

**IN THE SUPREME COURT OF CANADA**  
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

CHRISTINE DEJONG MEDICINE PROFESSIONAL CORPORATION

APPELLANT

- and -

DBDC SPADINA LTD. and THOSE CORPORATIONS LISTED ON  
SCHEDULE A HERETO

RESPONDENTS

- and -

SCHONFELD INC. IN ITS CAPACITY AS THE COURT-APPOINTED MANAGER OF  
THOSE COMPANIES LISTED IN SCHEDULE B AND THOSE PROPERTIES LISTED IN  
SCHEDULE C HERETO and  
CANADIAN CHAMBER OF COMMERCE

INTERVENERS

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**FACTUM OF THE INTERVENER, SCHONFELD INC., IN ITS CAPACITY AS THE  
COURT-APPOINTED INSPECTOR AND MANAGER OF TWIN DRAGONS  
CORPORATION, *ET AL.***

(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

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## SCHEDULE A - LIST OF RESPONDENTS\*

1. Dr. Bernstein Diet Clinics Ltd.
2. 2272551 Ontario Limited
3. DBDC Investments Atlantic Ltd.
4. DBDC Investment Pape Ltd.
5. DBDC Investments Highway 7 Ltd.
6. DBDC Investments Trent Ltd.
7. DBDC Investments St. Clair Ltd.
8. DBDC Investments Tisdale Ltd.
9. DBDC Investments Leslie Ltd.
10. DBDC Investments Lesliebroke Ltd.
11. DBDC Fraser Properties Ltd.
12. DBDC Fraser Lands Ltd.
13. DBDC Queen's Corner Inc.
14. DBDC Queen's Plate Holdings Inc.
15. DBDC Dupont Developments Ltd.
16. DBDC Red Door Developments Inc.
17. DBDC Red Door Lands Inc.
18. DBDC Global Mills Ltd.
19. DBDC Donalda Developments Ltd.
20. DBDC Salmon River Properties Ltd.
21. DBDC Cityview Industrial Ltd.
22. DBDC Weston Lands Ltd.
23. DBDC Double Rose Developments Ltd.
24. DBDC Skyway Holdings Ltd.
25. DBDC West Mall Holdings Ltd.
26. DBDC Royal Gate Holdings Ltd.
27. DBDC Dewhurst Developments Ltd.
28. DBDC Eddystone Place Ltd.
29. DBDC Richmond Row Holdings Ltd.

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Companies are numbered in accordance with the Schedule A to the Reasons of the Court of Appeal for Ontario, dated January 25, 2018.

**SCHEDULE B - LIST OF WALTON SCHEDULE B COMPANIES  
("WSB COMPANIES")**

1. Twin Dragons Corporation
2. Bannockburn Lands Inc. / Skyline
3. Wynford Professional Centre Ltd.
4. Liberty Village Properties Ltd.
5. Liberty Village Lands Inc.
6. Riverdale Mansion Ltd.
7. Royal Agincourt Corp.
8. Hidden Gem Developments Inc.
9. Ascalon Lands Ltd.
10. Tisdale Mews Inc.
11. Lesliebrook Holdings Ltd.
12. Lesliebrook Lands Ltd
13. Fraser Properties Group
14. Fraser Lands Ltd.
15. Queen's Corner Corp.
16. Northern Dancer Lands Ltd.
17. Dupont Developments Ltd.
18. Red Door Developments Inc. and Red Door Lands Ltd.
19. Global Mills Inc.
20. Donalda Developments Ltd.
21. Salmon River Properties Ltd.
22. Cityview Industrial Ltd.
23. Weston Lands Ltd.
24. Double Rose Developments Ltd.
25. Skyway Holdings Ltd.
26. West Mall Holdings Ltd.
27. Royal Gate Holdings Ltd.
28. Royal Gate Nominee Inc.
29. Royal Gate (Land) Nominee Inc.
30. Dewhurst Development Ltd.
31. Eddystone Place Inc.
32. Richmond Row Holdings Ltd.
33. El-Ad (1500 Don Mills) Limited
34. 165 Bathurst Inc.

**SCHEDULE C - LIST OF WALTON SCHEDULE C PROPERTIES  
("WSC PROPERTIES")**

1. 3270 American Drive, Mississauga, Ontario
2. 0 Luttrell Ave., Toronto, Ontario
3. 2 Kelvin Avenue, Toronto, Ontario
4. 346 Jarvis Street, Suites A, B, C, E and F, Toronto, Ontario
5. 1 William Morgan Drive, Toronto, Ontario
6. 324 Price Edward Drive, Toronto, Ontario
7. 24 Cecil Street, Toronto, Ontario
8. 30 and 30A Hazelton Avenue, Toronto, Ontario
9. 777 St. Clarens Avenue, Toronto, Ontario
10. 252 Carlton Street and 478 Parliament Street, Toronto, Ontario
11. 66 Gerrard Street East, Toronto, Ontario
12. 2454 Bayview Avenue, Toronto, Ontario
13. 319-321 Carlaw, Toronto, Ontario
14. 260 Emerson Ave., Toronto, Ontario
15. 44 Park Lawn Circle, Toronto, Ontario
16. 19 Tennis Crescent, Toronto, Ontario
17. 646 Broadview Avenue, Toronto, Ontario

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## **PART I. CONCISE OVERVIEW OF POSITION AND STATEMENT OF RELEVANT FACTS**

### **A. Overview**

1. This factum is filed by the intervenor, Schonfeld Inc. (“**Schonfeld**”), the Court-Appointed Inspector and Manager of the Companies Listed on Schedule “B” hereto (the “**Schedule “B” Companies**”) and the properties owned by those companies (the “**Schedule “B” Properties**”), and as Manager of the properties owned by the companies listed on Schedule “C” hereto (the “**Schedule “C” Companies**”).

2. Schonfeld is a court-officer, appointed first as Inspector to investigate the financial affairs of the Schedule “B” Companies, which were jointly owned by the Respondents (the “**Bernstein Companies**”) and Norma and Ronauld Walton (the “**Waltons**”).<sup>1</sup> As part of its mandate, it authored the tracing analysis that played a central role in the proceedings below.<sup>2</sup>

3. Before the Application Judge and the Court of Appeal, Schonfeld took no position with respect to the legal dispute between the Appellant and the Respondents. It also takes no position on what the outcome of this appeal should be. Its submissions below are limited to a summary of the evidence it generated in this proceeding and a discussion of how other stakeholders that are not before the Court may be affected by the outcome of the appeal.

### **B. Statement of Facts**

#### *(i) The investments at issue*

4. This proceeding began with a business relationship between Dr. Stanley Bernstein and the Waltons.<sup>3</sup> The Waltons operated a real estate business through numerous corporate vehicles, but the primary operating entity was The Rose & Thistle Group Ltd. (“**Rose & Thistle**”).

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<sup>1</sup> Order of Newbould J. dated October 4, 2013, Record of the Appellant (“**RA**”), Vol. III, Tab 20, p. 102.

<sup>2</sup> Tracing Analysis, being Appendix “A” to the Fourth Interim Report of the Inspector, RA, Vol. XIIIIV, Tab 68.A, p. 148.

<sup>3</sup> Reasons for Judgment of Brown J. dated August 12, 2014 at para. 1, RA, Vol. 4, Tab 32, p. 75.



5. Pursuant to a series of joint venture agreements (the “**Agreements**”), Dr. Bernstein and the Waltons were to each hold a 50% interest in the Schedule “B” Companies. Dr. Bernstein’s interest was held through a series of single purpose holding companies (collectively, the “**Bernstein Companies**”).<sup>4</sup> Each of the Schedule “B” Companies was to own one Schedule “B” Property.<sup>5</sup> Between 2010 and 2013, Dr. Bernstein invested approximately \$110 million in 34 Schedule “B” Companies through the Bernstein Companies.<sup>6</sup>

6. In addition to the Schedule “B” Properties, the Waltons were the beneficial owners of, or had an interest in, a separate portfolio of properties (the “**Schedule “C” Properties**”) that Dr. Bernstein did not invest in.<sup>7</sup> The Waltons issued common and preferred shares in the companies that owned the Schedule “C” Properties (the “**Schedule “C” Companies**”) to various individuals and entities (the “**Schedule “C” Investors**”).<sup>8</sup> When Schonfeld was appointed, and during the first phase of this litigation, it did not know that there were third party investors in the Schedule “C” Companies.

7. The Appellant (the “**DeJongs**”) is a Schedule “C” Investor. It invested in four of the 17 Schedule “C” Companies (the “**DeJong Companies**”).<sup>9</sup>

*(ii) The Waltons’ misuse of funds*

8. The Waltons were responsible for operating the Schedule “B” Properties and they controlled the Schedule “B” Companies’ bank accounts (the “**Schedule “B” Accounts**”). But they did not manage the Schedule “B” Companies’ financial affairs in the manner required by the Agreements. Instead, they transferred Dr. Bernstein’s investments in the Schedule “B” Companies, and any revenue derived from those companies, into Rose & Thistle’s bank account

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<sup>4</sup> Reasons for Judgment of Brown J. dated August 12, 2014 at para. 7, RA, Vol. IV, Tab 32, p. 76.

<sup>5</sup> Forty-Second Report of the Manager dated April 21, 2016 at para. 4, RA, Vol. XVI, Tab 81, p. 68.

<sup>6</sup> Reasons for Judgment of Brown J. dated August 12, 2014 at para. 7, RA, Vol. IV, Tab 32, p. 76.

<sup>7</sup> Reasons for Judgment of Brown J. dated August 12, 2014 at para. 187(iii), RA, Vol. IV, Tab 32, p. 137.

<sup>8</sup> Reasons for Judgment of Brown J. dated August 12, 2014 at para. 164, RA, Vol. IV, Tab 32, p. 131.

<sup>9</sup> Reasons for Decision of Newbould J. dated September 23, 2016 at para. 60, RA, Vol. I, Tab 4, p. 87.

(the “**Rose & Thistle Account**”). From there, funds were transferred to other Schedule “B” Companies, Schedule “C” Companies and the Waltons’ personal accounts.<sup>10</sup>

*(iii) Schonfeld’s Appointment as Inspector*

9. On October 4, 2013, Schonfeld was appointed Inspector pursuant to the [\*Business Corporations Act \(Ontario\), R.S.O. 1990, c. B-16\*](#) and authorized to investigate the affairs of the Schedule “B” Companies.<sup>11</sup> More specifically, the Inspector was directed to investigate and report to the Court upon the financial position of the Schedule “B” Companies including, but not limited to:

- (a) the financial position of the Schedule “B” Companies and the Schedule “B” Properties that they each own;
- (b) the equity and debt of the Schedule “B” Companies including secured debt;
- (c) the revenues and expenses of the Schedule “B” Companies;
- (d) any intercompany amounts owed by or to the Schedule “B” Companies;
- (e) any related party transactions;
- (f) the acquisition, purchase, financing, management, development and operations of the Schedule “B” Properties; and

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<sup>10</sup> Reasons for Judgment of Brown J. dated August 12, 2014 at para. 7, RA, Vol. IV, Tab 32, p. 76-78.

<sup>11</sup> The Manager conducted some investigation and analysis prior to its appointment, pursuant to a contract with the Respondents.

- (g) the results of tracing any amounts to and from the Schedule “B” Accounts, the Rose & Thistle Account or any other accounts under Rose & Thistle’s control (the “**Rose & Thistle Accounts**”).<sup>12</sup>

10. Although the Bernstein Companies commenced the application that resulted in Schonfeld’s appointment, Schonfeld is a court-officer. It was (and is) responsible to the Court.

11. Shortly after its appointment, Schonfeld discovered, among other things, the co-mingling of funds described above. On November 5, 2013, Schonfeld was appointed receiver/manager (in this capacity, the “**Manager**”)<sup>13</sup> to provide independent management to the Schedule “B” Companies in the interest of all stakeholders.<sup>14</sup> On August 12, 2014, Schonfeld was appointed Manager of the Schedule “C” Properties.<sup>15</sup>

### **C. The Inspector’s Conclusions**

12. As part of its investigation, the Inspector compiled a master spreadsheet (the “**Net Transfer Analysis**”) containing all of the transfers between the Schedule “B” Companies, Schedule “C” Companies and the Waltons’ personal accounts between October 2010 and December 2013. The Inspector then conducted a more detailed review of certain aspects of the Waltons’ financial dealings, which is described below.

#### *(i) The Net Transfer Analysis*

13. As noted, funds were circulating constantly between the Schedule “B” Accounts, the Schedule “C” Accounts and the Rose & Thistle Accounts. The Net Transfer Analysis calculated the net transfer in or out of each account during the period examined by the Inspector. Based on this analysis, the Inspector concluded that:

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<sup>12</sup> Order of Newbould J. dated October 4, 2013, RA, Vol. III, Tab 20, p. 102.

<sup>13</sup> Order of Newbould J. dated November 5, 2013, RA, Vol. III, Tab 24, p. 146. Although Schonfeld has been described throughout these proceedings as the Manager, its appointment order and mandate are based on the standard form receivership order.

<sup>14</sup> Order of Newbould J. dated November 5, 2013, RA, Vol. III, Tab 24, p. 146.

<sup>15</sup> Judgment and Order of Brown J. dated August 12, 2014 at paras. 14-17, RA, Vol. IV, Tab 33, p. 180-181.

- (a) The Waltons directed transfers of \$23.6 million (net) from the Schedule “B” Accounts to a Rose & Thistle Account during the period from October 2010 to October 2013. These transfers occurred on a regular and ongoing basis during the period examined; and,
- (b) During the same period, the Waltons directed transfers of \$25.4 million (net) from the Rose & Thistle Account to the Schedule “C” Companies and other companies controlled by the Waltons. These transfers also occurred on a regular and ongoing basis during the period examined.<sup>16</sup>

14. The Inspector concluded that the pattern of transfers between the Schedule “B” Accounts, the Rose & Thistle Accounts and bank accounts controlled by the Schedule “C” Companies (the “**Schedule “C” Accounts**”), is consistent with the conclusion that a significant portion of the Bernstein Companies’ advances to the Schedule “B” Companies were used to fund the Schedule “C” Companies. Although funds circulated regularly among the Schedule “B” Accounts, the Rose & Thistle Account and Schedule “C” Accounts, this circulation consistently resulted, on a net basis, in funds flowing out of the Schedule “B” Companies and into the Schedule “C” Companies.<sup>17</sup>

*(ii) Contribution Analysis*

15. The Manager also conducted a limited tracing of funds invested into the Schedule “B” Companies on a property by property basis. Given the volume of transactions between the Schedule “B” Accounts, Schedule “C” Accounts and the Rose & Thistle Account, the Inspector focused on the largest 53 advances from the Bernstein Companies to the Schedule “B” Companies. The Inspector concluded, in almost all cases, that some or all of the amounts

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<sup>16</sup> Fifth Report of the Inspector, para. 8(a) and (b), RA, Vol. XV, Tab 71, p. 78-79.

<sup>17</sup> Fifth Report of the Inspector, para. 9, RA, Vol. XV, Tab 71, p. 79.

advanced to the Schedule “B” Companies by the Bernstein Companies were transferred almost immediately to the Rose & Thistle Account.<sup>18</sup>

16. Once transferred to the Rose & Thistle Account, the funds were either transferred to Schedule “C” Accounts, transferred to other Schedule “B” Accounts and/or used to make payments directly from the Rose & Thistle Account.<sup>19</sup>

17. Based on the foregoing analysis, the Inspector concluded that the Waltons used new equity invested in, and mortgage amounts advanced to, the Schedule “B” Companies by the Bernstein Companies to fund the ongoing operations of other Schedule “B” Companies and the Schedule “C” Companies. Almost every time the Bernstein Companies advanced funds to one of the Schedule “B” Companies, a significant portion of those funds was transferred to Rose & Thistle. In some instances, funds could be traced directly into a Schedule “C” Company. In other instances, funds could not be traced directly because the Bernstein Companies’ funds were co-mingled with other funds in the Rose & Thistle Account.<sup>20</sup> However, the Inspector concluded that the Bernstein Companies’ investment in the Schedule “B” Companies was a major source of funds for the Schedule “C” Companies.<sup>21</sup>

18. The Waltons sought to justify the movement of funds from the Schedule “B” Companies to Rose & Thistle on the basis that these transfers were payments for services rendered by the Waltons to the Schedule “B” Companies.<sup>22</sup> However, they provided no evidence to substantiate the majority of the alleged fees, the Inspector has found evidence that is not consistent with this explanation and it was rejected by Justice Brown.<sup>23</sup>

**(iii) Constructive Trust Analysis**

19. As noted at paragraph 15 above, the Inspector conducted an analysis of how the Bernstein Companies’ 53 largest contributions to the Schedule “B” Companies had been used by

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<sup>18</sup> Fourth Interim Report of the Inspector at paras. 14-16, RA, Vol. XIV, Tab 68, p. 133.

<sup>19</sup> Fourth Interim Report of the Inspector at para. 17, RA, Vol. XIV, Tab 68, p. 133-134.

<sup>20</sup> Reasons for Decision of Brown J. dated August 12, 2014 at para. 168, RA, Vol. IV, Tab 32, p. 132.

<sup>21</sup> Reasons for Decision of Brown J. dated August 12, 2014 at para. 168, RA, Vol. IV, Tab 32, p. 132.

<sup>22</sup> Reasons for Decision of Brown J. dated August 12, 2014 at para. 85, RA, Vol. IV, Tab 32, p. 109.

<sup>23</sup> Reasons for Decision of Brown J. dated August 12, 2014 at para. 90, RA, Vol. IV, Tab 32, p. 110.

the Waltons (the “**Contribution Analysis**”). In all but two instances, funds invested by the Bernstein Companies in the Schedule “B” Companies were transferred from the relevant Schedule “B” bank account to the Rose & Thistle Account within days of the Bernstein Companies’ investment. Funds transferred into the Rose & Thistle Account were then used to make payments, transferred to other Schedule “B” Companies or to Schedule “C” Companies.<sup>24</sup>

20. In 7 cases, the Contribution Analysis showed that funds transferred from Dr. Bernstein had been used to purchase one of the Schedule “C” Properties. By Judgment dated August 12, 2014 (the “**August 12 Judgment and Order**”), Justice Brown awarded the Bernstein Companies constructive trusts to reflect these contributions.<sup>25</sup> No relief was awarded in the August 12, 2014 Judgment and Order with respect to transfers to Schedule “C” Companies that did not immediately precede the purchase of a property.<sup>26</sup>

21. In appointing Schonfeld as Manager of the Schedule “C” Properties in the August 12 Judgment and Order, Justice Brown found that the Waltons had mismanaged the Schedule “C” Companies and Properties:

I see no basis upon which to allow Ms. Walton to exercise any control over the future operation of the Schedule C Properties. She and her husband must be removed from dealing with Schedule C Properties and that task put in the hands of a court-appointed receiver who will take into account the interests of all claimants against the properties.<sup>27</sup>

*(iv) The status of the Inspector’s analysis*

22. The Inspector has not completed a tracing of how all of the funds taken in by the Waltons were used. The status of the Inspector’s tracing work was addressed at the hearing of the Appellant’s appeal of the August 12 Judgment and Order. In dismissing that appeal, the Court of Appeal for Ontario held that Schonfeld had no obligation to trace funds invested by the Schedule “C” Investors:

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<sup>24</sup> Fourth Interim Report of the Inspector at para. 17, RA, Vol. XIIIIV, Tab 68, p. 133.

<sup>25</sup> Reasons for Judgment of Brown J. dated August 12, 2014 at para. 264 and 267, RA, Vol. IV, Tab 32, p. 161-162.

<sup>26</sup> Reasons for Judgment of Brown J. dated August 12, 2014, RA, Vol. IV, Tab 32.

<sup>27</sup> Reasons for Judgment of Brown J. dated August 12, 2014 at para. 273, RA, Vol. IV, Tab 32, p. 164.

[14] The DeJong appellants' complaint about the motions judge's failure to give directions on their tracing rights is related to the work of the Inspector. They contend that the Inspector was obliged to do a full tracing of all monies, as opposed to focusing on tracing the Bernstein applicants' funds.

[15] The Bernstein applicants are paying for the Inspector. He is tracing their funds. Of course, in fulfilling his obligations, the Inspector must be mindful that he was appointed by the court. However, those obligations do not require the Inspector to trace the monies of all parties into and out of the various companies and properties. As the motions judge indicated, the DeJong appellants can assert their rights in the claims process. It is up to them to take such steps as are necessary to assert their rights in that process.<sup>28</sup>

#### **D. The Outcome of this Appeal will affect the Manager's Mandate**

23. The Schedule "C" Properties were sold several years ago, and the Manager has been holding the proceeds of these sales pending the outcome of the various legal disputes that could impact distribution of these funds. In particular, the Manager is presently holding \$2,637,720 in respect of the Schedule "C" Companies. A total of \$1,958,678<sup>29</sup> of these funds relate to the DeJong Companies.

24. The Bernstein Companies presently have judgment against the Schedule "C" Companies, on a joint and several basis, in the amount of \$22,680,852 less any amounts recovered in respect of the constructive trusts granted to the Bernstein Companies pursuant to the August 12 Judgment and Order.<sup>30</sup> If the judgment of the Court of Appeal stands, then the Bernstein Companies will recover funds available in respect of each Schedule "C" Property on a *pro rata* basis. In the case of the DeJong Companies, the Appellant and the Bernstein Companies will rank *pari passu*, resulting in recovery by the Bernstein Companies of approximately 13% of their claim against the relevant Schedule "C" Companies and recovery by the Appellant of approximately 2% of its claim.

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<sup>28</sup> Reasons of the Court of Appeal for Ontario dated September 17, 2015 at paras. 14-15, Vol. V, Tab 43, p. 70.

<sup>29</sup> These amounts do not include accrued interest on GICs, nor do they account for unpaid professional fees of the Manager and its counsel.

<sup>30</sup> Order of the Court of Appeal for Ontario dated January 25, 2018 at para. 2, RA, Vol. I, Tab 6, p. 103.

25. In the event that the appeal is granted and the application judge's judgment<sup>31</sup> is reinstated, then the Appellant will be entitled to receive most of the proceeds available from the DeJong Companies. With respect to the other Schedule "C" Companies, a claims process will be required to identify other shareholders of these companies and evaluate their entitlement (if any) to a distribution of proceeds.

26. In addition, the Appellant has asked this Court to exercise its discretion to deny the Bernstein Companies recovery because such recovery would "hurt the innocent investors and defrauded companies ensnared in a fraudster's scheme."<sup>32</sup> However, not all of the Schedule "C" Companies had third party investors. In the event that the Appellant's argument is accepted, then further analysis will be required to determine whether and to what extent the same reasoning should be applied to other parties not before the Court.

**PART II. CONCISE OVERVIEW OF POSITION ON THE APPELLANT'S QUESTIONS**

27. Schonfeld takes no position on the legal issues on this appeal.

**PART III. STATEMENT OF ARGUMENT**

28. Schonfeld makes no argument with respect to the legal issues before this Court.

**PART IV. SUBMISSIONS ON COSTS**

29. Schonfeld seeks no costs and respectfully requests that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 1<sup>st</sup> day of May, 2019.

SIGNED BY:

  
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**Mark Dunn**

**Carlie Fox**

Counsel for Schonfeld Inc.

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<sup>31</sup> Judgment of Justice Newbould dated September 23, 2016, RA, Vol. I, Tab 2, p. 15.

<sup>32</sup> Factum of the Appellant dated March 1, 2019 at para. 128.



**PART V. TABLE OF AUTHORITIES**

Nil.

**PART VI. STATUTORY PROVISIONS**

<b>Legislation</b>	<b>Paragraph in Schonfeld's Factum</b>
<a href="#"><i>Business Corporations Act (Ontario), R.S.O. 1990 c. B-16, section 162</i></a>	9