to exclusion under any other rule of law or policy. Evidence is relevant when it has some tendency as a matter of logic and human experience to make the proposition for which it is advanced more likely than the proposition would appear to be in the absence of that evidence (*R. v. J.-L.J.*, [2000] 2 S.C.R. 600, 148 C.C.C. (3d) 487, para. 47). The pleadings establish the facts in issue in a civil case. Evidence that is unrelated to the issues as disclosed in the pleadings is not admissible (*Beazley v. Suzuki Motor Corporation*, 2010 BCSC 681, paras. 15 – 16).

[61] While 61839 did not specifically address whether the various exhibits it seeks to have admitted into evidence are all relevant to the facts in issue, Philpott's did not take issue with the admissibility of the exhibits on the grounds of relevance.

Authentication

[62] Before any document can be admitted into evidence it must be authenticated by the party who wishes to admit and rely upon it (*R. v. Schwartz*, [1988] 2 S.C.R. 443, at 476).

[63] In *R. v. C.B.*, 2019 ONCA 380, Watt, J.A. stated at paras. 64 – 66 as follows:

> [64] The requirement of authentication applies to various kinds of real evidence. Authentication involves a showing by the proponent of the evidence that the thing or item proffered really is what its proponent claims it to be: Kenneth S. Broun, ed., *McCormick on Evidence*, 7th ed., vol. 2 (Thomson Reuters, 2013), at 212, pp. 4-5.
>
> [65] Authentication is the process of convincing a court that a thing matches the claim made about it. In other words, it is what its proponent claims it to be. Authentication is intertwined with relevance: in the absence of authentication, the thing lacks relevance unless it is tendered as bogus. Thus, authentication becomes necessary where the item is tendered as real or documentary evidence.
>
> [66] At common law, authentication requires the introduction of *some* evidence that the item is what it purports to be: *R. v. Donald*, 1958 CanLII 470 (NB CA), [1958] N.B.J. No. 7, 121 C.C.C. 304 (C.A.), at p. 306 C.C.C.; *R. v. Staniforth*, 1979 CanLII 4477 (ON CA), [1979] O.J. No. 1026, 11 C.R. (3d) 84 (C.A.), at p. 89 C.R.; *R. v. Hirsch*, [2017] S.J. No. 59, 2017 SKCA 14, 353 C.C.C. (3d) 230, at para. 18. The requirement is not onerous and may be established by either or both direct and circumstantial evidence.

[64] I am prepared to accept Kathleen Watton's evidence as constituting some evidence that the documents are what she purports them to be. These were found amongst HVRC's documents acquired by 61839. This does not mean that their acceptance as authenticated means that every word in these tendered records are accurate (*K.F. v. J.F.*, 2022 NLCA 33, para. 81).

Hearsay

[65] In *Ault v. Canada (Attorney General)*, 2007 CanLII 55395, 162 A.C.W.S. (3d) 619 (Ont. Sup. Ct.), Justice Aitken said the following:

> 15 An out-of-court statement, whether oral or in writing, will constitute hearsay evidence when (1) it is adduced to prove the truth of its contents, and (2) there is no opportunity for a contemporaneous cross-examination of the declarant. . . .
>
> . . .
>
> 17 A document sought to be admitted in evidence for the truth of its contents is hearsay evidence. This is the case even if the author of the document subsequently testifies, unless the author as witness repeats what was said in the document or adopts it as his or her evidence in court. . . . [Footnotes omitted]

[66] In *R. v. Khelawon*, 2006 SCC 57, Justice Charron stated at para. 38:

> 38 When the witness repeats or adopts an earlier out-of-court statement, in court, under oath or solemn affirmation, of course no hearsay issue arises. The statement itself is not evidence, the testimony is the evidence and it can be tested in the usual way by observing the witness and subjecting him or her to cross-examination. The hearsay issue does arise, however, when the witness does not repeat or adopt the information contained in the out-of-court statement and the statement itself is tendered for the truth of its contents. . . .

[67] A framework for considering the admissibility of hearsay evidence was set out in *R. v. Mapara*, 2005 SCC 23 at para. 15:

> 15 . . .
>
> > (a) Hearsay evidence is presumptively inadmissible unless it falls under an exception to the hearsay rule. The traditional exceptions to the hearsay rule remain presumptively in place.
> >
> > (b) A hearsay exception can be challenged to determine whether it is supported by indicia of necessity and reliability, required by the principled

> approach. The exception can be modified as necessary to bring it into compliance.
>
> (c) In "rare cases", evidence falling within an existing exception may be excluded because the indicia of necessity and reliability are lacking in the particular circumstances of the case.
>
> (d) If hearsay evidence does not fall under a hearsay exception, it may still be admitted if indicia of reliability and necessity are established on a *voir dire*.

[68] Utilizing the *Mapara* framework, I will shortly consider the admissibility of the hearsay evidence by first determining whether the evidence falls under a traditional exception to the hearsay rule. In 61839's Brief, it submitted that the documents were admissible as business records and as party admissions.

The business records exception

[69] In Newfoundland and Labrador, the admissibility of business records in civil cases is governed by the common law (*Labrador Community Development Corp.*, para. 21).

[70] At common law, a record is admissible as a business record if it contains:

- an original entry;
- made contemporaneously;
- in the routine of business;

- by a recorder with personal knowledge of the thing recorded as a result of having done or observed or formulated it;

- by a recorder who had a duty to make the record; and

- by a recorder who had no motive to misrepresent.

[71] The original entry need not have been made personally by a recorder with the knowledge of the thing recorded; it is sufficient if the record is functioning in the usual and ordinary course of a system in effect for the preparation of business records (*Labrador Community Development Corp.*, para. 34 and *R. v. Monkhouse*, 1987 ABCA 227).

The principled approach to the admissibility of hearsay evidence

[72] Under the principled approach, evidence will be admitted as an exception to the hearsay rule when the twin principles of necessity and reliability are met. This is subject to the judge's discretion to exclude hearsay evidence when its probative value is outweighed by its prejudicial effect (*R. v. Khelawon*, paras. 47 and 49).

Necessity

[73] As to the criterion of necessity, in *R. v. Khelawon* (para. 49), the Supreme Court of Canada stated it:

> 49 . . . is founded on society's interest in getting at the truth. Because it is not always possible to meet the optimal test of contemporaneous cross-examination, rather than simply losing the value of the evidence, it becomes necessary in the interests of justice to consider whether it should nonetheless be admitted in its hearsay form.
> . . .

[74] In assessing what necessity requires, (now Justice) David Paciocco, in "*The Principled Use of Hearsay in Civil Cases: A Technical Guide to Avoiding Technicality*" (2008) Vol. 87:2 Canadian Bar Review 277, observed that the necessity requirement "reflects pragmatic resignation".

[75] The learned author states (p. 290 – 291):

> [W]hen it comes to applying the necessity requirement, however, it is best to look at the other side of the coin and focus on why we exclude hearsay evidence. The reason of course is that the admission of hearsay is generally a compromise because it is typically an inferior kind of proof. . . . understood in this way, the "necessity" requirement is in substance no more than a best evidence requirement. As Charron, J. explained in *Couture*, 'The criterion of necessity is intended to ensure that the evidence presented to the court be in the best available form, usually by calling the maker of the statement'. . ."

[76] David Paciocco states, "Any references in the case law to "necessity" have to be read in light of the standard admonition that "necessity" means "reasonably necessary." which "imposes a best efforts requirement." He states ". . . a party cannot create their own "necessity" by failing to take reasonable steps to preserve evidence that was available." He cites McLachlin, J. in *R. v. F.(W.J.)*, [1999] 3 S.C.R. 569 at 588 who remarked "it is a matter of whether on the facts before the trial judge, direct evidence is not forthcoming with reasonable effort."

[77] The author at p. 291 states: "Taken together, the "best evidence" and "reasonable efforts" components of the necessity requirement mean that if the party calling the hearsay evidence can reasonably offer a better brand of proof in place of the hearsay that is presented, it should do so, failing which the necessity requirement will not be met."

[78] The most obvious form of necessity arises from the unavailability of the witness, with the paradigm case being the physically unavailable witness. But legal unavailability will also do. Paciocco states the requirement of necessity can also be met in cases of impracticability falling short of full necessity. He states at p. 293:

> In effect, if it would not be unreasonable in the circumstances to expect a party to secure original evidence, even though it would be more expedient or convenient not to have to, the necessity requirement will not be met. On the other hand, if it would impose an unfair or unrealistic burden or if it would be pointless to expect a party to secure a hypothetically available witness, the required will be satisfied.
>
> "Expedience and convenience" are, in my opinion, criteria according to which the civil context of the case can and should impact on the ultimate decision. If requiring the "best evidence" would be prohibitively expensive or burdensome given the role the evidence would play in the case, it may not be reasonable to expect the party to produce it. . . .

Reliability

[79] Turning to the criterion of reliability, the Court in *R. v. Khelawon* (para. 49) stated this was about ensuring the integrity of the trial process. The hearsay evidence, while it may be needed, is not admissible unless it is sufficiently reliable to overcome the dangers arising from the difficulty of testing it.

[80] The Court stated (para. 49) that generally the reliability requirement will be met on the basis of two different grounds, neither of which excludes consideration of the other. These are:

- In cases where because of the circumstances in which the hearsay statement came about, the contents of the statement may be so reliable that contemporaneous cross-examination of the declarant would add little, if anything, to the process; and

- In cases where the evidence may not be so cogent but the circumstances will allow for sufficient testing of the evidence by means other than by contemporaneous cross-examination.

[81] Necessity and reliability work in tandem such that if the reliability of the evidence is sufficiently established, the necessity requirement can be reduced (*R. v.*

Baldree, 2013 SCC 35, para. 72; *R. v. Furey*, 2022 SCC 52, para. 3). Even if the two criterion are met, the trial judge has the discretion to exclude hearsay when its probative value is outweighed by its prejudicial effect.

[82] To determine whether a hearsay statement is admissible, I am only to assess the statement's threshold reliability. This is distinct from the assessment of ultimate reliability where I am to determine whether and to what degree the statement should be believed and thus relied on to decide the issues in the case (*R. v. Bradshaw*, 2017 SCC 35, para. 39). Threshold reliability is established when the hearsay is sufficiently reliable to overcome the dangers arising from the difficulty of testing it (*R. v. Khelawon*, para. 49).

[83] In assessing threshold reliability, the trial judge must identify the specific hearsay dangers presented by the hearsay statement and consider any means of overcoming them (*R. v. Khelawon*, paras. 4 and 49). According to the Supreme Court of Canada in *R. v. Bradshaw* (para. 26), "The dangers relate to the difficulties of assessing the declarant's perception, memory, narration, or sincerity, and should be defined with precision to permit a realistic evaluation of whether they have been overcome."

[84] In *R. v. Bradshaw*, the Supreme Court discussed how threshold reliability can be established by showing procedural and substantive reliability:

> 27 The hearsay dangers can be overcome and threshold reliability can be established by showing that (1) there are adequate substitutes for testing truth and accuracy (procedural reliability) or (2) there are sufficient circumstantial or evidentiary guarantees that the statement is inherently trustworthy (substantive reliability) (*Khelawon*, at paras. 61-63; *Youvarajah*, at para. 30).
>
> 28 *Procedural* reliability is established when "there are adequate substitutes for testing the evidence", given that the declarant has not "state[d] the evidence in court, under oath, and under the scrutiny of contemporaneous cross-examination" (*Khelawon*, at para. 63). These substitutes must provide a satisfactory basis for the trier of fact to rationally evaluate the truth and accuracy of the hearsay statement (*Khelawon*, at para. 76; *Hawkins*, at para. 75; *Youvarajah*, at para. 36). Substitutes for traditional safeguards include a video recording of the statement, the presence of an oath, and a warning about the consequences of lying (*B. (K.G.)*, at pp. 795-

96). However, some form of cross-examination of the declarant, such as preliminary inquiry testimony (*Hawkins*) or cross-examination of a recanting witness at trial (*B. (K.G.)*; *R. v. U. (F.J.)*, [1995] 3 S.C.R. 764), is usually required (*R. v. Couture*, 2007 SCC 28, [2007] 2 S.C.R. 517, at paras. 92 and 95). In this respect, I disagree with the Court of Appeal's categorical assertion that safeguards relevant to assessing procedural reliability are only "those in place when the statement is taken" (para. 30). Some safeguards imposed at trial, such as cross-examination of a [page881] recanting witness before the trier of fact, may provide a satisfactory basis for testing the evidence.

. . .

30 A hearsay statement is also admissible if *substantive* reliability is established, that is, if the statement is inherently trustworthy (*Youvarajah*, at para. 30; *R. v. Smith*, [1992] 2 S.C.R. 915, at p. 929). To determine whether the statement is inherently trustworthy, the trial judge can consider the circumstances in which it was made and evidence (if any) that corroborates or conflicts with the statement (*Khelawon*, at paras. 4, 62 and 94-100; *R. v. Blackman*, 2008 SCC 37, [2008] 2 S.C.R. 298, at para. 55).

31 While the standard for substantive reliability is high, guarantee "as the word is used in the phrase 'circumstantial guarantee of trustworthiness', does not require that reliability be established with absolute certainty" (*Smith*, at p. 930). Rather, the trial judge must be satisfied that the statement is "so reliable that contemporaneous cross-examination of the declarant would add little if anything to the process" (*Khelawon*, at para. 49). The level of certainty required has been articulated in different ways throughout this Court's jurisprudence. Substantive [page882] reliability is established when the statement "is made under circumstances which substantially negate the possibility that the declarant was untruthful or mistaken" (*Smith*, at p. 933); "under such circumstances that even a sceptical caution would look upon it as trustworthy" (*Khelawon*, at para. 62, citing Wigmore, at p. 154); when the statement is so reliable that it is "unlikely to change under cross-examination" (*Khelawon*, at para. 107; *Smith*, at p. 937); when "there is no real concern about whether the statement is true or not because of the circumstances in which it came about" (*Khelawon*, at para. 62); when the only likely explanation is that the statement is true (*U. (F.J.)*, at para. 40).

32 These two approaches to establishing threshold reliability may work in tandem. Procedural reliability and substantive reliability are not mutually exclusive (*Khelawon*, at para. 65) and "factors relevant to one can complement the other" (*Couture*, at para. 80). That said, the threshold reliability standard always remains high - the statement must be sufficiently reliable to overcome the specific hearsay dangers it presents (*Khelawon*, at para. 49). For example, in *U. (F.J.)*, where the Court drew on elements of substantive and procedural reliability to justify the admission of a hearsay statement, both cross-examination of the recanting witness

> and corroborative evidence were required to meet threshold reliability, though neither on its own would have sufficed (see also *Blackman*, at paras. 37-52). I know of no other example from this Court's jurisprudence of substantive and procedural reliability complementing each other to justify the admission of a hearsay statement. Great care must be taken to ensure that this combined approach does not lead to the admission of statements despite insufficient procedural safeguards and guarantees of inherent trustworthiness to overcome the hearsay dangers.

Party admissions

[85] Party admissions include any acts or words of a party offered as evidence against that party. Party admissions fall within an existing exception to the hearsay rule. The common law justifies allowing party admissions into evidence on the basis that a party cannot complain of the unreliability of his or her own statements (*R. v. Schneider*, 2022 SCC 34, paras. 52 and 53).

[86] Except in rare cases, as referenced in *R. v. Mapara* at para. 15, where judges retain discretion to exclude any hearsay evidence on the basis that it is unreliable or unnecessary, party admissions are admissible without reference to necessity and reliability (*R. v. Schneider*, para. 55).

Determinations as to admissibility of the exhibits

[87] With these principles in mind, I turn to the admissibility of the various exhibits.

Documents admissible by consent

[88] Philpott's consented to the admissibility of any document bearing the stamp of a public registry. Accordingly, by consent, the following exhibits bearing registry stamps are admissible: exhibits 1, 5, 6, 22, 23, 24 and 27.

[89] Also admissible by consent are exhibits 10 and 11, being correspondence between the parties or their counsel.

Documents admissible as party admissions

[90] The following documentation was signed on behalf of Philpott's and are admissible as party admissions: document identified as Tab 337 of exhibit 8 and exhibit 29.

Instruments to which 61839 is a party

[91] Exhibit 7 to Kathleen Watton's affidavit purports to be a true copy of a Bill of Sale between Ernst & Young as bankruptcy trustee of companies, including HVRC, to 61839.

[92] As previously noted, at paragraph 2 of her affidavit, Kathleen Watton deposed that 61839, of which she is a corporate director, entered into a number of transactions which were completed on March 11, 2010 in which it acquired, for money, property including the right to acquire payment of financial obligations due to HVRC.

[93] This is a document that is being placed before the Court by a director of 61839 pertaining to 61839's purchase of HVRC's property. Kathleen Watton was available for cross-examination, including on this exhibit. Exhibit 7 is admissible.

Exhibits that contain corporate resolutions, by-laws and statements of HVRC and financial spreadsheet

[94] 61839, in proffering these documents as records under the business records exception, is in essence telling the Court that upon their admission they are to be taken as evidence of an act, transaction or event. To make that claim, a proper

groundwork that meets the common law requirement for admissibility of business records must be laid. There is no evidence before the Court as to the circumstances under which these records were made. In the absence of such evidence, I have no basis upon which I can conclude that the proffered records meet the common law test applicable to the business records exception to hearsay.

[95] Turning to the principled approach to the admissibility of hearsay, the criterion of necessity has not been satisfied. Individuals with direct involvement with the creation and storage of these documents, being the former officers and directors of HVRC, were not examined at discovery. Had they been, their evidence under oath could have been presented as evidence on this application under Rule 17A.02(c). I am not satisfied that 61839 used best reasonable efforts to obtain this evidence. While it may be more expedient or convenient for 61839 not to have to secure the original evidence in relation to these documents, that is not the test for necessity.

[96] Nor can I conclude that the contents of these out of court written statements, because of the circumstances under which they came about, are so reliable that cross-examination of their declarants will add little, if anything, to the summary trial process. The reason for this is simple: there is no evidence as to how these various documents came about.

[97] Accordingly, I conclude that exhibits 12, 14, 15, 19, 20, 21, 25 and 26 are inadmissible.

Exhibits that contain copies of agreements made between or amongst entities other than 61839

[98] Applying the common law business records exception to hearsay, again, there is no evidence before the Court as to the circumstances under which these records were made. In the absence of such evidence, I have no basis upon which I can conclude that the proffered records meet the test applicable to the business records exception to hearsay.

[99] Turning to the principled approach, again for similar reasons as given in the previous section, I am unable to conclude that exhibits 2, 4, 16 and 18 satisfy the test for admission.

Exhibits containing email communications between or amongst individuals other than 61839's representatives

[100] There is no evidence before me as to the circumstances under which these records were made. In the absence of such evidence, I have no basis upon which I can conclude that the proffered records meet the test applicable to the business records exception to hearsay.

[101] The request to admit numerous emails and email strings into evidence by merely attaching them as exhibits to the affidavit of Kathleen Watton is denied. There is no evidence before me to establish that any of the proffered emails were records that had to be made or were made in the usual and ordinary course of business (*Airia Brands Inc. v. Air Canada*, 2011 ONSC 4003, para. 20).

[102] I cannot conclude that the contents of those emails are so reliable that cross-examination of their declarants will add little to the trial process. Nor is necessity made out, for similar reasons as given previously.

[103] Accordingly, I rule that subject to my earlier ruling as to the admissibility of document tab 337 of exhibit 8, the remainder of exhibit 8 and exhibits 3, 9, 13, 17 and 28 are inadmissible.

61839's reliance upon Rule 17A.02(4) for admissibility of documents

[104] Before concluding the discussion on admissibility, I will address 61839's submission that Rule 17A.02(4) permits the receipt of the hearsay evidence proffered

in this case on the basis that Rule refers to Rule 48.01(1) which permits the use of an affidavit that contains statements as to the belief of the deponent with the source and grounds. No authorities were cited by 61839 that discussed this matter. Nor did I find a discussion of the matter by our courts. I disagree with 61839's submissions.

[105] In *Drummond v. Cadillac Fairview Corporation Limited*, 2019 ONCA 447, the Ontario Court of Appeal discussed the use of hearsay evidence on summary judgment motions. Rule 20.02(1) of Ontario's Rules of Civil Procedure allows affidavits made on information and belief providing the affidavit specifies the source of and fact of the belief. At para. 21, the Court of Appeal stated:

> [21] The principles governing the admissibility of evidence on a summary judgment motion are the same as those that apply at trial, save for the limited exception of permitting an affidavit made on information and belief found in r. 20.02(1): *Sanzone v. Schechter*, 2016 ONCA 566, 402 D.L.R. (4th) 135, leave to appeal refused, [2016] S.C.C.A. No. 443, at para. 15. Rule 20.02(1) provides, in part, that "[a]n affidavit for use on a motion for summary judgment may be made on information and belief as provided in subrule 39.01(4)" which, in turn, requires that the affidavit specify "the source of the information and the fact of the belief". However, r. 20.02(1) continues: "[B]ut, on the hearing of the motion, the court may, if appropriate, draw an adverse inference from the failure of a party to provide the evidence of any person having personal knowledge of contested facts."

[106] *Drummond* involved an occupier's liability action against Cadillac Fairview Corporation Limited for damages. The plaintiff, Stephen Drummond, visited the Fairview Mall in Toronto with his fiancée and daughter. While in the mall's food court, he tripped over a skateboard, which a 12-year-old boy had brought into the mall. Cadillac moved for summary judgment dismissing the action. In resisting the motion, Mr. Drummond's affidavit deposed that his daughter had informed him she had seen the owner of the skateboard playing with it with his feet. Mr. Drummond also deposed his fiancée had informed him of conversations she had with the unidentified members of the cleaning staff at the mall. The first cleaner told her that about an hour before the incident, a skateboard had struck her and the board's owner had been seated in the same area as the incident involving Mr. Drummond occurred. The second cleaner told his fiancée that she had seen the skateboarder playing with the skateboard with his foot on the floor of the food court. The motion judge admitted the hearsay from Mr. Drummond's daughter and fiancée for the truth of its contents, relying on Rule 20.02(1), the business records exception and the reliability and

necessity exception to the rule against hearsay. The motion judge granted judgment to Mr. Drummond on liability.

[107] Cadillac's appeal alleged error in the admission of the hearsay evidence. Brown, J.A., with whom Doherty, J.A. and Rouleau, J.A. concurred, at paras. 21 – 30 stated:

> [21] The principles governing the admissibility of evidence on a summary judgment motion are the same as those that apply at trial, save for the limited exception of permitting an affidavit made on information and belief found in r. 20.02(1): *Sanzone v. Schechter*, 2016 ONCA 566, 402 D.L.R. (4th) 135, leave to appeal refused, [2016] S.C.C.A. No. 443, at para. 15. Rule 20.02(1) provides, in part, that "[a]n affidavit for use on a motion for summary judgment may be made on information and belief as provided in subrule 39.01(4)" which, in turn, requires that the affidavit specify "the source of the information and the fact of the belief". However, r. 20.02(1) continues: "[B]ut, on the hearing of the motion, the court may, if appropriate, draw an adverse inference from the failure of a party to provide the evidence of any person having personal knowledge of contested facts."
>
> [22] In *Armstrong v. McCall* (2006), 213 O.A.C. 29 (C.A.), at para. 33, this court expressed strong reservations about using r. 20.02(1) to admit affidavits that assert contested facts on information and belief. That caution regarding the use of hearsay evidence on summary judgment motions in respect of contested facts was repeated recently by this court in *Kawartha-Haliburton Children's Aid Society v. M.W.*, 2019 ONCA 316, at para. 80:
>
> > The court must conduct a careful screening of the evidence to eliminate inadmissible evidence. The court should not give weight to evidence on a summary judgment motion that would be inadmissible at trial.
>
> [23] Although that caution was made in the context of a summary judgment motion in a child protection proceeding, the caution applies equally to the treatment of hearsay evidence that goes to fundamental issues in dispute on a summary judgment motion under the *Rules of Civil Procedure*. As Edwards J. stated in *Mitusev v. General Motors Corp.*, 2014 ONSC 2342, at para. 20: "If the hearsay evidence is on a fundamental aspect of the motion, it is unlikely that the motion judge will decide the motion favourably to the party adducing the hearsay evidence."
>
> [24] If the evidence on information and belief in an affidavit goes to a fundamental contested aspect of the summary judgment motion, the motion judge should first determine whether the evidence would be admissible under the rules governing

admissibility at trial. If the evidence meets those criteria, it is admissible on the motion. If the evidence does not meet the criteria for admissibility at trial, the onus should fall on the party proffering the evidence to justify some expansion of the rules governing admissibility in the context of the motion. For example, there may be cases in which an affidavit complies with r. 20.02(1) and it can be said that the opposing party had a fair chance to challenge the hearsay evidence, even though the evidence might not qualify as admissible hearsay.

[25] The information that Mr. Drummond relayed from his daughter and fiancé went to the heart of the plaintiff's negligence claim against Cadillac Fairview. While the information in Mr. Drummond's affidavit provided by his daughter met the technical requirement of disclosing the source of the information, that from his fiancé did not. The material information from the fiancé was information provided to her by two unnamed members of the cleaning staff about what they had seen the skateboard owner do some time before the incident with Mr. Drummond. In his factum on the summary judgment motion, Mr. Drummond described the two unnamed cleaners as "essential witnesses". The absence of an actual identification of such essential witnesses is a significant consideration in determining whether the evidence is sufficiently reliable to warrant its admissibility under r. 20.02(1).[1]

[26] In his affidavit tendering the hearsay and double-hearsay statements from his daughter and fiancé, Mr. Drummond offered no explanation about why they could not provide their own affidavits on the motion, especially in light of the materiality of the information he attributed to them. Nor did Mr. Drummond explain why he did not tender direct evidence from the members of the cleaning staff, whom he described as "essential witnesses". In his reasons, the motion judge failed address those evidentiary frailties or explain how, given those frailties, any weight could be given to the hearsay statements, even under r. 20.02(1).

[27] Instead, the motion judge concluded, without analysis, that the hearsay evidence would have been admissible pursuant to the business records exception and the reliability and necessity exception to the rule against hearsay: *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787. In admitting the hearsay evidence on those bases, the motion judge committed legal error.

[28] Mr. Summerville's affidavit did not attempt to lay any foundation to admit the unsworn, handwritten statements of the daughter and fiancé under the business records exception. Their handwritten statements patently were not business records.

[29] Nor were the statements by, or the information from, the daughter or fiancé recounted in Mr. Drummond's affidavit admissible under the principled exception to the hearsay rule because there was no evidence about the need to admit that evidence or its reliability.

> [30] The motion judge erred in law by admitting that hearsay evidence for the truth of its contents.
>
> [Emphasis added]

[108] In my view, although Rule 17A permits the use of affidavits made on information and belief, I would respectfully agree with the unanimous panel of the Ontario Court of Appeal in *Drummond* that caution is similarly required regarding the use of hearsay evidence in respect of contested facts and to evidence that goes to fundamental issues in dispute in a summary trial under Rule 17A.

[109] In exercising this caution, my task, as stated in *Drummond*, is to first determine whether the evidence will be admissible under the rules governing admissibility at trial. I have done so in the previous section of this decision. I have found that several documents sought to be admitted are not admissible and therefore would not be admissible under the rules governing admissibility at trial.

[110] In respect of the exhibits that I have held are not admissible under the rules governing admissibility at trial, the onus falls on 61839 to justify some expansion of the rules governing admissibility in the context of the application.

[111] In this case, the context is that Kathleen Watton has grounded her belief as regards the extent and contents of HVRC's documents as recovered from a database, on Graham Watton who, like Kathleen Watton, has no personal knowledge of the matters in dispute. Nor has 61839 explained why it did not seek to tender direct evidence from the person or persons who authored, received or were responsible for maintaining HVRC's records. It is not reasonable, in my view, for the Court to justify an expansion of the rules governing admissibility by placing an onus on Philpott's to challenge the hearsay evidence. Philpott's made no secret of its objection to the proffered evidence. Indeed, Philpott's filed an application on September 27, 2022 objecting to the admissibility of the exhibits attached to Kathleen Watton's Affidavit, which application by agreement of the parties was dealt with as part of the hearing of the summary trial application itself.

Analysis of Issue 2 – Am I, on the whole of the admissible evidence before the Court, able to find the facts necessary to decide the factual issue of whether HVRC authorized and issued dividends to Canex?

[112] I must, as directed by Rule 17A.03(2), determine whether, on the whole of the evidence before the Court, I am able to find the facts necessary to decide the questions of fact and law or whether it would be unjust to decide the issues on the application. The principles I am to apply to this determination are set out as principles 13 and 14 at para. 76 of *Marco*:

> 76 . . .
>
> > 13 . . . In making that determination the court must keep in mind that it is entitled, on a common sense basis, to draw inferences from the evidence and from failure of a party to comply with Rule 17A.02(4) and (5). It does not mean that the chambers judge must nevertheless be satisfied that if the proceeding went through the full trial process the result would inevitably be the same as would be given on summary trial. It simply means that so long as the chambers judge is satisfied that there is a sufficient evidentiary backdrop against which findings of fact can be made and in which there are no material unanswered questions, he or she should be able to adjudicate on the merits.
> >
> > 14. A closed list of factors which the chambers judge must consider in determining this issue cannot be given. The list would obviously include:
> >
> > (a) whether there are conflicts in the evidence which can be resolved by reference to other known facts and whether those facts are themselves proven on the record;
> >
> > (b) whether there are issues of credibility which can be resolved without the necessity of observing the demeanor of the witnesses or of having more elaborate explanation of facts to which they have deposed.
> >
> > (c) whether material evidence from a "principal player" is absent [this is particularly important where the absent evidence is from the applying party's side. It may be less significant where the evidence is absent from the responding party's case, in light of his general obligation to "put his best foot forward"].

> In the end, this determination is a matter of discretion for the trial judge to determine whether he or she is confident that the court has the factual sub stratum necessary to make an informed decision on the merits.

[113] Each of the parties submits that the Court is able to decide this factual issue on the record before it.

[114] To address this issue, I return to the positions of the parties and review the admissible evidence before the Court in support of their positions.

[115] Philpott's has pleaded a detailed defence to 61839's claim that Philpott's is liable to 61839. As referenced in para. 7 of this decision, it has set out a series of transactions that led to its entry into an Offset and Release Agreement with HVRC on August 29, 2006. It was the Offset and Release Agreement, says Philpott's, that resulted in Philpott's debt to HVRC of $1,300,000 being paid in full.

[116] In answer to Philpott's assertion that it paid off the $1,300,000 in the manner set out in its Defence, 61839 denies that:

- HVRC authorized and issued the alleged dividends to Canex; and even if it did,

- HVRC had the capacity to issue the dividends to Canex.

As to the first point, 61839 submits that the August 26, 2006 transaction creating an obligation of $1,300,000 on the part of HVRC to Canex (which Philpott's purports to have the ability to set off against the $1,300,000 it owed HVRC) required a lawful resolution of the Board of Directors of HVRC of that date in order to be effective. 61839 states that the documentation it acquired in the HVRC database does not contain a copy of such a resolution and Philpott's has not produced a resolution and

this lack of evidence constitutes strong circumstantial evidence that the dividends were not issued or authorized.

[117] As to the second point, 61839 submits that HVRC could not legally declare dividends to any of its shareholders on August 26, 2006 because such declaration and payment would have been unlawful by contract given alleged assurances given to parties under a Share Purchase Agreement. The draft and unsigned Share Purchase Agreement, which is attached as exhibit 18 to the affidavit of Kathleen Watton, has been ruled inadmissible. Further, 61839 states that any such declaration and payment of dividends on August 26, 2006 would have been prohibited by s. 76 of the *Corporations Act*, R.S.N.L. 1990, c. C-36 and prohibited by clause 13.01 of HVRC's By-Law No. 1 of March 12, 1999. Section 76 prohibits a corporation from declaring or paying a dividend when there are reasonable grounds for believing that the corporation is or will after the payment be unable to pay its liabilities as they become due or the realizable value of the corporation's assets will be less than the aggregate of its liabilities and stated capital of all classes. By-Law No. 1 of HVRC at exhibit 19 of Kathleen Watton's affidavit has been ruled inadmissible.

[118] In its Brief, 61839 submits that although it denies that HVRC had the capacity to issue the dividend, on reflection, the matter is too complex for a summary trial determination.

[119] As previously discussed, in actions on promissory notes, all the payer is required to do is produce the promissory note and prove that it was signed by the defendant. The onus is upon the defendant to show that the note has been discharged by payment or otherwise.

[120] Accordingly, principle 3(b) as set down at para. 76 in *Marco* applies. This principle is that in cases where the other party has the burden of proof on the merits, that party must put forward an evidentiary base establishing a defence to the claim as defined in the pleadings or tending to show that the other party's claim has no substance to it.

The evidence of Philpott's

[121] In support of its position in its Amended Defence, Philpott's filed an affidavit of Rex Philpott. He is a director of Philpott's. He deposed that the promissory note upon which 61839 sues was issued by Philpott's and was payable to HVRC as consideration for the conveyance by HVRC to Philpott's of Lot 83 of the Humber Valley Resort. His affidavit attached a copy of the deed of conveyance to Philpott's dated December 31, 2005 which bears the signature of Keith Smith on behalf of HVRC. The deed was signed on behalf of HVRC by Keith Smith and witnessed by solicitor, Kenneth Young. He also provided a copy of the Purchase and Sale Agreement in relation to the transaction.

[122] Rex Philpott deposed that at the time of the execution of the PRL Note and the conveyance of Lot 83, Philpott's was a shareholder in Canex and Canex, in turn, was a shareholder of HVRC. He deposed that at that time, or shortly thereafter, Canex and other companies, including HVRC, were undergoing corporate restructuring with the expectation that certain companies, including HVRC, would be merged and acquired by or on behalf of Nettec plc. He deposed that the companies, their directors and other officials of the companies were advised and guided by specialist advisors in the fields of mergers and acquisitions, corporate accounting, corporate finance, taxation and general corporate legal advice. He stated that advice was provided by, among others, Grant Thornton Canada, Grant Thornton UK, Grant Thornton Ireland, Pricewaterhouse Coopers, and law firms McInnis Cooper and Fasken, Martin and DuMoulin.

[123] Rex Philpott deposed that while he had a good sense of the reorganization/restructuring and merger and acquisition transactions, he would not be able to speak to the specific elements of the reorganization nor the specific due diligence provisions undertaken by the advisors. He deposed that the details and particulars of the arrangements would have to be presented by various experts engaged in the process.

[124] Mr. Philpott deposed that at the culmination of the arrangements, Canex, although maintaining its corporate status, became inactive and HVRC and other

related companies became wholly owned by a Netherlands corporation, Newfound N.V., which Mr. Philpott understood to have been incorporated by or on behalf of Nettec plc.

[125] Rex Philpott deposed that by early November 2006, at the latest, he had ceased to hold any directorship position with any of the merged entities and all shares previously held by him, personally, corporately or by Philpott's in any of the merged entities, had been transferred to third parties outside of his control.

[126] He further deposed that prior to the reorganization, restructuring and merger and acquisition and on the advice of various experts, certain of the corporate entities involved authorized and issued shares and dividends. He deposed that HVRC issued various dividends to its shareholders (including Canex), some or all of which were in the form of promissory notes.

[127] Mr. Philpott has provided signed copies of Demand Promissory Notes C2 and C3 as exhibits to his affidavit. Each are signed by Keith Smith on behalf of HVRC. These Demand Promissory Notes respectively state as follows:

DEMAND PROMISSORY NOTE
("Note C2")

August 26, 2006

Cdn. $1,100,000

WHEREAS:

1. at 3:05 p.m. (St. John's time) on the date hereof the undersigned declared a dividend of $3,000,000 in the aggregate to the holders of its Class A common shares, of which $2,000,000 is payable to Canex Development Corporation Limited by the issuance of demand promissory notes of the undersigned with a principal amount of $900,000 and $1,100,000 respectively;

2. this promissory note is intended to be assigned to Philpott's Realty Co. Limited ("**PRL**") to buy out part of PRL's interest in Canex Development Corporation Limited and be offset against part of a $1,300,000 note payable by PRL to the undersigned;

FOR VALUE RECEIVED, the undersigned promises to pay on demand to or to the order of **Canex Development Corporation Limited** (the "**Lender**"), at its office at St. John's, Newfoundland and Labrador, the sum of **$1,100,000** without interest.

The undersigned shall pay all principal without counterclaim and without deduction or withholding for or on account of any present or future taxes, levies, duties, imposts or other charges of any kind.

The undersigned may repay this promissory note, in whole or in part, at any time without notice, bonus or penalty. The undersigned waives demand, presentment, dishonour, notice of dishonour, protest or notice of protest of this promissory note.

DATED this 26th day of August, 2006.

HUMBER VALLEY RESORT CORPORATION

By:
(sgd) _____
Name: Keith Smith
I have authority to bind the corporation.

DEMAND PROMISSORY NOTE
("Note C3")

August 26, 2006

Cdn. $200,000

WHEREAS:

1. at 3:10 p.m. (St. John's time) on the date hereof the undersigned declared a dividend of $300,000 in the aggregate to the holders of its Class A common shares, of which $200,000 is payable to Canex Development Corporation Limited by the issuance of a demand promissory note;

2. this promissory note is intended to be assigned to Philpott's Realty Co. Limited ("**PRL**") to buy out part of PRL's interest in Canex Development Corporation Limited and be offset against part of a $1,300,000 note payable by PRL to the undersigned;

FOR VALUE RECEIVED, the undersigned promises to pay on demand to or to the order of **Canex Development Corporation Limited** (the "**Lender**"), at its office at St. John's, Newfoundland and Labrador, the sum of **$200,000** without interest.

> The undersigned shall pay all principal without counterclaim and without deduction or withholding for or on account of any present or future taxes, levies, duties, imposts or other charges of any kind.
>
> The undersigned may repay this promissory note, in whole or in part, at any time without notice, bonus or penalty. The undersigned waives demand, presentment, dishonour, notice of dishonour, protest or notice of protest of this promissory note.
>
> **DATED** this 26th day of August, 2006.
>
> **HUMBER VALLEY RESORT CORPORATION**
>
> By:
> (sgd) _____
> Name: Keith Smith
> I have authority to bind the corporation.

[128] As can be seen in the recitals of Note C2 and Note C3, it states that HVRC declared a dividend to the holders of its Class A common shares, of which an amount was payable to Canex. Each note also states it is intended to be assigned to Philpott's Realty Co. Limited ("**PRL**") to buy out part of PRL's interest in Canex and be offset against part of a $1,300,00 note payable by PRL to HVRC.

[129] Rex Philpott's Affidavit also attaches a signed copy of an Assignment dated August 29, 2006 amongst Canex (as Assignor), Philpott's Realty Co. Limited (as Assignee) and HVRC (the Borrower) in which it is recited that on August 26, 2006, HVRC issued to Canex Note C2 and Note C3 in the respective amounts of $1,100,000 and $200,000 as partial payment of a dividend. It also recites that on August 29, 2006, Canex repurchased from Philpott's 3,357,477 common shares of Canex for a purchase price of $1,300,000 with "such consideration to be paid by the assignment by the Assignor to the Assignee of the Notes (the "Share Purchase"). The Assignment then states that:

> In consideration of the surrender for cancellation of 3,357,477 common shares of the Assignor by the Assignee, the Assignor hereby assigns to the Assignee, effective as of 9:00 a.m. . . . on the date hereof, all of the right, title, and interest of the Assignor in and to the Notes. . . ."

[130] The Assignment is signed on behalf of the parties to it. At para. 1.2, the Borrower, HVRC, makes the following acknowledgment:

> 1.2 Acknowledgement of the Borrower
>
> The Borrower hereby acknowledges and agrees to be bound by the foregoing assignment of the Notes by the Assignor to the Assignee, and undertakes to pay all amounts owing under the Notes to the Assignee as if it were the Assignor.

[131] Rex Philpott in his Affidavit attached a signed copy of the First Share Purchase Agreement dated August 29, 2006 as between Philpott's (as Seller) and Canex (as Buyer) whereby Philpott's agreed to sell and transfer its common shares in Canex to Canex for the purchase price of $1,300,000 which purchase price, as set out in Article 2.2., was agreed to be paid by Canex's assignment to Philpott's of Notes C2 and C3 that were issued by HVRC to Canex by HVRC as partial payment of a dividend. Article 2.2 states:

> 2.2 Purchase Price
>
> The purchase price (the "**Purchase Price**") payable by the Buyer to the Seller at the Effective Time for the Purchased Shares shall be $1,300,000. The Purchase Price shall be paid by the assignment by the Buyer to the Seller of the demand promissory note having a principal amount of $1,100,000 and designated as Note C2 ("**Note C2**") and the demand promissory note having a principal amount of $200,000 and designated as Note C3 ("**Note C3**") that were issued by Humber Valley Resort Corporation to the Buyer as partial payment of a dividend.

[132] Rex Philpott's Affidavit also attached a copy of the Offset and Release Agreement made August 29, 2006 between HVRC as Lender and Philpott's as Borrower as is referenced at para. 8(f) of its Defence. Rex Philpott signed it on behalf of Philpott's and Keith Smith signed it on behalf of HVRC. Under each signature it states, "I have the authority to bind the corporation." The Offset and Release Agreement recites as follows:

> A. The Borrower issued to the Lender a promissory note designed Note A on or about December 31, 2005 having a principal amount of $1,300,000 (the "**Borrower's Note**").

B. On August 26, 2006 the Lender issued to Canex Development Corporation Limited (the "**Assignor**") a demand promissory note having a principal amount of $1,100,000 and designated as Note C2 and a demand promissory note having a principal amount of $200,000 and designated as Note C3 (collectively, the "**Lender's Notes**"), as partial payment of a dividend.

C. At 9:00 a.m. (St. John's time) on August 29, 2006, the Assignor repurchased for cancellation from the Borrower 3,357.477 common shares of the Assignor in consideration for the assignment by the Assignor to the Borrower of the Lender's Notes;

D. The Parties desire that the Borrower's Note be returned to the Borrower in exchange for the return of the Lender's Notes to the Lender and that such exchange will constitute full payment and settlement of the respective indebtedness of the Parties to each other under such notes.

[133] Then, the Offset and Release Agreement at Article 1 provides for mutual releases between Philpott's and HVRC on the following terms:

1.1 Release of Borrower

In consideration of the release of the Lender of all of the obligations of the Lender under the Lender's Notes, the Lender hereby remises, releases and forever discharges the Borrower of and from all actions, causes of action, suits, debts, duties, accounts, bonds, covenants, contracts, claims and demands whatsoever up to the date hereof which the Lender may now have or hereafter can, shall or may have for or by reason of or in any way arising out of or in connection with the Borrower's Note.

2.2 Release of Lender

In consideration of the release of the Borrower of all of the obligations of the Borrower under the Borrower's Note, the Borrower hereby remises, releases and forever discharges the Lender of and from all actions, causes of action, suits, debts, duties, accounts, bonds, covenants, contracts, claims and demands whatsoever up to the date hereof which the Borrower may now have or hereafter can, shall or may have for or by reason of or in any way arising out of or in connection with the Lender's Notes.

[134] In the Offset and Release Agreement, Philpott's and HVRC also agreed they shall do such acts and execute such further documents as are within their power as may be necessary to give full effect to the provisions of the agreement.

Court's finding on sufficiency of the record

[135] Philpott's has put forward evidence that could constitute a defence in law to 61839's claim that Philpott's is liable to it on the PRL Note. It has, as acknowledged by 61839, discharged its evidentiary burden to demonstrate that there is a genuine issue for trial. Philpott's has provided evidence and documentation that explains how the Offset and Release Agreement came about and how it purported to release each of Philpott's and HVRC in connection with liability under the promissory notes each had previously issued. In the Offset and Release Agreement, HVRC agreed to release Philpott's from liability under the December 31, 2005 $1,300,000 promissory note, and in exchange Philpott's agreed to release HVRC from liability under the notes HVRC issued to Canex on August 29, 2006 for $1,100,000 and $200,000.

[136] 61839 submits that it has produced strong circumstantial evidence that no dividends were issued.

[137] As previously noted, 61839 does not have any personal or direct knowledge of this matter. In support of its contention that HVRC did not issue dividends, it relies on the lack of a record in the form of a corporate resolution of HVRC approving the dividend. 61839 argues that it is impossible that HVRC's board of directors would issue significant dividends on August 26, 2006 and fail to record it. It also refers to an email from Rex Philpott to his lawyer, Derrick White, of February 9, 2007 in which he requests to be provided with "the necessary paperwork, ie minutes and whatever is necessary to be able to record the dividend in our books as well as to record the repayment of the promissory note through the issuance of the dividend." In the preface to the request, Rex Philpott states:

> Derrick:
>
> . . . 1) Regarding Lot #83 in the Resort. This was sold to Philpott's Realty in December 2005 with a $1.3 million promissory note payable taken. It was agreed that through the re-organization that a Dividend would be issued to repay the $1.3 million promissory note. This was confirmed by Keith to be done and to our understanding it was done at the re-organization.

[138] Other circumstantial evidence that 61839 sought to rely upon for its contention that HVRC did not issue a dividend is based on its interpretation of documents that it found in the database of HVRC which I have determined to be inadmissible. I cannot entertain these submissions.

[139] Based on the record before me, I am satisfied that the evidentiary record is sufficient for adjudication allowing me to determine the factual issue of whether HVRC authorized and issued the dividends to Canex.

[140] However, the evidentiary record is not sufficient for me to determine the mixed fact and law question of whether or not HVRC had the capacity to authorize and issue the dividends to Canex. Accordingly, I will not determine that issue.

Analysis of Issue 3 – Would it be unjust to decide this issue on the summary trial application?

[141] Each of the parties urged the Court to decide the issue, albeit in its favour. Neither took issue with the justness of the Court's doing so.

[142] Of course, it is for the Court to be satisfied that it is not unjust to decide the issues on the application. I am satisfied that the Court has a sufficient handle on the facts to make an informed decision on the issue.

[143] The course of these proceedings to date has been quite protracted. A determination on this factual issue, even if not dispositive of the litigation, will advance it by taking an issue off the table.

Determination of the issue

[144] While there has been no directors' resolution produced by either party that evidences a resolution approving dividends by HVRC to Canex, Philpott's has produced copies of agreements dated contemporaneous with the events in question in which both the recitals and the operative terms of the instruments refer to HVRC's issuance of the promissory notes to Canex as partial payment of a dividend and Canex's assignment of those promissory notes to Philpott's with HVRC's acknowledgment and agreement. Philpott's has also produced the Offset and Release Agreement whereby HVRC and Philpott's agreed to mutually release each other from liability on their respective promissory notes.

[145] Philpott's has established that HVRC issued Notes C2 and C3 to its shareholder, Canex, and the notes, taken together, state that HVRC on August 26, 2006 declared dividends to Canex of $2,000,000 and $200,000 payable by the issuance of demand promissory notes of HVRC. A dividend, as a matter of law, can be paid by delivery of a promissory note. The legal effect of delivery of a promissory note depends upon all relevant facts with the most important fact being the intention of the maker of the note (*Banner Pharmacaps NRO Ltd. v. Canada*, 2003 FCA 367). In this case, the intention of HVRC is stated on the face of the notes – the payment of a particular obligation that HVRC had to Canex.

[146] Philpott's has put forward documentary evidence and personal knowledge of Rex Philpott about the matter in issue that is considerably stronger than the circumstantial evidence put forward by 61839.

[147] As regards 61839's reference to the email inquiry of Rex Philpott to solicitor, Derrick White, I regard this email as confirmatory of Mr. Philpott's understanding that a dividend would be issued to pay the PRL Note and that it was done at the

reorganization. I take his email as his merely looking for copies of the documentation.

[148] During the hearing, counsel for 61839 candidly acknowledged that in order for the Court to conclude that HVRC did not issue dividends to Canex, the Court would need to draw an adverse inference against Philpott's. Counsel stated that in the absence of an adverse inference, 61839 could not establish its contention that HVRC did not issue dividends to Canex.

[149] In connection with this contention, 61839 submitted that the circumstantial evidence which it provided is all the evidence that it could be expected to produce given that it has HVRC's records but no personal knowledge of the facts. 61839 submits that Philpott's could have provided evidence by its advisors, Derrick White Law Office and Pricewaterhouse Coopers. It states that Philpott's could have also arranged for interrogatories or discoveries of Rex Philpott's past colleagues. 61839 states that Philpott's has failed to "put his best foot forward" as required by Rule 17A and therefore the Court may draw an adverse inference against it.

[150] I do not consider that it would be appropriate to draw an adverse inference against Philpott's on this basis. As I read *Marco*, the reference to the obligation on a respondent to "put his best foot forward" was made in connection with the burden on the responding party to show that there is a genuine issue for trial. Principle no. 7 in *Marco* reads:

> 76 . . .
>
> > 7 If the applying party satisfies the threshold test for the application of the rule by putting forward an evidentiary basis for his or her position, the responding party then has an evidentiary burden to demonstrate that there is a genuine issue for trial. This cannot be accomplished by showing an issue raised by the pleadings. The argument on a Rule 17A application takes place at a level below the pleadings within the forums of evidence and legal argument. The responding party must therefore "put his best foot forward" since failure to do so may lead the court to conclude that there is in fact no genuine issue for trial. The responding party should therefore set out in affidavits, or answers given on interrogatories or oral discoveries, an evidentiary foundation for his or her case so that the court can see that there

> is a genuine issue of fact or law that is joined and has to be resolved before the court can make an ultimate determination on the merits.
>
> [Emphasis added]

[151] Likewise, Principle No. 13 in *Marco* reads:

> Where there is a genuine issue for trial, the court must then go on to consider whether, on the evidence as presented, it is nevertheless possible and appropriate to decide the issues on the application on the basis of the existing record. At this point, the inquiry changes focus. The responding party had an obligation to put his or her best foot forward to demonstrate that there was a genuine issue for trial. Having done so, the focus shifts, to some extent, to a determination of the court's "comfort level" with the state of the record as being able to justify a determination on the genuine issues that have been identified. . . .
>
> [Emphasis added]

[152] The same point is made in *Brook Construction* at para. 78 where it was observed that the respondent had the burden to "demonstrate that there was a genuine issue for trial and in discharging that burden had to put its evidentiary 'best foot forward' . . ." A party with the burden to establish that there is a genuine issue for trial runs the risk of not meeting that burden if it fails to put forward evidence including, if necessary, from witnesses that may not be under its control and who may not be compelled to provide an affidavit. Such evidence can be compelled on discovery and used under Rule 17A.02(1)(c). But in this case, Philpott's met its burden to demonstrate there was a genuine issue for trial (as conceded by 61839) and it was able to do so without providing evidence from others, including those individuals 61839 argues Philpott's ought to have obtained evidence from.

[153] Apart from the best foot forward argument rooted in Rule 17A, I will also address whether the Court should draw an adverse inference against Philpott's for its failing to call persons who were its advisors and others who were past officers of HVRC. In *O'Connor v. Nolan*, 2024 NLSC 5, Handrigan, J. stated at paras. 22 – 23:

> [22] John Sopinka, Sidney N. Lederman & Alan W. Bryant stated the general rule of evidence for drawing adverse inferences in civil proceedings in *The Law of*

Evidence in Canada, 2nd ed. (Toronto: Butterworths, 1999) at paragraph 6.321. (I pulled this quotation from *Doiron v. Haché*, 2005 NBCA 75, paragraph 106, quoted by Richard, J.A., as he was then):

> In civil cases, an unfavourable inference can be drawn when, in the absence of an explanation, a party litigant does not testify, or fails to provide affidavit evidence on an application, or fails to call a witness who would have knowledge of the facts and would be assumed to be willing to assist that party. In the same vein, an adverse inference may be drawn against a party who does not call a material witness over whom he or she has exclusive control and does not explain it away. Such failure amounts to an implied admission that the evidence of the absent witness would be contrary to the party's case, or at least would not support it.

[23] In *Doiron v. Haché*, Richard, J.A. also noted that drawing adverse inferences is a "discretionary" matter; and as he explained:

> The power to draw an adverse inference when a party fails to call a witness who would have given material evidence is discretionary, but the discretion can only be exercised upon the satisfaction of a precondition. As explained by the Ontario Court of Appeal in *Lambert v. Quinn* (1994), 68 O.A.C. 352 (Ont. C.A.), *Levesque v. Comeau*, [1970 SCC 4] only stands for the proposition that an adverse inference "may be drawn against a party for failure to call a witness who may give material evidence *where that party alone could bring the witness before the court*." [Emphasis in original.] (para. 108)

[154] Rex Philpott ceased to be a director of HVRC in 2006. HVRC's officers and directors at that time are not witnesses over whom Philpott's has control, let alone exclusive control. Nor does Rex Philpott or Philpott's representatives have control or exclusive control over advisors who were involved in the 2006 restructuring of HVRC. Further, as pointed out by counsel for Philpott's, there was nothing to prevent 61839 from obtaining evidence from such persons. In these circumstances, I will not draw an inference that the evidence of such persons will be contrary to or will not support Rex Philpott's evidence, including the documents he has presented in support of Philpott's position.

[155] In light of the evidence of Rex Philpott and the documents he has presented, I am not prepared to infer from the lack of a signed resolution of directors approving dividends to Canex that no such dividends were approved. The documentation not

only states on behalf of HVRC that dividends were issued, it also establishes that Philpott's, Canex and HVRC entered into agreements premised on that fact.

[156] I find that HVRC authorized and issued dividends to Canex on August 26, 2006 in the amount of $2,200,000 and said dividends were partially paid by HVRC's issuance of Notes C2 and C3 to Canex.

COSTS

[157] Rule 17A.05(2) provides:

> 17A.05(2) Where on an application for summary trial under this rule, the applying party obtains no relief, the Court shall fix the opposite party's costs of the application on a solicitor and client basis and order the applying party to pay them forthwith unless the Court is satisfied that the bringing of the application, although unsuccessful, was nevertheless reasonable, in which case the costs may be assessed on a party and party or some other lesser basis, or not at all.

[158] During the hearing before me, the parties urged the Court to provide them with a judgment in their favour on this application and stated that the record before the Court was sufficient for the purpose of adjudication. Accordingly, while 61839 was unsuccessful on the relief it sought, I am satisfied that its bringing of the application was nevertheless reasonable. As permitted by Rule 17A.05(2), I will assess costs against 61839 on a party and party basis in accordance with Column 3 of the Scale of Costs appended to Rule 55.

SUMMARY

[159] For the foregoing reasons, the following is ordered:

1. 61839's summary trial application for judgment against Philpott's is dismissed.

2. Pursuant to Rule 17A.07(1), this proceeding shall proceed to trial in the normal course.

3. Pursuant to Rule 17A.07(2)(a), it is hereby declared on the trial of the proceeding that HVRC authorized and issued dividends to Canex on August 26, 2006 in the amount of $2,200,000 and said dividends were partially paid by HVRC's issuance of Notes C2 and C3 to Canex.

4. Philpott's is entitled to costs of this application on a party and party basis under Column 3, to be taxed.

[160] Order accordingly.

THOMAS J. JOHNSON
Justice