Docket: 2016-2496(IT)G

BETWEEN:

CONRAD M. BLACK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on January 22, 23, 24 and 25, 2019, at Toronto, Ontario

Before: The Honourable Eugene P. Rossiter, Chief Justice

Appearances:

Counsel for the Appellant:	David C. Nathanson, Q.C. Adrienne K. Woodyard
Counsel for the Respondent:	Arnold H. Bornstein Christa Akey

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* for the 2008 taxation year is allowed in accordance with the attached Reasons for Judgment. The Appellant shall have his costs with a hearing on costs to be scheduled forthwith.

Signed at Ottawa, Canada, this 14th day of June 2019.

"E.P. Rossiter"

Rossiter C.J.

TABLE OF CONTENTS

Citation: 2019 TCC 135
Date: 20190614
Docket: 2016-2496(IT)G

BETWEEN:

CONRAD M. BLACK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Rossiter C.J.

A. Introduction:

[1] The Appellant, Conrad M. Black ("Black"), is a businessman and a writer. At times relevant to this Appeal, he was the principal and controlling shareholder, as well as officer and director, of several companies, including Ravelston Management Inc. ("Ravelston"), Hollinger Inc. ("Inc.") and Hollinger International Inc. ("International").

[2] In 2004, Black borrowed $32.3 million US ("Quest Loan") from Quest Capital Corporation ("Quest"). This Appeal arose from the Minister of National Revenue's denial of Black's deduction of expenses related to the Quest Loan, which are primarily interest expenses.

[3] Black obtained the Quest Loan for the purpose of paying two damages awards arising from a judgment that International obtained against him, one independently and another with Inc. on a joint basis ("Joint Damages"). Black used the proceeds of the Quest Loan to advance funds to International to satisfy his independent damages. Black also used the Quest Loan to advance funds to International to satisfy the Joint Damages.

[4] At issue in this Appeal is whether the latter advance was on Inc.'s behalf, such that there was a loan between Black and Inc., or whether Black paid the Joint Damages on his own account. A characterization of the nature of Black's direct use of the Quest Loan, and the purpose behind that use, are necessary to the determination of whether the Quest Loan expenses are deductible in computing Black's income during the relevant taxation years.

[5] I find that Black used the Quest Loan for the purpose of earning income from property. Black is entitled to deduct interest and other expenses related to the Quest Loan.

B. Facts:

Black, Inc., and International

[6] Black resided in Toronto, Ontario in 2004; he did not reside in Delaware, USA. International was a resident of the USA and, in particular, of the State of Delaware. Inc. was a resident of Canada. Both International and Inc. were public corporations. Inc. held 30 percent of the shares, and 72 percent of the voting rights, in International. Through a number of corporations, Black was the controlling shareholder of both International and Inc. Black was the Chief Executive Officer and Chairman of the Board of Directors of Inc. from 1978 onward. Black was the Chief Executive Officer and Chairman of the Board of Directors of International from 1978 until November 2003.

[7] In July 2004, the Directors of Inc. were Black, Barbara Amiel Black (Black's spouse), General Richard Rohmer, Peter White, Gordon Walker, David Radler and John Boultbee.

[8] All dollar amounts referred to herein are Canadian dollars unless otherwise noted.

International Sues Black and Inc.

[9] In 2004, International launched a civil action against Black and Inc. in the Court of Chancery in the State of Delaware (the "Delaware Court").

[10] International claimed, among other things, that Black had violated his fiduciary duty to International and had breached an agreement he had entered into with International to, among other things, repay certain non-compete payments that he had received and to cause Inc. to repay certain non-compete payments that Inc. had received from International. Black did not receive any monies from Inc. that had been paid to Inc. by International as non-compete payments.

[11] By Final Order and Judgment dated June 28, 2004 ("Judgment"), the Delaware Court ordered that:

a) Black pay damages of $8,693,053.66 US, plus interest to International; and

b) Black and Inc. jointly pay to International damages of $21,154,025.91 US, inclusive of interest to June 1, 2004, with the interest to be calculated at a particular rate thereafter.

[12] The Joint Damages are equal to the non-compete payments received by Inc. from International in the amount of $16,550,000.00 together with interest calculated at the rate described in the Restructuring Proposal dated November 15, 2003 (Exhibit A-2, Tab 3).

[13] A Restructuring Proposal, (Exhibit A-2, Tab 3), contained the following paragraph:

…

> 4. As used in this Restructuring Proposal, the term "Payments" shall mean the aggregate US$16,550,000 paid to Hollinger Inc. ("HLG"), the aggregate US$7,197,500 paid to each of Messrs. Black and Radler, and the aggregate US$602,500 paid to each of Messrs. Atkinson and Boultbee from 1999 to 2001. The payments were not properly authorized on behalf of the Company. The Payments received by HLG and Messrs. Black, Radler, Atkinson and Boultbee will be repaid to the Company by each such recipient in full, with interest calculated from the date of receipt of the payment to the date of repayment at the applicable Federal rate of interest in effect on the date of the receipt of the Payment. Each of Messrs. Black, Radler, Atkinson and Boultbee will make an initial ten percent (10%) of the total amount of the Payments received by each of them, plus interest. The balance will be evidenced by a promissory note and will be repaid on or before the earlier of a Liquidity Event (as defined below) or June 1, 2004. The Special Committee and the Audit Committee will entertain proposals from HLG with respect to the schedule of repayment by HLG of the Payments it has received, provided that repayment in full is received on or before the earlier of a Liquidity Event and June 1, 2004. As used herein, the term "Liquidity Event" means (i) in the case of HLG, the consummation by the Company of a transaction (or series of related transactions) that result in HLG realizing net proceeds of at least US$50,000,000; (ii) in the case of Messrs. Black and Radler, the consummation by the Company of a transaction (or series of related transactions) that result in either of them realizing net proceeds of at least US$5,000,000; and (iii) in the case of Messrs. Atkinson and Boultbee, the consummation by the Company of a transaction (or series of transactions) that result in either of them realizing net proceeds of at least US$400,000.

…

[14] In the Judgment, the Delaware Court made no apportionment of liability for the Joint Damages, although in the Judgment it was represented that the Joint Damages represented the non-compete payments made by International to Inc., for which Black, according to his own testimony, did not receive any monies.

[15] Black paid $8,693,053.66 US plus interest to International.

[16] Inc. paid or caused to be paid to International the amount of $5,964,107.10 US in respect of the Joint Damages.

[17] The remaining amount of $15,315,364.74 was paid by Black, which Black asserts was a loan by Black to Inc.

[18] On June 8, 2004, Inc. issued a press release indicating its desire to appeal the Judgment:

> …
>
> At a hearing held earlier today, Vice-Chancellor Strine of the Delaware Chancery Court ruled that Hollinger will be ordered to repay US$16.55 million to Hollinger International which it received on account of non-competition payments, together with interest. A final order will be issued on or after June 21, 2004. Hollinger regrets the decision of Vice-Chancellor Strine and believes there are meritorious grounds for appeal and will be considering its options in the upcoming weeks.
>
> …

[19] Black and Inc. later appealed the Delaware Court's decision. The Supreme Court of the State of Delaware affirmed the Delaware Court's decision on April 19, 2005.

The Quest Loan

[20] Pending the appeal to the Supreme Court of the State of Delaware, on July 15, 2004, Black entered into an agreement with Quest to borrow $32,300,000.00.

[21] The initial effective interest rate on the Quest Loan was 12.68 percent or, more precisely, 12 percent per annum, calculated daily and compounded monthly.

[22] The interest rate was, however, reduced over time from that initial effective rate.

[23] As security for the Quest Loan, Black provided Quest a promissory note and first mortgages over his residences in the United Kingdom and Toronto, Ontario.

[24] Under the Quest Loan, Black could use $300,000 of the proceeds thereof only to pay a structuring fee of $200,000 and for a holdback of $100,000 in respect of Quest's legal fees and related out-of-pocket expenses.

[25] Under the Quest Loan, Black could use the other $32,000,000 only as follows:

a) to satisfy in part the damages awarded by the Court of Chancery; and/or

b) to deposit as security in support of a supersedeas bond to be obtained in connection with staying enforcement of the Final Order and Judgment of the Court of Chancery dated June 28, 2004 pending appeal; and

c) to remit applicable holding taxes to Inland Revenue in connection with the interest payable on the Quest Loan.

[26] Black used $200,000 of the proceeds of the Quest Loan to pay the structuring fee.

[27] Quest held back $100,000 of the Quest Loan for its legal fees and out-of-pocket expenses.

Black Decides to Help Inc.

[28] Black knew that he needed money to pay the damages award against him independently under the Judgment. He testified that he decided to loan money to Inc. so that Inc. could pay the Joint Damages. Inc. did not have the liquidity at the time to fund the money due to International. If the Joint Damages were not paid on time, the consequences would be as follows:

- there was a very strong possibility of a seizure of personal assets of Black, in particular, his personal residence in Toronto and New York if the Judgment was not paid;

- there was a significant possibility of seizure of the head office of Inc. in Toronto, Ontario; and

- failure to pay the Judgment could have been treated as a default event under certain security provided by Inc. and others to Wachovia on an indenture which would apparently have had a catastrophic effect on the parties, that is Inc. and Black, not to mention reputational damage.

[29] Time was most certainly of the essence because the Judgment was released on June 28, 2004 and the Joint Damages were due to be paid by mid-July, 2004. In addition to the consequences above, the Judgment could not be appealed before paying the damages in full.

[30] Black had spoken to Rohmer, one of Inc.'s two independent directors, and told him about his desire to help Inc. This conversation took place before Black advanced the funds to International. He advised Rohmer of the potential loan to Inc. and what it would be used for, that is to pay off the Delaware judgment. Black had told Rohmer the rate that he expected to pay on the Quest Loan and he expected to remain whole. Rohmer felt this was very generous of Black. The loan to Inc. would spare the company from the drastic consequences of not paying the Joint Damages, such as the possible seizure of its head office.

Black also had a similar conversation with White about his intentions and the terms of the loan he was negotiating with Quest, including the amount and the interest rate.

The Audit Committee Meeting

[31] An Inc. Audit Committee meeting was held on July 13, 2004. Present were the following: White, Chairman of the Audit Committee, Walker, an independent director and Rohmer, also an independent director, by conference call. By invitation Adrian White, Acting Chief Financial Officer of Inc., Monique Delorme, the Controller of Head Office Companies of Inc., Laurence Zeifman of Zeifman & Company, LLP, the external auditor of Inc. and Norman May of Fogler, Rubinoff LLP, external counsel to the corporation also attended. The minutes of the meeting state in part as follows:

> …
>
> The next item on the agenda was the matter of the judgment issued on June 28, 2004 in the Delaware Chancery Court, in which the Corporation was ordered to pay to International the amount of approximately US$21 million. The Chairman advised the Committee that Lord Black, the Chairman and Chief Executive Officer of the Corporation, was in the process of arranging a personal loan and that he would, in turn, be lending to the Corporation or an affiliate an amount of approximately US$15 million out of the proceeds of such loan to assist the Corporation in paying the amount of the judgment. Accordingly, the Corporation would be required to add approximately an additional US$6 million out of its own resources in order to satisfy the judgment in full.
>
> The Chairman indicated that payment of the judgment was the only realistic procedure, in that the issuance of a bond would require the deposit of additional funds, to provide for the cost of the bond and for subsequent interest on the judgment, and that the Corporation did not have such additional funds at its disposal at this time.
>
> The Chairman stated that the terms of the loan from Lord Black to the Corporation would be negotiated by the Independent Committee on behalf of the Corporation. Mr. Walker suggested, and Mr. Rohmer agreed, that the terms of the loan from Lord Black to the Corporation, when they are completed, should reflect the terms of the loan that Lord Black himself was obtaining from third party sources, so as to avoid any suggestion of conflict.
>
> …

[32] The particulars of the loan that Black expected to obtain from Quest were presented to the Audit Committee. As a related party transaction, the loan from Black to Inc. needed to be approved by the independent directors. At the time, Inc. had only two independent directors, namely Rohmer and Walker.

[33] The Audit Committee was made up of three people, White, who was the CEO and de facto President of Inc., Walker and Rohmer. White presented the likely Quest Loan particulars to the Audit Committee for the purpose of having the loan from Black to Inc. approved at its meeting on July 13, 2004. As stated previously, time was of the essence with respect to payment of the Joint Damages.

[34] The Quest Loan was soon finalized on July 15, 2004.

Black's Understanding of the Loan to Inc.

[35] Black was of the view that an agreement had been reached with Inc. on the loan and that the loan would yield 12.6 percent interest. Black wanted to receive interest on his loan to Inc. equal to the interest he was paying on the Quest Loan. Black asserted that the loan was put to the Audit Committee and it was agreed to that Inc. would pay him what it cost him to repay the Quest Loan eventually. The Audit Committee and the independent directors were one and the same in that the Audit Committee only contained three persons, two of whom were independent directors.

[36] According to Black, the purpose of the loan was that he wanted to help out Inc. As he was the Chairman and principal shareholder, he wanted to avoid a default which would have been significantly problematic, both financially and reputationally, and he wanted to make enough money on the loan to cover his costs on the Quest Loan. Black wanted to help Inc., but remain whole. He accepted that there might be an accrual of interest over time due to Inc.'s liquidity issues, but he did not feel that he was in danger of not being repaid the principal and interest as Inc. was a successful company.

[37] The loan agreement was never reduced to writing but Black thought that was a function of the disputes within the company, a change of company personnel, and the variety of opinions which arose and developed in trying to overcome a cascade of litigation. He did not get the agreement in writing prior to advancing the funds to International on Inc.'s behalf, but counsel for Inc. had led him to believe that they would complete the documentation.

[38] In July 2004, Black was of the view that the loan to Inc. would be repaid but as time went on the atmosphere in Inc. was changing. There were suggestions that Inc. would go private but Black was of the view that he would get paid with or without Inc. going private.

White's Understanding of the Loan to Inc.

[39] White had been a friend of Black since university and was a director of Inc. which was the main operational company from 1979 to 2005 and was CEO from 2004 and de facto President. White did not know the actual terms of the Quest Loan when it was discussed at the Audit Committee as the Quest Loan was not yet finalized. The Audit Committee, in his view, approved the loan from Black. The terms of the loan to Inc. would be the same or no better than the terms of the Quest Loan. The loan was to a related party and therefore needed independent director approval. There was no formal resolution for the approval of the loan. Throughout this period of time, from June 2004 onward, the independent directors had access to a lawyer both before and after the Audit Committee meeting.

[40] White was of the view that there were pressing difficulties; timing was of the essence with respect to the loan in question to ensure there was no default by Inc. for the reasons enumerated. He himself felt that he had the authority to manage the company, including dealing with the loan.

Walker's Understanding of the Loan to Inc.

[41] In July 2004, Walker believed that there was a loan between Black and Inc. The terms were left open but the amount was known, and the interest and the payments would reflect the terms of the Quest Loan.

[42] Walker noted that the loan was made to allow Inc. to pay the judgment against it. In making the payment, Black relied upon the existence of the loan, that some terms would be negotiated, and further the terms would not be greater than the terms of the Quest Loan.

[43] Walker was of the understanding that the Judgment came out in June 2004 for about $21 million. It was levied against both Black and Inc. At the time he knew that Inc. did not have the money to satisfy the Judgment but he knew it had to be paid because of the indenture given to Wachovia and the possibility of default would be catastrophic to Inc. and likely to Black. The money had to be paid by the end of July, 2004.

[44] Walker was of the understanding the money would be paid somehow. He was told at the time by White that the money could come from a loan to Inc. from Black of approximately $15 million and the money would be used to discharge the damage claim. He had discussed this with independent counsel's solicitor. At the Audit Committee meeting, it was decided that independent directors would review the terms of the loan between Black and Inc., and they would negotiate the terms of the loan on behalf of Inc. He and Rohmer had specifically talked about this. White had introduced the subject of the loan to the Audit Committee and indicated that the independent directors would negotiate on behalf of Inc. The terms were not negotiated at the meeting and at no time in the ensuing weeks were the terms ever negotiated as they were very busy. Ultimately, legal counsel to the independent directors told them it was not appropriate for them to deal with the loan between Black and Inc. The discussions on the terms of the loan were invariably deferred due to counsel's advice not to touch this on numerous occasions.

Inc.'s Actions after the Audit Committee Meeting

[45] After the Audit Committee meeting of July 13, 2004, the relationship between the independent directors of Inc. and Black deteriorated. There was fluidity with respect to the independent directors as some were leaving and some new ones were coming in. There were ongoing investigations and inquiries with respect to the affairs of Inc. on an external basis. In fact, there was a

recommendation in early September 2004 that Black and others should be removed as directors of the company. As time went on, the relationship between Black and others deteriorated to the point where Black was no longer a director of Inc. after November 2004.

[46] There were a variety of difficulties according to White with respect to Inc. There was a letter of August 28, 2004 where there was a request for information on the Quest Loan by the independent directors' lawyers. The terms of the Quest Loan were provided and it was confirmed at the time that Domgroup Ltd. ("Domgroup"), which was a subsidiary of Inc., paid $5,964,107.10 on the Delaware judgment on behalf of Inc. and Black had paid the balance of $15,315,364.76.

[47] A press release was issued by Inc. on August 13, 2004 and stated in part as follows:

> …
>
> As previously disclosed, on July 16, 2004, Hollinger and Conrad Black, without prejudice to their respective appeals, paid an aggregate of approximately US$30.0 million to Hollinger International in full satisfaction of the monetary awards under the order and final judgment (the "Judgment") of the Delaware Chancery Court requiring Hollinger and Conrad Black to repay certain non-compete payments to Hollinger International. The Judgment ordered Hollinger and Conrad Black to repay approximately US$21.3 million to Hollinger International, inclusive of interest, in respect of certain non-compete payments received by Hollinger (the "Hollinger Amount"). The Judgment also ordered Conrad Black separately to repay approximately US$8.7 million to Hollinger International, inclusive of interest, in respect of certain non-compete payments received by Conrad Black. Hollinger directly paid approximately US$6 million of the Hollinger Amount, while the remainder of approximately US$15.3 million was advanced by Conrad Black on behalf of Hollinger. The structure and terms of such advance, as between Conrad Black and Hollinger, are currently being reviewed and negotiated between Conrad Black and the independent directors of Hollinger.
>
> …

The Lawyers Get Involved

[48] Inc.'s external legal counsel was Avi Shane Greenspoon, who gave a confirmation of the transaction in question in a memorandum to the corporation wherein he stated in part as follows (Exhibit R-3):

> …
>
> It has always been recognized that any determination of what, if anything, Lord Black is to receive in consideration of the advance of such sum to International would involve a careful analysis of the following considerations, among others: (i) the restrictions under the Wachovia Indenture on the ability of Inc. and certain of its subsidiaries to incur indebtedness or grant security; (ii) whether or not any advance to Inc. or any of its subsidiaries would come from Lord Black or an entity controlled by Lord Black (eg. The Ravelston Corporation Limited, Conrad Black Capital Corporation); (iii) related party transaction/conflict considerations under applicable corporate and securities law, including, if necessary, depending on the structure of any transaction, the approval of the transaction solely by the independent directors; (iv) withholding tax issues in connection with any loan arrangements (as Lord Black is not a resident of Canada); (v) the fact that the Inc./Black judgment was a joint and several obligation; and (vi) the limited availability of assets of Inc. or its subsidiaries which can be secured having regard for the competing interest looking for security.
>
> …

[49] Greenspoon was with the firm Fogler, Rubinoff LLP, who had also been hired by Black to arrange for the mortgage on his personal residences as security for the Quest Loan. He was familiar with the Judgment and the security on the Quest Loan. He was of the view that the loan was not papered at the time given the limited time they had to arrange for the Quest Loan and advance the funds to International on Inc.'s behalf, all while Inc. was dealing with other legal issues. He also felt there was complexity around the security that Inc. had given to Wachovia on a prior indenture and covenants in relation to who could borrow money. Inc. could not borrow the money from a related party without triggering a default under the Wachovia Indenture, but they could do it through a subsidiary, such as Domgroup. Finally, there was the possibility, if the money was not paid, of the seizures of the personal residences of Black in New York and Toronto and the seizure of Inc.'s head office in Toronto. At the time, Inc. was constrained in terms of monies it could raise. There was the imminent reporting of a possible default of the Wachovia Indenture. Domgroup had $6,000,000.00 that could be used to pay the Joint Damages and Black would step up and get the balance of the monies necessary to pay off the Joint Damages.

[50] Greenspoon was of the view there was a loan from Black even though there was no formal written loan agreement with Inc. The lawyers had decided that they would do the next steps based on the Audit Committee meeting. The meeting itself confirmed the loan but the terms were not completed as they were to be negotiated, according to the minutes by the independent directors. He felt the reasons that the Inc. loan was not papered in July of 2004 were: (1) the terms were still to be agreed upon by the independent directors; (2) there were differences between what happened in March 2004 and July 2004; (3) there were many more problems with Inc.; (4) there were applications to appoint inspectors to Inc.; (5) there was the Judgment; (6) there was the lack of cooperation with International; (7) the financial statements had not been done for Inc.; and (8) there were significant consequences to Inc. if the money was not paid as ordered. He was of the view that there was no question that this was a loan by Black to Inc.; he did not know what else it would have been and the amount of the judgment against Inc. was equivalent to the amounts paid to Inc. by International as non-competes.

[51] Inc. established a Litigation Committee sometime in the spring of 2004. There was a lot of litigation and there were lawyers all over the place representing Inc. There was a need for a litigation committee but the committee was not actually formed until the end of June 2004. Prior to formal establishment of a litigation committee, the Audit Committee was functioning as a Litigation Committee. Initially, they had to find out about the actions and what was going on in the individual actions. The Litigation Committee were the only persons to instruct the lawyers because they were not conflicted. The Litigation Committee obtained legal counsel in the person of Harvey Strosberg, retained around mid-July 2004.

[52] The Litigation Committee met on September 1, 2004. In attendance were Walker, Paul Carroll, Don Vale, Canadian counsel to the Litigation Committee, Harvey T. Strosberg and Nate Eimer. At that time, the Delaware Judgment was discussed. The Litigation Committee minutes stated in part as follows (Exhibit R-1, Tab 6):

> …
>
> 6. A discussion then ensued about the allocation between Black and Inc of responsibility for the approximate US$21 million Delaware judgment which is on appeal. This judgment has been paid by Inc advancing about US$6 million and CB advancing approximately US$15 million. Strosberg advised that before Campbell J., he argued that the independent directors

had not yet made any decision on this allocation. He told this judge that the independent directors would eventually decide the allocation between Black and Inc considering that Inc received the US$16.5 million, that Inc's liability arose as a result of CB signing the restructuring proposal in November, 2003 and also the opinion from Eimer's firm about the meaning of "joint liability". Strosberg also advised that the judge seemed to suggest during argument that the independent directors would wait until the disposition of the appeal before making their decision. Eimer advised that his firm is preparing the appeal. He believes that the appeal is likely to be argued by the end of November, 2004.

7. The independent directors deferred any decision about allocation of the US$21 million and asked Eimer to provide an opinion on this issue. They also considered that it will be necessary to get confirmation about the use Inc made of the US$16.5 million after it was received.

…

[53] On September 4, 2004, there was another Litigation Committee meeting. In attendance were Messrs. Walker, Q.C., Carroll, Vale, and counsel to the Independent Directors being Harvey T. Strosberg, Q.C. and William Sasso. At this meeting it was noted as follows (Exhibit R-1, Tab 7):

…

2. Gordon W. Walker, Q.C. reported that there have been ongoing discussions concerning Lord Black, Lady Black, David Radler and Jack Boultbee stepping down as officers and directors of Inc.

…

4. Lord Black has suggested in discussions with Mr. Walker that he wishes to arrange to step down in conjunction with an arrangement made by Inc to retire the mortgage on his homes. The optics are difficult, to say the least, and the approval of any related party agreement involving the assumption by Inc of the obligation of paying the joint and several US$21M Delaware judgment respecting the non-compete payments will be carefully scrutinized and will be difficult for the Independent Directors to justify.

5. A general consensus was reached that, while the Independent Directors will discuss alternative financing arrangements with Lord Black in good faith, those arrangements cannot be tied into the corporate governance decision on changes of officers and directors.

…

9. The discussion returned to the question of whether or not it was advisable for Inc to make final arrangements concerning the joint and several liability for the $21M Delaware judgment for the non-compete payments. To assist the Independent Directors in its deliberations, Mr. Sasso agreed to prepare a summary of the submissions made in the Catalyst proceedings concerning these payments, as well as the notes of the judge's comments.

…

[54] The Litigation Committee met further on September 17, 2004 and in attendance were Walker, Carroll, Vale, Canadian counsel to the Litigation Committee being Harvey T. Strosberg, Sasso and Jasminka Kalajdzic. At paragraph 16 of the minutes, it was stated in part as follows (Exhibit R-1, Tab 8):

…

16. Mr. Eimer advised the independent directors that if they wished to keep the target date of September 22, 2004 as the date for Lord Black's resignation, it is imperative that they decide the following issues:

(a) the proposed substitution of Domgroup assets for the mortgages on Lord Black's Toronto home under the Quest loan;

(b) the setoff of the $1.1 million loan owed by Ravelston to Inc against the undocumented $15 million debt from Inc to Black; and

(c) the payment of 50% of Lord Black's legal fees.

…

[55] The Litigation Committee met further on September 20, 2004 and in attendance were Walker, Carroll, Vale, Canadian counsel to the Litigation Committee being Harvey T. Strosberg, Sasso and Kalajdzic. The following was stated in the minutes (Exhibit R-1, Tab 9):

…

> 9. Mr. Strosberg then discussed his lengthy written legal opinion which had been delivered via email to the independent directors shortly before the meeting. He believes that the independent directors must consider a number of issues carefully before making a final determination of whether Inc in fact should agree to be indebted to Lord Black in the sum of $15 million and whether Domgroup assets should be sold or pledged as collateral for Lord Black's loan with Quest. Those issues are enumerated in the Sutts, Strosberg opinion letter dated September 20, 2004.
>
> …

[56] There was a Material Change Report published by Inc. on September 7, 2004. Attached was a press release of September 2, 2004 which stated in part as follows (Exhibit R-1, Tab 3):

> …
>
> On March 23, 2004, in order to assist Hollinger in complying with the terms of the Indenture governing its Senior Secured Notes due 2011 and avoiding the potential acceleration of the Notes upon the occurrence of an Event of Default under the Indenture, Domgroup Ltd. ("Domgroup"), a wholly-owned subsidiary of Hollinger, lent to The Ravelston Corporation Limited ("Ravelston") the principal amount of US$3.540 million, evidenced by a demand promissory note bearing interest at prime plus 4% per annum. As security therefor, Ravelston entered into a general security agreement in favour of Domgroup. The terms of the loan were reviewed, reported on and approved by the independent directors of Hollinger. All of the proceeds of the loan were immediately contributed by Ravelston to Ravelston Management Inc. ("RMI") as a capital contribution, without deduction, and RMI immediately paid such proceeds to Hollinger as a contribution to the capital of Hollinger pursuant to the terms of the March 10, 2003 Support Agreement between Hollinger and RMI (the "Support Agreement").
>
> …

[57] On September 4, 2004, at the Litigation Committee it was noted that final arrangements were to be made concerning the payment of the Joint Damages. The issue at that time, which arose in July 2004, initially related to the question of the division of the liability between Black and Inc. Justice Campbell of the Ontario Superior Court had said that it would be wise not to make a decision on the division of the $21 million until the Delaware judgment appeal had been resolved.

[58] Basically, the Litigation Committee did nothing to negotiate with Black on the loan. The independent directors did nothing on the terms of the loan nor did they substitute any assets for security. All discussions at that time were via the

lawyers, there was no conversation with Black as Black and Walker were not on good terms.

[59] On September 27, 2004, there was a Board meeting of Inc. Present at this meeting were Messrs. John Boultbee, Vale and White. The following directors participated in the meeting by means of a conference call: Black, Barbara Amiel Black and Messrs. Carroll, Radler and Walker, Greenspoon and Allan Wakefield. Also in attendance were Laurence Zeifman of Zeifman & Company, LLP, Jay Richardson and Monique Delorme. At this meeting, there was a detailed discussion about termination of the Litigation Committee. The discussion about termination was summarized as follows (Exhibit R-1, Tab 11, pages 323 and 324):

> …
>
> The Chairman remarked that it was his belief that, as a result of the disbanding of the Litigation Committee, the second point, the retainer of Mr. Harvey Strosberg's firm would automatically end, that the independent directors would then be instructing the Corporation's counsel and that, of course, they could retain other counsel as they so wished. The Chairman then made remarks about Mr. Strosberg's legal advice and the quantum of his legal accounts. It was the consensus of the Meeting that Mr. Strosberg was no expert on sophisticated corporate and securities law matters.
>
> Following discussion, the Chairman indicated that the proposed motion before the Meeting would be as follows: (1) the Litigation Committee be disbanded; (2) as part of the process in which the Corporation becomes re-empowered to exercise authority in International matters, the directors are prepared to proceed with the Chairman's proposed double firewall plan, with the respective proxies being in the hands of a majority of independent directors at both the Corporation and International, until the resolution of all significant litigation; (3) henceforth, the independent directors instruct the Corporation's counsel in any matters where there is any divergence of interest between the independent and affiliated directors; and (4) the retainer of Sutts, Strosberg LLP be terminated.
>
> Mr. Walker stated that he would register his opinion as being opposed to the motion, but that if the motion was broken down into parts it might be easier to discuss it. It was Mr. Walker's view that changing horses in mid-stream on the Catalyst matter was not a wise idea.
>
> Mr. Vale stated that he had taken a telephone call from Mr. Bill Sasso of Sutts, Strosberg LLP, who had advised that he had received a voicemail message from Catalyst's counsel earlier in the day advising that Catalyst would be seeking

through the courts two types of relief: one, all directors and officers of the Corporation to be removed, except for the independent directors; and two, an injunction prohibiting any further related party transactions without court approval.

Following discussion in respect of Mr. Vale's report, the Chairman stated that Mr. Walker had expressed his opposition to the proposed motion and asked for any additional comments.

Mr. Metcalfe commented that, if the independent directors deemed it necessary to retain outside counsel, it would be beneficial to have someone who really understood corporate transactions in recognition of the fact that the transactions in which the Corporation was involved in were not normal transaction, but highly sophisticated ones.

Mr. Walker requested that the motion be broken down into specific points for discussion.

The Chairman indicated that, going from memory, the first point was the Chairman's so-called firewall plan, whereby it would be made public that, to facilitate a reassumption of the Corporation's position at International, Ravelston and the Corporation would lodge their respective proxies with a group composed of people not involved in the litigation, a majority of whom would be comprised of independent directors. Mr. Walker stated that he did not have any objection with that portion of the motion.

Mr. Walker stated that he did not have a problem with the disbanding of the Litigation Committee and remarked that at times the members of the Committee had great difficulty in ascertaining whether they were meeting as a Litigation Committee or an Independent Committee.

The Chairman stated that the third point was the status of Fogler, Rubinoff LLP as company counsel in any matters where there was a related party aspect or any divergence of the interest between the affiliated and the independent directors, and in such instances, Fogler, Rubinoff LLP would take their instructions from the independent directors. The Chairman confirmed that the independent directors were free to retain whatever counsel they deemed necessary, but suggested that doing so be done conscientiously without verging into extravagance or duplication. The Chairman recognized the fact that the conduct of all of the directors was under a microscope and every director must have a comfort level based in part on the ability to seek whatever counsel they reasonably consider necessary. The Chairman stated that there was no thought whatsoever of trying to curtail that, but that he believed all had agreed that there should be an attempt not to engage in unnecessary duplication and unnecessary

legal bills. The Chairman stated that "we'll do the necessary, but we shouldn't bother with the superfluous".

The Chairman stated that it seemed to him that on each of these points, Mr. Walker had no objection, and that the only point that he did have a problem with was the termination of Mr. Strosberg. Mr. Walker reiterated his view that it would be foolish for the Corporation to change the handling of the Catalyst matter at this point in time.

Discussion ensued in respect of the quantum of Mr. Strosberg's legal bills.

The Chairman stated that Mr. Walker's views were carefully noted, that as far as he was concerned they were not completely persuasive, but welcomed his support of 3/4 of the motion. The motion was then tabled for the Meeting, the Chairman acknowledging that Mr. Walker had registered a negative vote.

Upon motion duly made, seconded and carried (Mr. Walker voting against), it was RESOLVED THAT:

1. the Litigation Committee of the board of directors of the Corporation be hereby disbanded, effective immediately;

2. as part of the process in which the Corporation become re-empowered to exercise authority in International mattes, the directors hereby approve the proceeding with the implementation of a plan involving the placing of the Corporation's International proxy in the hands of a majority of independent directors, until the resolution of all significant litigation;

3. henceforth, the independent directors hereby agree to instruct the Corporation's counsel, Fogler, Rubinoff LLP, in any matters where there is any divergence of interest between the independent directors and those directors affiliated with Ravelston; and

4. the retainer of Sutts, Strosberg LLP be hereby terminated, effective immediately.

…

[60] At or about the same time, the Litigation Committee's counsel, Harvey Strosberg, provided a detailed comprehensive letter with respect to his views on the loan, among other matters. In paragraphs 22, 23 and 24 of the letter, he stated in part as follows (Exhibit R-1, Tab 10, page 307):

…

22. At a meeting of the Audit Committee of Inc.'s Board of Directors on July 13, 2004, Mr. Peter White, the Chairman of the Committee, advised the members of the Committee that:

(a) Lord Black was in the process of arranging a personal loan and that he would, in turn, be lending to Inc or an affiliate an amount of approximately US$15 million out of the proceeds of such loan to assist Inc in paying the amount of the Inc/Black judgment; and

(b) the terms of the loan from Lord Black to Inc would be negotiated by the Independent Committee on behalf of Inc.

23. According to the minutes of this meeting, Mr. Walker suggested, and Mr. Rohmer agreed, that the terms of the loan from Lord Black to Inc, when they were completed, should reflect the terms of the loan that Lord Black himself was obtaining from third party sources, so as to avoid any suggestion that Lord Black received a financial benefit for arranging the loan. Significantly, there was no agreement authorized between Black and Inc at this meeting of the Audit Committee.

24. As previously stated, Inc did not have sufficient cash on hand to pay the full US$21 million judgment. The issue of Lord Black's cash resources was never discussed or explored with the independent directors.

…

[61] Further, at paragraph 28, there was disclosure with respect to the particulars of the Quest Loan. Mr. Greenspoon's involvement with the matter was also referred to in paragraph 36 as follows (Exhibit R-1, Tab 10, page 309):

…

36. Mr. Greenspoon confirmed that "*the transaction by which Lord Black advanced US$15,315,364.74*" had not been documented and he continued as follows:

It has always been recognized that any determination of what, if anything, Lord Black is to receive in consideration of the advance of such sum to International would involve a careful analysis of the following considerations, among others: (i) the restrictions under the Wachovia Indenture on the ability of Inc. and certain of its

> *subsidiaries to incur indebtedness or grant security; (ii) whether or not any advance to Inc. or any of its subsidiaries would come from Lord Black or an entity controlled by Lord Black (e.g. The Ravelston Corporation Limited, Conrad Lord Black Capital Corporation); (iii) related party/conflict considerations under applicable corporate and securities law, including, if necessary, depending on the structure of any transaction, the approval of the transaction solely by the independent directors; (iv) withholding tax issues in connection with any loan arrangement (as Lord Black is not a resident of Canada); (v) the fact that the Inc./Lord Black judgment was a joint and several obligation; and (vi) the limited availability of assets of Inc. or its subsidiaries which can be secured having regard to the competing interests looking for security."*

[62] Finally, at paragraph 39, Mr. Strosberg stated as follows (Exhibit R-1, Tab 10, page 310):

> 39. In summary, no particulars of the Quest loan or any proposed arrangements between Lord Black and Inc were given to the independent directors or their counsel before or at the time of the Quest loan. No documentation was prepared or authorized either at or before the time of the payment of the US$21 million judgment to reflect a loan from Lord Black to Inc. No press release was issued by Inc advising that the judgment had been repaid by virtue of a loan from Lord Black to Inc. The US$15,315,364.74 has not been recorded as Inc's liability and there has been no demand by Inc that Ravelston and RMI make this payment. Undoubtedly, these omissions resulted at least in part from the severe time constraints faced by the parties in meeting the July 16 deadline for payment or providing security for the judgment. However, they also arose because, as reflected in Mr. Greenspoon's correspondence, there was no agreement as to what, *if anything*, Lord Black or an entity to be controlled by him would receive in consideration of the funds advanced toward payment of the judgment.

[63] Mr. Greenspoon had given evidence as to what he really meant by the various conditions that he had in relation to the loan transaction. He noted that the focus of his letter related to Black's request for security for the monies that he advanced to International on Inc.'s behalf. He said the loan was undocumented between Black and Inc. There were issues that might be considered in relation to the loan, such as:

a) restrictions in Wachovia's indenture on who could have borrowed the money and what money could be borrowed;

b) who would the advance come from, either from Black or some other entity controlled by Black;

c) as a related party transaction there were conflict regulations that had to be dealt with, such as who would approve the loan;

d) withholding tax issues as Black was a non-resident of Canada for tax purposes;

e) obligations were joint and several so the terms would have to be balanced against the joint and several obligations; and

f) the limited assets that Inc. had available to grant as security.

[64] There was a memorandum of September 22, 2004 from Greenspoon to the independent directors at the time when Greenspoon's firm was counsel to Inc. This memorandum was to the independent directors only and was focused on what security, if any, could be given to Black for the loan to Inc. There was a proposal presented which related to the loan in question. The memorandum stated in part as follows, at paragraph 5 (Exhibit R-4, page 2):

> …According to the minutes of such meeting, Mr. Walker suggested, and Mr. Rohmer agreed, that the terms of the loan from Lord Black to Inc., when they were completed, should reflect the terms of the loan that Lord Black himself was obtaining from third party sources, so as to avoid any suggestion of conflict.

[65] Further, at paragraph 10 of the memorandum, it was noted (Exhibit R-4, page 3):

> Because of the urgency of obtaining the required funds at the time and the complexities involved, the terms of the funding by Lord Black of the Black Advance Amount on account of Inc./Black Judgment Amount, were not then documented.

[66] The proposal presented with respect to documenting the various transactions was as follows (Exhibit R-4, pages 4 and 5):

> …
>
> 1. Effective as of July 16, 2004, Lord Black or an entity controlled by Lord Black ("**BlackCo**") will have lent to Domgroup the principal sum of

US$15,315,364.74. As an "unrestricted subsidiary" under the Wachovia Indenture, unlike Inc. and all its other wholly-owned subsidiaries, Domgroup is permitted to incur indebtedness, grant or incur liens and is not subject to the restrictions concerning transactions with affiliates.

2. The term of the loan will be there years, maturing on July 15, 2007, with a rate of interest equal to 12.68% per annum (being the same rate as that charged by Quest). As with the Quest facility, interest will accrue but will only be payable annually. Upon the maturity or retirement of the Quest loan, the rate of interest will thereupon be adjusted to a pre-determined commercially reasonable rate of interest agreed to by the independent directors and BlackCo.

3. Lord Black has proposed that the loan be secured against all of Domgroup's real estate assets (and the proceeds thereof) but only to the extent of the US dollar equivalent of Cdn.$17,000,000 (being US$12,990,982.71 at the rate of exchange of US dollars to Canada dollars as reported by the Bank of Canada on July 16, 2004 of 1:1.3086), plus accrued and unpaid interest thereon to the date upon which the mortgage on Lord Black's Toronto residence is released and discharged under the Quest facility (the "**Secured Portion**").

4. All or any portion of the loan may be prepaid by Domgroup from time to time, without bonus or penalty. Upon monetization of any of the Domgroup properties (i.e., sale or mortgage to a third party) after July 16, 2004, the loan will provide for a mandatory prepayment on account of the Secured Portion in an amount equal to the net proceeds realized by Domgroup in respect of any such monetization.

5. All fees and expenses incurred by Lord Black in connection with the Quest loan, including the Quest Fees and Expenses and net withholding taxes paid, will be apportioned, and reimbursed to Lord Black, on the basis that the amount advanced by BlackCo to Domgroup bears to the total principal amount of the Quest loan (approximately 63%/38%). To the extent that Inc. incurred some of such fees and expenses, these amounts will be netted from the amounts so reimbursed to Lord Black.

6. Lord Black and Inc. will enter into a written instrument to the effect that the foregoing transactions are conducted on a without prejudice basis and are not an acknowledgement by either party of the ultimate liability for the Black/Inc. Judgement Amount.

It should be understood that the Proposal as set forth above is not a substitution or exchange of collateral as has been stated; Quest has not agreed to substitute a mortgage on the Domgroup properties for the mortgage on Lord Black's Toronto residence.

[67] There was then some discussion, which was reflected in an earlier paragraph above. Counsel for the corporation stated in part as follows (Exhibit R-4, pages 6 and 7):

> …
>
> 1. The judgment of Vice-Chancellor Strine was based on his analysis of the terms of the so-called Restructuring Proposal of November, 2003 and its reference to the matter of repayment by Inc. of amounts paid to it as non-competition payments. Leaving aside for now the question of whether this analysis is faulty, the issue nonetheless is that of the liability of Inc. for repayment of the monies which it in fact received, and the conclusion is therefore that this was primarily a debt of Inc. rather than Lord Black. Accordingly, it would be reasonable to argue that the advance of the Black Advance Amount was genuinely in the nature of a loan transaction, and that it would not be inappropriate to provide Lord Black, the lender, with security for its repayment.
>
> …

[68] The evidence before the Court on the facts was pretty straightforward and without conflict. There was however one conflict between two witnesses called by the Respondent. Strosberg thought that there was a problem in that there were outstanding obligations to Wachovia with a Support Agreement. Ravelston and another company had an obligation to support minimum payments if there was a default. Ravelston controlled Inc. and Inc. controlled International. Strosberg raised the money issue with the independent directors. He said he was told after the July 13, 2004 audit meeting that both Rohmer and Walker agreed to some sort of arrangement as described in paragraphs 22 and 23 of his letter. He said that they told him they did not agree to paragraph 23 in the agreement referred to therein. He noted there were no minutes signed by Rohmer and Walker, there was no agreement signed by Rohmer and Walker, there was no memorandum in writing, therefore you cannot answer the question more as to whether or not there was a loan agreement with Black. Walker testified exactly opposite, that there was in fact an agreement and that he understood there was an agreement. This assertion by Strosberg in paragraphs 22 and 23 of his September 27, 2004 letter was never put by the Respondent to their own witness.

The Financial Statements Mention a Loan Between Black and Inc.

[69] The external auditor for Inc., at the Audit Committee meeting of July 13, 2004, recalled the discussion at the meeting was to have the loan from Black to Inc. on the same terms as the Quest Loan. He was of the view that it was presumed that the amount would be repaid by the company to Black and that the company was of the belief that it owed the money to Black and there was presumed intention to repay Black so that he would remain whole. It was clear at the time that Inc. did not have the liquidity to pay the Judgment and it was their obligation to repay the monies that they had received from non-compete funds that were advanced to them by International.

[70] The financial statements of Inc. of September 30, 2004 identify the loan as a liability. Under current liabilities it shows amounts due to related parties (note 4) of $28,183,000. When one goes to note 4, it shows the related parties and the amounts due to them. It shows that some amounts are due are Black (c) $19,868,000. Paragraph (c) then states as follows (Exhibit A-2, Tab 8, page C-23):

> …
>
> (c) The Corporation had a joint obligation, pursuant to a judgment, to repay non-compete amounts of US$16,549,950 received by the Company in prior years plus interest. This amount is included as part of the receivable from RMI under the Support Agreement. Pursuant to an Order and Final Judgment of the Delaware Court of Chancery dated June 28, 2004 (the "Order"), the Corporation and Lord Black, the Corporation's controlling shareholder and former Chairman and Chief Executive Officer, were ordered to jointly pay to International the non-compete amounts plus interest. On July 16, 2004, the Company repaid to International US$5,964,000 and the balance was paid by Lord Black. The terms of the Company's obligation to make restitution to Lord Black, if any, have not been resolved. Until such determination is made, the balance sheet shows a payable to Lord Black. The Corporation is currently appealing the Order.
>
> …

[71] The auditors, Zeifman & Company, LLP, did formal audit statements for the year ending March 31, 2006. Those statements were prepared internally for the Company. The external auditors did audits of financial statements for December 31, 2004, December 31, 2005 and March 31, 2006. In these audit statements, which were prepared under new management who then controlled the company, it showed that the monies in question were owed to related parties. Under liabilities, current, amounts due to related parties in 2004 were shown as: $65,345,000; 2005 - $73,688,000 and 2006 - $75,617,000. Reference was made to note 4. Note 4 shows

amount due and then under that it says disputed amount due to Black, December 31, 2004 - $19,478,000; December 31, 2005 - $21,259,000 and March 31, 2006 - $21,921,000 and then it refers to paragraph (f). Paragraph (f) states as follows (Exhibit A-2, Tab 14, page 13):

…

(f) Pursuant to an Order and Final Judgment of the Delaware Court of Chancery dated June 28, 2004, the Corporation and Black were ordered to jointly pay Sun-Times an aggregate of US$16.55 million on account of non-compete payments received by the Corporation in prior years, plus accrued interest of US$4.7 million. On July 16, 2004, Sun-Times was paid US$21.3 million pursuant to this Order, of which US$15.3 million was advanced by Black and US$6.0 million was advanced by the Corporation. Black has demanded repayment from the Corporation of the amount advanced by him plus interest. The Corporation disputes any obligation to make restitution to Black (see note 14(g)). Although the Corporation disputes Black's claim for these amounts and believes that, in any event, it has a valid basis for offsetting any such amount against various unrecorded amounts contingently owing to it from Black, the consolidated balance sheets include a liability to Black for such balance, plus interest accrued at the rate of 12% per annum, which the Corporation understands was the interest rate incurred by Black to finance the payment. The amounts contingently owing to the Corporation by Black include amounts claimed in respect of the non-compete payments.

…

[72] These financial statements were followed by further financial statements of the same external auditor for the year March 31, 2007. Again, it shows the amount due to related parties as current liabilities are $89,944,000 in 2007. It refers to a note 3, which continues to show a disputed amount due to Black of $24,405,000 for 2007. Note (e) states (Exhibit A-2, Tab 15, pages 11 and 12):

…

(e) Pursuant to an Order and Final Judgment of the Delaware Court of Chancery dated June 28, 2004, the Corporation and Black were ordered to jointly pay Sun-Times an aggregate of US$16.6 million on account of non-compete payments received by the Corporation in prior years, plus accrued interest of US$4.7 million. On July 16, 2004, Sun-Times was paid US$21.3 million pursuant to this Order, of which US$15.3 million was advanced by Black and US$6.0 million was advanced by the Corporation.

> Black has demanded repayment from the Corporation of the amount advanced by him plus interest. The Corporation disputes any obligation to make restitution to Black (see note 15(g)). Although the Corporation disputes Black's claim for these amounts and believes that, in any event, it has a valid basis for offsetting any such amount against various unrecorded amounts contingently owing to it by Black, the consolidated balance sheets include a liability to Black for such balance, plus interest accrued at the rate of 12% per annum, which the Corporation understands was the interest rate incurred by Black to finance the payment. The amounts contingently owing to the Corporation by Black include amounts claimed in respect of the non-compete payments.

…

[73] All of these financial statements were prepared according to GAAP. The auditor was of the view that even though the amount was in dispute it was reflected as a liability as, to the auditors, the obligation to Black met the definition of liability in the GAAP handbook. There was no question it was a liability in 2004 to 2006 and needed to be identified as a liability on the Balance Sheet. It certainly met the definition of "materiality". The external auditor was very familiar with the terms and nature of the transaction and they did consider it as a liability.

[74] The change in description from a debt, from a loan or an outstanding loan to related parties to a disputed loan is due to a change in the attitude by management and management's tone. In 2004, management was mostly Black, White and Radler, plus some independent directors. Black left in 2004 and the auditor witnessed several changes in management, directors and counsel. Every new group would tend to be more combative against Black and former management as time progressed.

Black Sues Inc. for Repayment of the Loan

[75] By Notice of Action dated July 13, 2006, Black commenced an action against Inc. in the Superior Court of Justice of Ontario in which Black claimed, among other things:

a) damages for breach of contract, including repayment of the principal of the Disputed Loan in the amount of $20,363,308.95;

b) the associated costs of the Disputed Loan in the amount of $192,000;

c) in the alternative, restitution for payment of an advance on behalf of Inc. in the amount of $20,363,309.95, plus the associated costs of the advance in the amount of $192,000; and

d) interest on the amounts in subparagraph (a) or (b) at the rate of 12.68 percent per annum calculated from July 15, 2004.

[76] Black filed and served a Statement of Claim dated August 11, 2006.

[77] In 2007, Inc. sought protection from its creditors under the *Companies' Creditors Arrangements Act*, RSC 1985, c C-36.

[78] By Notice of Action Dismissal dated July 14, 2008, the Superior Court of Justice of Ontario notified Black that the action would be dismissed as abandoned, unless within 45 days of being served with the Notice, a Statement of Defence was filed.

[79] By letter dated August 22, 2008, Heenan Blaikie LLP, counsel for Black, notified the Court that the action should not be dismissed because it had been stayed along with all proceedings against Inc. as a result of the latter's insolvency and enclosed a copy of the stay order and the order confirming the stay.

[80] By letter dated August 22, 2008, the Court acknowledged that the action was stayed and not abandoned.

[81] On May 23, 2013, Black gave notice to Heenan Blaikie LLP and the lawyers for Inc. that he had appointed Stikeman Elliott LLP and Lerners LLP as lawyers of record.

[82] In November 2014, Black and Inc., among others, settled various actions, including the action.

[83] The settlement was set out in a Release and Settlement Agreement made as of November 10, 2014. This Release and Settlement Agreement was approved by the Ontario Superior Court of Justice by Order dated November 13, 2014.

[84] As part of the settlement, Black released Inc. from his claims under the Action and agreed to pay Inc. $5 million.

[85] Eventually, there was a settlement reached with Inc. in which Black had agreed to pay Inc. the sum of $5,000,000 US in total. This particular settlement settled a number of outstanding pieces of litigation and one on them was the action. The amount paid was as a result of an arbitration which was the result of the main action against Black and everything was put in to resolve all outstanding litigation of which the amount claimed by Black against Inc. was part thereof.

[86] Eventually, there was a claim by Black against Inc. There was a demand by Black to Inc. on July 6, 2006 through legal counsel, Heenan Blaikie. The relevant paragraphs are as follows (Exhibit A-2, Tab 12):

> …
>
> The Delaware Judgment ordered Hollinger Inc. and Conrad Black to pay US $21,279,471.84 inclusive of interest to Hollinger International. On July 16, 2004, Conrad Black advanced by way of loan US $15,315,364.74 to Hollinger International on behalf of Hollinger Inc. to satisfy a portion of the Delaware Judgment.
>
> Hollinger Inc. accepted this loan of funds from Conrad Black, but due to urgent circumstances, Hollinger Inc. did not formally confirm the interest and payment terms of the loan but committed to do so. Subsequent to the advance, Hollinger Inc. refused to do so.
>
> Conrad Black hereby demands repayment by 5:00 p.m. on July 12, 2006 of the sum of US $15,315,364.74 (CDN $20,363,308.95) advanced by him on behalf of Hollinger Inc. in respect of the Delaware Judgment, and of the associated costs of the advance in the amount of CDN $192,000 (the costs of the loan facility obtained by Conrad Black), plus interest from July 16, 2004 to the date of repayment at the rate of 12 percent per annum net of all taxes, calculated daily and compounded monthly (yielding an effective rate of 12.68 per cent per annum). The interest rate applicable is the rate at which Mr. Black borrowed funds to make the advance. The interest to July 5, 2005 is CDN $5,134,276.91 and accrues in the amount of $7,140.86 per day.
>
> …

[87] Following this letter of demand, a Notice of Action was issued by Black against Hollinger Inc., on July 13, 2006, in the Ontario Superior Court of Justice. This was followed by a Proof of Claim by Black as a creditor of Inc., among others, when Inc. went into bankruptcy on July 11, 2008.

[88] Ultimately, the claim was part of an omnibus settlement reached between Black and Inc., some years later.

Black's Income Tax Adjustments

[89] Black wanted to make an adjustment to his 2005, 2006 and 2007 tax returns to reflect:

1) the inclusion of interest receivable on the loan using the proceeds from the Quest Loan;

2) deduction of the interest that Black paid on the Quest Loan;

3) deductions of other expenses in connection with the Quest Loan; and

4) doubtful debt reduction related to the interest received or soon to be received on the Inc. loan.

[90] The Respondent refused to make the requested adjustments in total.

[91] For 2008, Black applied a non-capital loss from prior years, which relates to interest and other expenses associated with the Quest Loan. The Respondent denied the non-capital losses for 2008 on the basis that the loan to Inc. was not a loan and that the money borrowed from Quest was not used for the purpose of earning income.

C. Issue

[92] The issue in this Appeal is whether Black used the Quest Loan for the purpose of earning income from property. Is Black is entitled to deduct interest and other expenses related to the Quest Loan?

D. Appellant's Position

[93] Black argues that his direct use of the Quest Loan was to make an interest-bearing loan to Inc., in exchange for satisfying Inc.'s liability for the Joint Damages. One of the purposes in making the interest-bearing loan to Inc. was to earn interest income.

[94] If there was no loan, Black argues in the alternative that his direct use of the Quest Loan was to acquire a right of action against Inc. founded in unjust enrichment.

E. Respondent's Position

[95] The Respondent argues that there was no such loan between Black and Inc. There was merely an agreement to agree between Black and Inc., not an enforceable loan. Black's direct use of the Quest Loan was to pay the Joint Damages, for which he was responsible, not to earn income. The Respondent concedes that if there was a loan between Black and Inc., then Black is entitled to deduct interest and other expenses related to the Quest Loan.

[96] With respect to Black's alternative argument, the Respondent argues that Inc. was not unjustly enriched. A right of action founded in unjust enrichment cannot support the deduction of interest and other expenses incurred under the Quest Loan. Even if Inc. was unjustly enriched, Black's purpose in using the Quest Loan was not to acquire an unjust enrichment claim and earn income therefrom.

F. The Law

[97] Subparagraph 20(1)(c)(i) of the *Income Tax Act* allows taxpayers to deduct from their income interest payments on borrowed money that is used for the purpose of earning income from a business or property:

> 20(1) Notwithstanding paragraphs 18(1)(a), 18(1)(b) and 18(1)(h), in computing a taxpayer's income for a taxation year from a business or property, there may be deducted such of the following amounts as are wholly applicable to that source or such part of the following amounts as may reasonably be regarded as applicable thereto
>
> …
>
> > (c) an amount paid in the year or payable in respect of the year (depending on the method regularly followed by the taxpayer in computing the taxpayer's income), pursuant to a legal obligation to pay interest on
> >
> > > (i) borrowed money used for the purpose of earning income from a business or property (other than borrowed money used to acquire property the income from which would be exempt or to acquire a life insurance policy)

[98] In *Shell Canada Ltd. v R*, the Supreme Court of Canada outlined the four elements of subparagraph 20(1)(c)(i) that must be present before interest can be deducted:

> (1) the amount must be paid in the year or be payable in the year in which it is sought to be deducted; (2) the amount must be paid pursuant to a legal obligation to pay interest on borrowed money; (3) the borrowed money must be used for the purpose of earning non-exempt income from a business or property; and (4) the amount must be reasonable, as assessed by reference to the first three requirements.[1]

[1] *Shell Canada Ltd. v R*, [1999] 3 SCR 622 (SCC) at para 28.

G. Analysis

[99] The Quest Loan represents borrowed money to Black. It is not disputed that Black paid interest on the Quest Loan during the relevant taxation years. This satisfies the first element of the *Shell* test.

[100] It is not disputed that Black had a legal obligation to pay interest on the Quest Loan during the relevant taxation years. This satisfies the second element of the *Shell* test.

[101] Quest operates at arm's length from Black and the reasonableness of the interest rate is not in dispute. This satisfies the fourth element of the *Shell* test.

[102] The third element, that the borrowed money be used for the purpose of earning non-exempt income from a business or property, is the primary point of contention in this Appeal. This element itself contains two requirements: 1) direct use of the borrowed money; and 2) for an income earning purpose.

[103] I will first characterize Black's direct use of the Quest Loan. I will then characterize Black's purpose in using the Quest Loan.

1. What was Black's direct use of the Quest Loan?

[104] I find that Black's direct use of the Quest Loan was to make an interest-bearing loan to Inc.

[105] In *Shell*, McLachlin J., as she then was, outlined that the third element concerns the taxpayer's direct use of the borrowed money:

> The third element -- that the borrowed money is used for the purpose of earning non-exempt income from a business or property -- has likewise been met. This element focuses not on the purpose of the borrowing *per se*, but rather on the taxpayer's purpose in using the borrowed money. As Dickson C.J. stated in Bronfman Trust, supra, at p. 46, "the focus of the inquiry must be centered on the use to which the taxpayer put the borrowed funds". Dickson C.J. further specified that it is the current use of the borrowed money that is relevant and that the provision generally "requires tracing the use of borrowed funds to a specific eligible use": Bronfman Trust, supra, at p. 53. The deduction is therefore not available where the link between the borrowed money and an eligible use is only indirect. Interest is deductible only if there is a sufficiently direct link between the borrowed money and the current eligible use: Tennant v. M.N.R., 1996 CanLII 218 (SCC), [1996] 1 S.C.R. 305, at paras. 18-20, per Iacobucci J. Furthermore, it does not necessarily matter if the borrowed funds are commingled with funds used for another purpose, provided that the borrowed funds can in fact be traced to a current eligible use.[2]

[106] Black did not attempt to earn income from a business with the Quest Loan. To satisfy the third element, Black must therefore demonstrate that he used the Quest loan to earn income from property. If Black cannot demonstrate that he acquired such a property, then there is no property from which he can compute his income under section 9. In that situation, a deduction under paragraph 20(1)(c) would therefore be unavailable to Black.

[107] To state the obvious, for Black's direct use of the Quest Loan to have been to make an interest-bearing loan to Inc., there must have been a loan between Black and Inc.

(1) Did Black and Inc. have a binding loan agreement?

[108] Black's Law Dictionary defines "loan" as:

---

[2] *Shell Canada Ltd. v R*, [1999] 3 SCR 622 (SCC) at para 31.

> 1. An act of lending; a grant of something for temporary use…
>
> 2. A thing lent for the borrower's temporary use; esp., a sum of money lent at interest.[3]

[109] The Oxford English Dictionary defines "loan" as:

> 2. A thing lent; something the use of which is allowed for a time, on the understanding that it shall be returned or an equivalent given.[4]

[110] In *Autobus Thomas Inc. v R*, [2002] 1 CTC 3 (FCA), upheld by the Supreme Court of Canada, 2001 SCC 64, [2001] 3 SCR 5, the Federal Court of Appeal commented with respect to the direct transfer of property between two parties to establish a loan when they stated as follows:

> 6. According to counsel for the appellant, no money was handed over from one party to the other "a requirement for the formation of a loan contract under the Civil Code" so the overall transaction could not possibly be identified as a loan. However, the point is that money was indeed handed over within the meaning of the Civil Code; the bank used the loaned money to pay the invoices in performance of the order from its client. The absence of direct, physical handing over of money is now commonplace in the case of many commercial loans, as much at civil law as at common law.

[111] To find a legally enforceable loan agreement, the Court requires evidence that:

a) the parties to the alleged bargain outwardly manifested their current intention to enter into binding contractual relations;

b) the essential terms of the contract can be determined within a reasonable degree of certainty; and

c) there was an exchange of legally-recognized value between the parties.[5]

---

[3] *Black's Law Dictionary*, 8th Ed., *sub verbo*, "loan".
[4] *The Oxford English Dictionary*, 6th Ed., *sub verbo*, "loan".
[5] *UBS Securities Canada Inc. v Sands Brothers Canada*, [2008] OJ No. 1676; Stephen Waddams, *The Law of Contracts*, 7th ed, (Aurora, ON: Canada Law Book, 2017) at 19.

[112] With respect to the requirement that the essential terms must be determined within a reasonable degree of certainty, the essential terms do not need to be in writing. Where the essential terms are not agreed upon, however, the parties merely have a "contract to make a contract" or an "agreement to agree":

> As a matter of normal business practice, parties planning to make a formal written document the expression of their agreement, necessarily discuss and negotiate the proposed terms of the agreement before they enter into it. They frequently agree upon all of the terms to be incorporated into the intended written document before it is prepared. Their agreement may be expressed orally or by way of memorandum, by exchange of correspondence, or other informal writings. The parties may "contract to make a contract", that is to say, they may bind themselves to execute at a future date a formal written agreement *containing* specific terms and conditions. When they agree on all of the essential provisions to be incorporated in a formal document with the intention that their agreement shall thereupon become binding, they will have fulfilled all the requisites for the formation of a contract. The fact that a formal written document to the same effect is to be thereafter prepared and signed does not alter the binding validity of the original contract.
>
> However, when the original contract is incomplete because essential provisions intended to govern the contractual relationship have not been settled or agreed upon; or the contract is too general or uncertain to be valid in itself and is dependent on the making of a formal contract; or the understanding or intention of the parties, even if there is no uncertainty as to the terms of their agreement, is that their legal obligations are to be deferred until a formal contract has been approved and executed, the original or preliminary agreement cannot constitute an enforceable contract. In other words, in such circumstances the "contract to make a contract" is not a contract at all. The execution of the contemplated formal document is not intended only as a solemn record or memorial of an already complete and binding contract but is essential to the formation of the contract itself. See, generally, Von Hatzfeld Wildenburq v. Alexander, [1912] 1 Ch. 284; Canada Square Corp. Ltd. et al. v. Versafood Services Ltd. et al. (1980), 1979 CanLII 2042 (ON SC), 25 O.R. (2d) 591 (H.Ct.), aff'd., (1981), 1981 CanLII 1893 (ON CA), 34 O.R. (2d) 250 (C.A.); Bahamaconsult Ltd. v. Kellogg Salad Canada Ltd. (1976), 1975 CanLII 379 (ON SC), 9 O.R. (2d) 630 (H.Ct.), rev'd, (1977), 1976 CanLII 554 (ON CA), 15 O.R. (2d) 276 (C.A.); Chitty on Contracts, 26th ed. (1990), at pp.79-91; Corbin on Contracts, (1963), Vol. 1, § 29-30; and Treitel, Law of Contract, 7th ed. (1987), at pp.42-47.[6]

(a) Manifestation of Intention to Contract

[6] *Bawitko Investments Ltd. v Kernels Popcorn Ltd.*, 1991 CanLII 2734 (ON CA) at p 12-13.

[113] The test for whether the parties manifested an intention to contract is objective. The inquiry is focused on "what a reasonable observer would have believed the parties intended, taking into consideration the evidence of all the parties as well as the surrounding documentary evidence."[7]

[114] I believe a reasonable observer would conclude that from the course of conduct it is clear that Black and Inc. regarded themselves as being bound by a loan agreement. It is difficult to comprehend that a person of Black's experience would personally advance over $15,000,000 US without receiving some sort of assurance, comfort, or confidence that the monies would be repaid, and with interest. Black was only looking to remain whole. The benefits of the loan were just as much for Inc. as they were for Black, if not more so. Despite the joint nature of the damages, the evidence indicates that Inc. and Black considered that the damages were at least in part, if not wholly, Inc.'s responsibility.

[115] The evidence of all of the key individuals at Inc., including Black, White, and Walker, was that there was a loan agreement that bound Inc. to repay Black with interest. The evidence is clear that Black did not make a gift to Inc. Each of these witnesses indicated that Black was to be repaid the amount he advanced to International to satisfy the Joint Damages, with interest such that he would remain whole.

[116] White testified that he thought there was a loan at the time. As White explained, a loan from Black was the only realistic procedure given that the payment to International was due on short notice, and Inc. had neither the assets to pay the Joint Damages nor the ability to borrow from other sources without serious consequences.

[117] Walker, a witness called by the Respondent, testified that they thought there was a loan at the time. The only thing that remained to be done was for the independent directors to negotiate the terms necessary to document the loan.

[118] The Audit Committee meeting minutes of July 13, 2004 suggest there was a loan. They indicate that Black would take a personal loan from a third party, which he would use to loan funds to Inc. to "assist the Corporation in paying the amount of the judgment" and that the terms of repayment to Black would be negotiated by the independent directors. Walker, an independent director, suggested the loan

[7] *McLean v Mclean*, 2013 ONCA 788 at para 10.

from Black should reflect the terms of the loan Mr. Black obtained from the third party. The other independent director, Rohmer, agreed.

[119] Inc.'s press release suggests it thought there was a loan. The press release stated that "approximately US$15.3 million was advanced by Conrad Black on behalf of Hollinger. The structure and terms of such advance, as between Conrad Black and Hollinger, are currently being reviewed and negotiated between Conrad Black and the independent directors of Hollinger." (Exhibit A-2, Tab 7)

[120] Over the next several months, Black's relationship with Inc. and Walker deteriorated and became confrontational as time went on. Black was no longer a director or officer of Inc. in the fall of 2004. The loan agreement was never documented, but an agreement need not be in writing for a loan or a contractual obligation to exist.

[121] Inc.'s financial statements showed for years that an amount was due to Black, although the explanation evolved as time progressed and management changed.

[122] There was technically no formal approval by the full Board of Directors, but there was approval by the independent directors, the only ones who could give approval, albeit in the Audit Committee environment.

[123] A reasonable observer would conclude that Black and Inc. intended for there to be a loan agreement, and the key players thought there was a binding loan agreement.

(b) Essential Terms or a Mechanism for Their Resolution

[124] An enforceable contract requires that the essential terms be clear or reasonably ascertainable. The essential terms of the loan between Black and Inc. can be determined with a reasonable degree of certainty. The amount is known, $15.3 million; the interest rate is known, the same interest rate that Black was to pay on the Quest loan; the date on which the monies were advanced, and therefore when interest would begin to accrue, is known.

[125] The Audit Committee meeting took place before Black borrowed money from Quest, so the terms of the loan agreement between Black and Inc. were not absolutely clear. The standard is whether the terms can be determined with a reasonable degree of certainty, not absolute certainty. It was clear that Black's

borrowing was imminent and the essential terms of repayment to Black would match the eventual Quest Loan. It was reasonable to expect that the Quest Loan would reflect market terms at market rates as it was negotiated between arm's length parties. The essential terms of the agreement, matching the Quest Loan, could be determined with a reasonable degree of certainty. A review of the Quest Loan's terms is the mechanism by which the essential terms of the loan to Inc. would solidify. Inc. requested the terms of the Quest Loan from Black, which Black provided in August 2004.

[126] Later on, representatives of Black and Inc. discussed whether, when papering the deal, the lender and the borrower would be intermediaries of the parties. I am satisfied that this discussion, which took place after the initial agreement had been reached, after Black advanced the funds, and after the lawyers became involved, represents a discussion to modify or substitute the original agreement rather than negotiations to reach an agreement for the first time.

[127] There was no suggestion of security at the time Black and Inc. reached an agreement. While security would ordinarily be expected for such a large amount of money, in these circumstances I am satisfied that security was not an essential term given that Black indirectly controlled Inc. Again, while security was discussed once the lawyers became involved, the essential terms had already been agreed on.

[128] The Respondent argues that Black and Inc. merely reached an "agreement to agree" rather than a binding agreement. After hearing the testimony of Black, White, and Walker and counsel for Inc. and after reviewing the Audit Committee meeting minutes and Inc.'s press release, I find that Black and Inc. had agreed that the essential terms or repayment would match the Quest Loan so as to ensure Black was not out-of-pocket after stepping up to help Inc.

[129] Given the short timeline to pay the Joint Damages, and the severe consequences to Inc. of not doing so, Black and Inc. reached an agreement on the essential terms of the loan and left the details to be worked out at a later date. The fact that a formal document outlining those essential terms was to be prepared later on and signed, with the independent directors taking on that responsibility on behalf of Inc., does not alter the validity of the earlier contract. Black and Inc. reached an agreement, not merely an agreement to agree. Neither the lack of a written agreement nor the later discussions once the lawyers became involved altered the binding nature of the agreement with its essential terms.

(c) Exchange of Legal Consideration

[130] Black and Inc. exchanged valuable consideration. Black advanced the funds to International. The advance reduced Inc.'s liability to pay the Joint Damages, to the tune of Black's advance. Inc. accepted that benefit and communicated its intention to repay the advance, with interest, as noted in the Audit Committee meeting minutes and a press release. While Inc. did not in fact pay interest to Black, it was obligated to do so under the agreement.

[131] Black's direct advancement of funds to International on Inc.'s behalf is not a bar to a loan existing between Black and Inc. As outlined in *Autobus Thomas Inc.*, the absence of direct, physical handing over of money is now commonplace at common law and an advance on another party's behalf can support a binding loan.

[132] Black and Inc. entered into a loan agreement. Black's direct use of the Quest Loan was therefore to acquire the loan agreement, which is property to him.

(2) Did Black acquire a right of action founded in unjust enrichment?

[133] Since I have found that Black's direct use of the Quest Loan was to acquire the loan agreement, Black's alternative argument that he acquired a right of action founded in unjust enrichment is unnecessary. Had I found that there was no loan agreement between Black and Inc., Black's direct use of the Quest Loan cannot have been to acquire such a right of action because the evidence does not prove a claim for unjust enrichment.

[134] To prove unjust enrichment, Black must demonstrate that:

1. Inc. has been enriched;

2. Black has suffered a corresponding deprivation; and

3. There was no juristic reason for the enrichment of Inc.[8]

[135] Black's position is that Inc.'s decision to not pay the Joint Damages to International in relation to the non-compete payments, and to instead allow Black to do so on its behalf, means that Inc. was unjustly enriched as it retained the benefit of the non-compete payments it received, at Black's expense.

[8] *Garland v Consumers' Gas Co*, 2004 SCC 25 at para 30.

[136] I agree with Black that a right of action for unjust enrichment can be a chose in action, and can therefore be property as defined in subsection 248(1). I disagree with Black on whether he has a claim for unjust enrichment. The evidence in this appeal does not sufficiently support such a claim for unjust enrichment.

[137] Inc. may well have been enriched, but it is not clear from the evidence adduced in this appeal. Black led no evidence to support the proper apportionment of the Joint Damages at law. The testimonies of White and Walker were that Inc. considered itself morally responsible for the Joint Damages, and intended to repay them in full, but there was no agreement to the effect that Inc. was required to pay the Joint Damages entirely. As the amount of the damages for which Inc. is legally responsible is unclear, the amount by which Inc. has been unjustly enriched is also unclear.

[138] Black suffered a deprivation, but without evidence of Inc.'s enrichment Black's deprivation cannot be said to be a deprivation corresponding to Inc.'s enrichment. Further, if Inc. was enriched there was a juristic reason for the enrichment given that International was entitled to recover the damages fully from Black. Black would then likely seek reimbursement or contribution from Inc. toward the Joint Damages, but that is the proper claim, not unjust enrichment.

2. Did Black's use of the Quest Loan have an income-earning purpose?

[139] The leading case on this purpose test is *Ludco Enterprises Ltd. v R*, 2001 SCC 62. In *Ludco*, the Supreme Court of Canada outlined that the purpose test for interest deductibility under paragraph 20(1)(c) is:

> whether, considering all the circumstances, the taxpayer had a reasonable expectation of income at the time the investment is made. [9]

[140] The purpose test is to be applied objectively:

> Reasonable expectation accords with the language of purpose in the section and provides an objective standard, apart from the taxpayer's subjective intention, which by itself is relevant but not conclusive.[10]

[9] *Ludco Enterprises Ltd. v R*, 2001 SCC 62 at para 54.
[10] *Ludco Enterprises Ltd. v R*, 2001 SCC 62 at para 55.

[141] The taxpayer need only establish that earning income was a purpose, not the main purpose, of borrowing money:

> [I]t is perfectly consistent with the language of s. 20(1)(c)(i) that a taxpayer who uses borrowed money to make an investment for more than one purpose may be entitled to deduct interest charges provided that one of those purposes is to earn income.
>
> In this connection, the adjectives that have been heretofore used by courts to characterize the requisite purpose in s. 20(1)(c)(i), such as "bona fide", "actual", "real" or "true", are to my mind ultimately useful only when describing whether the transaction at issue was a mere sham or window-dressing designed to obtain the benefit of interest deductibility. Absent a sham or window dressing or other vitiating circumstances, a taxpayer's ancillary purpose may be nonetheless a bona fide, actual, real and true objective of his or her investment, equally capable of providing the requisite purpose for interest deductibility in comparison with any more important or significant primary purpose.[11]

[142] Subparagraph 20(1)(c)(i) refers to income generally, not net income.[12] Gross income is sufficient for the purpose of subparagraph 20(1)(c)(i). Black is not required to prove that the Quest Loan was used to generate a profit beyond the Quest Loan's expenses.

[143] The use of the word "purpose" suggests that Black is not required to prove that he actually earned income. Black must prove that he used the Quest Loan for the purpose of earning income that would come into income for taxation purposes.

[144] Black gave clear, unequivocal, and uncontradicted evidence on this particular point that I found both credible and reliable. Black was clear that one of the purposes for making the loan was to be made whole after stepping up to help Inc. pay the Joint Damages. Since Black had an obligation to pay interest expenses on the Quest Loan, Black had to earn interest income on the loan to Inc. in order for him to be made whole.

[145] Black clearly had other purposes in making the loan to Inc. The primary purpose appears to have been to assist Inc. in a time of need and avoid the associated financial and reputational risks. Inc. did not have the financial wherewithal to satisfy the outstanding $21,000,000 US judgment ordered by the Delaware Court. It could pay $6,000,000 through its own resources, but it had no

---

[11] *Ludco Enterprises Ltd. v R*, 2001 SCC 62 at paras 50-51.
[12] *Shell Canada Ltd. v R*, [1999] 3 SCR 622 (SCC) at para 61.

ability to borrow from other lenders due to covenants in an indenture held by Wachovia.

[146] Numerous witnesses testified that if Black had not provided the money to pay the judgment it would have resulted in default on the Wachovia indenture, which would have had catastrophic consequences for Inc.

[147] Black and White both testified that if International had not been paid by the July deadline, International would, among other things, seize Inc.'s head office at 10 Toronto Street, in Toronto, Ontario.

[148] Finally, Inc. would not have had standing in the Delaware Court to file an appeal from the Judgment unless the Joint Damages were satisfied beforehand.

[149] When Black used the Quest Loan to make an interest-bearing loan to Inc., one of his purposes was to earn income. While I find that this was an ancillary purpose compared to his primary purpose of helping Inc., that was a bona fide objective of his investment, which is capable of providing the requisite purpose for interest deductibility under paragraph 20(1)(c).

[150] In the circumstances, Black had a reasonable expectation of income. Despite Inc.'s later misfortunes, Black made a loan to a historically profitable, public company that he controlled indirectly. As he testified, while he may have expected some interest to accrue in that time of corporate crisis, he always expected to be repaid and made whole. I find that his expectation was objectively reasonable.

[151] While I have already found that there was a loan between Black and Inc., and that Black has not made out a claim for unjust enrichment, I would add that I find it difficult to foresee any situation in which a claim for unjust enrichment can support interest deductibility. Remedies for unjust enrichment are restitutionary. They are intended to restore parties to the position they were in before the unjust enrichment took place. There is no income-earning purpose to an unjust enrichment claim. It would be difficult to find any taxpayer that purposefully, unjustly enriched a third party with the intention of earning income.

H. Conclusion

[152] For the reasons stated herein, I allow the Appellant's appeal. The Appellant shall have his costs with a hearing on costs to be scheduled forthwith.

Signed at Ottawa, Canada, this 14th day of June 2019.

"E.P. Rossiter"

Rossiter C.J.

CITATION:	2019 TCC 135
COURT FILE NO.:	2016-2496(IT)G
STYLE OF CAUSE:	CONRAD M. BLACK AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATES OF HEARING:	January 22, 23, 24 and 25, 2019
REASONS FOR JUDGMENT BY:	The Honourable Eugene P. Rossiter Chief Justice
DATE OF JUDGMENT:	June 14, 2019

APPEARANCES:

Counsel for the Appellant:	David C. Nathanson, Q.C. Adrienne K. Woodyard
Counsel for the Respondent:	Arnold H. Bornstein Christa Akey

COUNSEL OF RECORD:

For the Appellant:

Name:	David C. Nathanson, Q.C.
Firm:	DLA Piper (Canada) LLP Toronto, ON

For the Respondent:	Nathalie G. Drouin Deputy Attorney General of Canada Ottawa, Canada