SUPREME COURT OF NOVA SCOTIA
Citation: *Link v. Link*, 2020 NSSC 293

Date: 20201215
Docket: 497455
Registry: Halifax

Between:

Jay Link

Applicant

v.

John E. Link, Troy Link, John Hermeier, and Link Snacks Inc.

Respondents

Decision

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	September 23, 2020, in Halifax, Nova Scotia
Counsel:	Scott R. Campbell and Christopher Madill, for the Applicant Michelle Awad, QC and Michael Richards, for the Respondents

By the Court:

Introduction

I - *The history of the parties*

[1] Link Snacks Inc. ["Link Snacks"], a Wisconsin USA Corporation, is a producer and distributor of Jack Link's meat snacks products. Link Snacks was

founded in 1986 by Jack Link. He began by selling beef jerky from the back of a pick-up truck, and Link Snacks became one of the largest protein snack companies in the world, selling jerky, stick products, steak strips and bars, sausages, and lunchbox snacks. According to the affidavit of Director and Officer John Hermeier, whose evidence I accept unless I indicate otherwise:

> Until June 2009 Link Snacks was owned by Jack (55%) and his two sons, Troy (21.5%) and Jay (23.5%), who received their shares as gifts from Jack. All three were members of the Board of Directors, with Jack as Chairman and CEO. As Link Snacks grew, Jack and his sons set up several companies that serviced Link Snacks either by producing meat snacks for Link Snacks or distributing its products in markets outside the USA. These related companies typically were owned by Troy and Jay on a 50-50 basis. One of the companies incorporated for international distribution of Jack Link's products was Link Snacks Global, Inc. ["Link Global"]. Link Global is a Wisconsin holding Corporation and never conducted any business itself, but instead owned several subsidiary companies, which either directly, or through sub-subsidiaries, distributed Link Snacks' Jack Link meat-snacks brand in markets outside the USA …
>
> Jay and Troy each own 50% of the outstanding shares of Link Global… [which] owns a corporation known as LSI Canada Holdings, Inc. ("LSI Canada Holdings"), which is also itself a holding Corporation. LSI Canada Holdings, in turn, owns 100% of the outstanding shares of Jack Link's Canada Company ("Link Canada"), a Nova Scotia unlimited liability company incorporated in Nova Scotia on November 8, 2002 …
>
> Link Canada's business consisted solely of its distribution of Link Snacks' products. It owned no production facilities, recipes, or intellectual property rights. And, at no time did Link Canada have a written or verbal contractual right to distribute Link Snacks products. Rather, Link Canada's ongoing ability to serve as a distributor was always and exclusively at the sole discretion of Link Snacks.
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> …
>
> On August 4, 2005, Jay entered [into] a "Departure Memorandum" under which he agreed, among other things, to be terminated as an employee and/or officer of Link Snacks and other companies and to negotiate an amicable buy-out of his interests in Link Snacks and related companies.

> Prior to his departure Jay expressed dissatisfaction with his role as COO and demanded that he be appointed CEO of Link Snacks. When members of management expressed their views that Jay was not yet ready or qualified to be CEO, Jay became increasingly hostile. As a result, his ability to work with members of senior management, as part of a cohesive team, became strained. Ultimately, Jay refused to report to his father, Jack, who was the chief executive officer, or consult with other members of Link Snacks management, he failed to communicate about what he was doing for the company and he did not timely perform his responsibilities.
>
> Jay stated to me, at or about the time of his departure, that if Jack and Troy did not accept his terms, Jay would make life miserable for [them and] Link Snacks with a bunch of lawsuits which he had ready to file. He threatened that management would be spending all of its time responding to his lawsuits and they would have no time to operate the business. His stated goal was to 'bring the company to its knees' through the litigation process.[1]

II - *Jay's claims against the Respondents*

[2] Jay alleges that between 2009 and 2016, Jack, Troy, and John Hermeier acted in breach of their fiduciary duties by effecting, in bad faith (and, incidentally, to the benefit of Link Snacks Inc.) the following acts:

1. Transferring profits from Link Canada to Link Snacks Inc., the "**Transfer Pricing Claims**"; and

2. Terminating Link Canada's distribution of Link Snacks' products in Canada and the transfer of Link Canada's assets to Link Snacks at undervalued amounts (Jay says "at no cost"), such that Link Canada's share value became negligible, which correspondingly meant that Link Global's share value similarly became negligible, and ultimately that Jay's 50% ownership of Link Global's value became negligible, the "**Theft of Link Canada Claims**" (which latter claims were also characterized by Jay at the Wisconsin litigation in the Third Amended

[1] Affidavit of John Hermeier, Director and Officer (Executive Vice President of Business Development and International Sales for Link Snacks) - paras. 15-29.

Complaint as "unjust enrichment of Link Snacks to the detriment of Link Canada").

[3] This decision addresses whether I should grant leave to Jay Link ["Jay"] to bring an action in this court, in the name and on behalf of Jack Link's Canada Company ["Link Canada"], against his father John E. Link ["Jack"], Troy Link ["Troy"], John Hermeier ["Hermeier"], (collectively, "the Individual Respondents") and Link Snacks Inc. ["Link Snacks"], a Wisconsin, USA, Corporation.

III - *A synopsis of the Wisconsin litigation*

[4] For present purposes it is accurate to say, until a motion to amend seeking leave regarding the Third Amended Complaint, initially proposed on or about August 15, 2017, by Jay's counsel, seeking to add as plaintiffs Link Global, LSI Canada Holdings Inc ["LSI"] and Link Canada, Jay participated in his personal capacity in multiple related lawsuits in the State of Wisconsin against Link Snacks, Jack, Troy, and John Hermeier.

[5] In summary, most relevant for my purposes are the following:

1. The so-called "**Link I**" lawsuit, where Link Snacks, Jack and Troy sued Jay for specific performance of the Buy-Sell Agreement between Link Snacks and its shareholders, which, after the termination of Jay's employment, triggered his obligation to sell his Link Snacks shares

back to the Corporation. Jay filed counterclaims against Jack, Troy and Link Snacks, and filed third-party claims against John Hermeier, as well as against Link Snacks, three other Directors and against four other Link companies, including Link Global. Link I went to trial in 2008, and on July 9, 2008, the jury returned its verdict. The jury found that:

a. Jay breached the terms of the Departure Memorandum; Jay breached his fiduciary duties to Link Snacks and another Link owned company; Jay tortiously interfered with Link Snacks' prospective contractual rights with a third party;

b. John Hermeier and the other Officers and Directors of the Link companies did not breach their fiduciary duties to Jay;

c. Troy technically breached his fiduciary duties to Jay, but that those breaches caused Jay zero dollars in damages; and

d. Jack breached his fiduciary duties to Jay. The jury awarded reciprocal punitive damages awards of $5 million against each of Jack and Jay.

[6] In assessing the equities, the Link I court also stated the following in relation to Jay's conduct:

> One, when faced with changes in his job responsibilities, Jay disobeyed the Chief Executive Officer and refused to ever submit to the boss' direction.
>
> Two, Jay threatened to harm the Corporation, to seek vengeance, and to *hamper the business of Link Snacks, Inc.*
>
> Three, Jay threatened with the foulest of language to cut off the raw supply of beef product necessary for the continued existence of the business.
>
> Four, notwithstanding the clear and unequivocal obligations Jay had in the 1995 Buy-Sell Agreement entered into, Jay entered into a transaction with J&F, also known as Friboi, where the largest beef producer in the world would have the option to purchase shares in all of the Link-related companies and thereby become that very large, quote, third party, end quote, that can interfere with the management and control of Link Snacks. Specifically, the joint venture agreement with JF provided -- I grabbed the wrong exhibit. We know what it provided: J&F has the option to purchase any shares, any interest, that Jay has or may acquire in the Link-related companies.
>
> Five, notwithstanding knowledge that unless and until this Court's ruling on the condition precedent is reversed by the appellate courts of this state Jay is not entitled to any payment for his shares until he signs a non-competition agreement, notwithstanding that, Jay went forward with a, quote, competitive business, individually and with Friboi. That new enterprise, although small, presently presents a serious business risk to the long-term viability of Link Snacks, Inc.
>
> Six, *Jay tortiously interfered with the prospective contract between Friboi and Link Snacks, Inc.*, that, although proof of damages was inadequate, the conduct was wrong as to Link Snacks, Inc.; and the jury so found.
>
> Seven, Jay breached the Departure Agreement by instead of exercising good faith in the negotiation for the sale of his shares pursuant to the agreement he signed, he proposed that he purchase Jack and Troy's shares. That counter-proposal was completely contrary to the intent and the purpose of both the Departure Memorandum and the 1995 Buy-Sell Agreement.

Eight, *Jay disclosed confidential business information that is almost impossible to determine the value as to that disclosure of confidential information*.[2]

[My italicization added]

2. The so-called "**Link II**" lawsuit[3] filed December 6, 2010 [the "**First Complaint**"- the equivalent in Nova Scotia being a "Statement of Claim"] in Wisconsin Circuit Court. Jay sued in his personal capacity all of the Respondents herein, and alleged that "they breached their fiduciary duties by manipulating intercompany transactions which allegedly deprived Jay of monies and dividends properly payable to him … Jay refers to this claim … as his 'Transfer Pricing Claims'"[4] - which evolved to become the "**First Amended Complaint"** dated February 28, 2013.[5]

[7] The First Amended Complaint evolved to become "**Second Amended Complaint**", filed on May 10, 2016[6] wherein he added the content of paragraph 19

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[2] Tr. 11:20-13:19, August 8, 2008 - true copies of excerpts from the August 8, 2008 Link I hearing are attached as Exhibit "C", Norton affidavit.

[3] See Exhibit "E" Norton affidavit.

[4] Para. 23 Norton affidavit.

[5] Exhibit "O" Norton affidavit.

[6] Exhibits "O" and "P" Norton affidavit.

G: "[the Individual Defendants breached their fiduciary duties to Jay Link by…] causing, through their actions and inactions, the transfer of value from those companies identified in paragraph 18 above [including Link Global] to themselves or to Link Snacks for less than adequate consideration." This added paragraph more specifically reflects what Jay would characterize as "the Theft of Link Canada" claims in the proposed derivative action in Nova Scotia.[7]

3. After Link Snacks terminated Link Canada's status as its distributor by notice June 12, 2015, with an effective date February 12, 2016[8], Jay amended his Complaint again to add as Plaintiffs, Link Global, LSI, and Link Canada; and Link Snacks as a Defendant. Together these comprise the "**Third Amended Complaint**".[9] Therein, Jay added a further breach of fiduciary duty claim as against the Individual Respondents in relation to the "Theft of Link Canada Claims", and one of "Unjust Enrichment" as against Link Snacks.[10]

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[7] Para. 24 Norton affidavit.

[8] Paras. 42 and 58 Hermeier affidavit

[9] See Jay's counsel's August 15, 2017 Brief in support of the motion for leave to amend the Complaint and enclosing a proposed draft of the Third Amended Complaint at Exhibit "Y" Norton affidavit.

[10] That brief was written by Jay's counsel after having received the July 31, 2017 brief from Respondent's counsel wherein Mr. Kirtley states at page 2 of his letter under the heading "Canadian Law Would Govern the Litigation and Canadian Court Approval is Required": "Under the 'internal affairs doctrine', a court must apply the law of the State (or country) of incorporation. Here, the parent company, Link Global is a Wisconsin corporation. Wisconsin

IV - *The present decision that this Court must make*

[8] At its core, Jay seeks to re-invent his unsuccessful Wisconsin litigation regarding the "Transfer Pricing Claims" and "Theft of Link Canada Claims", not by proceeding here in Nova Scotia in his personal name this time, but rather in the name of Link Canada.

[9] Jay seeks permission to conduct what is called a "derivative action" pursuant to s. 4 of the Third Schedule of the Nova Scotia *Companies Act*, RSNS 1989, c. 81.

[10] In *Budd v Bertram*, 2018 NSCA 95, Justice Hamilton speaking for our Court of Appeal, discussed derivative actions:

> 32 Derivative actions allow minority shareholders, among others, to bring actions in the name and on behalf of the company, to enforce a right of the company, when those who control the company refuse to do so. Federal and provincial statutes were enacted to permit such actions, which for the most part had been previously barred at common law. …:
>
> 1. they ensure that a shareholder has a right to recover property or enforce rights for the corporation if the directors refuse to do so, and
>
> 2. it helps to guarantee some degree of accountability and to ensure that control exists over the board of directors by allowing shareholders the right to bring an action against directors if they have breached their duty to the company.
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> …

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has codified the internal affairs doctrine as it applies to derivative actions… [Citations omitted]. Therefore, in the triple derivative proceeding regarding the rights of Link Canada, a company incorporated in Nova Scotia Canada, Canadian law will govern the action. *We have confirmed with Canadian legal experts that, under the Nova Scotia Companies Act, you must 'apply to the court for leave to bring an action in the name and on behalf of the Company or any of its subsidiaries.*'"

> 34 Granting leave to commence a derivative action is a discretionary remedy arising out of equitable principles … Leave should not be granted where there is an adequate alternate remedy available to the complainant … The parties agree there is no alternative remedy in this case.
>
> 35 The legislation governing derivative actions is drawn in broad terms and, as remedial legislation, should be given a liberal interpretation in favour of the applicant … A judge hearing a leave application is not called upon to determine questions of credibility or to resolve the issues in dispute and ought not to try. These are matters for trial … The threshold the applicant has to meet is low as the test is that it "appears" to be in the interests of the company, not that it is in the interests of the company.
>
> [Citation omitted]

[11] For the reasons that follow, I conclude that I should not grant leave, and I decline to do so.

Background

1 - The Grounds for Relief in the Notice of Application in Chambers

[12] In his Application for permission to bring a derivative action against the Respondents, Jay sets out the following alleged factual basis for his claim:[11]

> The Parties
>
> **1.** Link Canada is an unlimited liability company, incorporated pursuant to the laws of Nova Scotia. Link Canada is a wholly-owned subsidiary of LSI Canada Holdings, Inc. ("LSI"), which is a company incorporated pursuant to the laws of Wisconsin. LSI is a wholly-owned subsidiary of Link Snacks Global, Inc. ("Link Global"), which is a company also incorporated pursuant to the laws of Wisconsin.
>
> **2.** Jay is a 50% shareholder in Link Global. Jay is a resident of Wisconsin.

[11] The Respondents' Notice of Contest filed June 10, 2020, admits to the facts stated at paragraphs 1, 2, 5, 7, 8, 22, and 23 in the "Grounds for Relief" of the Notice of Application filed March 12, 2020.

3. The Respondent, Troy Link ("Troy"), owns the remaining 50% shares in Link Global. Troy holds the deciding shareholder vote in the event of a tie between Jay and Troy.

4. At certain material times, the following Respondents were officers and directors and – collectively – had the ability and authority to manage, direct and control the affairs of Link Global, LSI and Link Canada:

a. Troy;

b. John Link ("Jack"); and

c. John Hermeier ("Hermeier").

5. On the Nova Scotia Registry of Joint Stock Companies profile for Link Canada, the civic address for each of Troy, Jack and Hermeier is listed as 1 Snackfood Lane in Minong, Wisconsin.

6. Link Global is presently the subject of a dissolution proceeding in the Wisconsin State Circuit Court (the **"**Receivership Court**"**), in which a receiver (the "Receiver") has been appointed to liquidate the assets of Link Global and its subsidiaries. In this capacity, and as of April 2018, the Receiver's authority has been confirmed to include management and control of the affairs of Link Canada.

7. The remaining Respondent, Link Snacks, Inc. ("Link Snacks"), is a company incorporated pursuant to the laws of Wisconsin. Link Snacks is among the world's largest producers of meat-snacks.

8. Jay was a shareholder of Link Snacks until June 30, 2009. Since that time, Jack and Troy have been the sole shareholders of Link Snacks.

9. At all materials times, Troy, Jack and Hermeier were officers and directors and – collectively – had the ability and authority to manage, direct and control the affairs of Link Snacks.

10. Despite their similar names, Link Snacks and Link Global are independent companies. The officers and directors of Link Global and its wholly-owned subsidiaries (LSI and Link Canada) owe legal and fiduciary duties to those companies, including a duty of undivided loyalty.

Link Canada – Business and Operations

11. Link Canada was formed in 2002. Until 2016, Link Canada distributed Link Snacks' jerky product in Canada. During this time, Link Canada built a distribution network that reached grocery stores, convenience stores, big-box stores, and other retail outlets throughout Canada.

12. Beginning in or about 2009, the individual Respondents (Jack, Troy and Hermeier – the "Individual Respondents") began to privilege their duties to Link Snacks over their duties to Link Canada. The Individual Respondents operated Link Canada as a subservient subsidiary of Link Snacks, rather than the subsidiary of an independent Link Global.

13. Over time, the Individual Respondents authorized and directed Link Snacks to set the terms of every transaction between Link Snacks and Link Canada, without any opportunity for negotiation on the part of Link Canada. In so doing, Link Snacks was able to exercise full control over Link Canada's business and over Link Canada's employees.

14. In response, Jay filed a claim against the Respondents in December 2010 in the United States, in the State of Wisconsin, Washburn County Circuit Court Case No. 2011CV62 (historically referred to by the parties as "*Link II*").

15. In approximately February of 2016, the Individual Respondents (as directors and officers of Link Snacks) authorized and directed Link Snacks to acquire every operating asset of Link Canada for itself. At the same time, the Individual Respondents (as directors and officers of Link Canada) authorized and directed Link Canada to relinquish the entirety of its operating assets to Link Snacks at no cost and with no benefit to Link Canada, LSI or Link Global.

16. Thereafter, the Individual Respondents and Link Snacks:

a. set up a new company in Canada, LSI Enterprises Canada ULC, that was wholly owned by Link Snacks, rather than Link Global / LSI;

b. transferred the employment agreements of Link Canada employees to this new company;

c. transferred the leases from Link Canada to this new company, including its primary office space; and

d. seized all of Link Canada's customer information and customers and transferred them to this new company.

17. In the result, Link Canada no longer has any employees and no longer conducts any business.

Corporate Misappropriation

18. At all material times, the officers and directors of Link Canada were obliged to act in the best interests of Link Canada. Because the Individual Respondents were officers and directors of both Link Canada and Link Snacks, they had conflicted loyalties with respect to any and all business affairs between the two companies.

19. The Individual Respondents took no steps to resolve these conflicts, such as appointing independent management teams to handle any business affairs between Link Snacks and Link Canada. Instead, and as outlined above, the Individual Respondents acted in violation of their legal and fiduciary duties to Link Canada.

20. As the operating minds of both Link Canada and Link Snacks, the Individual Respondents authorized and directed an entire asset transaction in conflict (the "Corporate Misappropriation"). This ultimately decimated Link Canada and the value of its shareholdings up the corporate ladder.

21. Link Snacks was the primary beneficiary of this Corporate Misappropriation by the Individual Respondents. Link Snacks received all the operating assets of a highly developed Canadian distribution company for no consideration whatsoever.

2 - The facts asserted in Jay's affidavit

[13] In his affidavit Jay states:[12]

> The Parties and Corporate Structure
>
> 4. The companies described below are, or have been, in the business of producing and distributing meat snacks, including meat jerky products.
>
> 5. Jack Link's Canada Company ("Link Canada") is a Nova Scotia unlimited liability corporation (Registry ID 3072204). A true copy of the corporate profile for Link Canada from the Nova Scotia Registry of Joint Stock Companies website is attached to this Affidavit and marked as Exhibit "A".
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> 6. There are three directors of Link Canada, all of whom are named as Respondents to this proceeding:
>
> (a) John E. Link ("Jack"), who is also Chairman of the Board and Chief Executive Officer;
>
> (b) Troy Link ("Troy"), who is also the President; and
>
> (c) John Hermeier ("Hermeier"), who is also the Chief Financial Officer.
>
> 7. Link Canada is a wholly owned subsidiary of LSI Canada Holdings, Inc. ("LSI"), which is a Wisconsin corporation (Entity ID L035676). A true copy of the Corporate Report for LSI from the Wisconsin Department of Financial Institutions website is attached to this Affidavit and marked as Exhibit "B".

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[12] I bear in mind that there has been no cross-examination of any affiants, and that some of the Respondents' affiants' factual statements differ from those of Jay: for example, *John Hermeier* states at paragraphs 6 and 7 of his affidavit filed June 12, 2020: "I have reviewed the affidavit of Jay sworn April 24, 2020 and Jay's Notice of Application in Chambers. I note that both Jay's affidavit and the Notice of Application in Chambers misstate or ignore material facts related to the historical litigation and the relationship between Link Canada and Link Snacks (both defined below). I correct many of Jay's misstatements in this affidavit. However, the fact that I have not addressed any specific fact or allegation in Jay's affidavit should not be construed as an admission that said fact or allegation is true." *Brian P Norton*, counsel for the Respondents stated in his affidavit filed June 19, 2020 at paragraph 6: "I have read the Applicant Jay Link's ("Jay") Notice of Application and accompanying affidavit. Jay, who is not a lawyer, spends considerable time in those submissions providing an incomplete and sometimes inaccurate history of the Link I and Link II proceedings. I submit this affidavit in response. As counsel of record to the Respondents throughout Link I; Link II, and the South Dakota Action, I here attempt to set forth an accurate and comprehensive summary of what occurred in those cases beginning in 2005. I apologize in advance for the length of this affidavit but because those proceedings have been hotly contested for almost 15 years now, even a summary is long…. paragraph 7… It is my understanding that the Corporate Misappropriation Claims [the "Transfer Pricing Claims" and "Theft of Link Canada claims"] represent the entirety of the claims Jay is presently seeking leave to pursue on Link Canada's behalf. Accordingly, Jay, at the very latest, became aware of the Corporate Misappropriation Claims in December 2010 and then May 2016."

8. Jack, Troy and Hermeier are the directors and officers of LSI.

9. LSI, in turn, is a wholly owned subsidiary of Link Snacks Global, Inc. ("Link Global"), which is also a Wisconsin corporation (Entity ID L034225). A true copy of the Corporate Report for Link Global from the Wisconsin Department of Financial Institutions website is attached to this Affidavit and marked as Exhibit "C".

10. Jack, Troy and Hermeier are the directors and officers of Link Global.

11. I own 50% of the shares in Link Global. Troy owns the other 50% of the shares in Link Global. If there is a tie between me and Troy, Troy gets to cast the deciding shareholder vote.

12. The other Respondent to this proceeding is a company called Link Snacks, Inc. ("Link Snacks"). Link Snacks is also a Wisconsin corporation (Entity ID C032662). A true copy of the Corporate Report for Link Snacks from the Wisconsin Department of Financial Institutions website is attached to this Affidavit and marked as Exhibit "D".

13. Jack, Troy and Hermeier are the directors and officers of Link Snacks.

14. I was a shareholder of Link Snacks until June 30, 2009, when I sold my shares back to Link Snacks pursuant to a Wisconsin Circuit Court Order enforcing a 1995 Buy-Sell Agreement. A true copy of the June 15, 2009 Order in this regard is attached to this Affidavit and marked as Exhibit "E".

15. To the best of my understanding, Jack and Troy have been the only shareholders of Link Snacks since June 30, 2009.

16. Link Canada was the sole distributor for Link Snacks' products in Canada until 2016.

Allegations of Corporate Misappropriation

17. I am seeking derivative leave because I believe that Jack, Troy, and Hermeier (the "Individual Respondents") have breached their fiduciary duties to Link Canada by engaging in acts of unlawful corporate misappropriation. I assert that the Individual Respondents and Link Snacks owe compensation to Link Canada for their misconduct.

18. I allege that the Individual Respondents' misconduct began in or around 2009, when they started to operate Link Canada as a subservient subsidiary of Link Snacks, even though Link Canada is a subsidiary of Link Global – an entirely different and separate corporate chain.

19. The alleged misconduct includes manipulation of the "transfer prices" paid by Link Canada to Link Snacks. I assert that the Individual Respondents caused Link Canada to overpay for the product it was buying from Link Snacks, thereby siphoning money away

from Link Canada and into Link Snacks. I refer to these allegations as the "**Transfer Pricing Claims**."

20. In December 2010, I filed a claim against the Respondents in Wisconsin (Washburn County Circuit Court Case No. 2011CV62, a proceeding which the parties have historically referred to as "*Link II*"). The 2010 complaint filed included the Transfer Pricing Claims.

21. In February 2016, the Individual Respondents then brought the operations of Link Canada to an end:

(a) as directors and officers of Link Snacks, the Individual Respondents authorized and directed Link Snacks to acquire every operating asset of Link Canada for itself; and

(b) at the same time, and as directors and officers of Link Canada, the Individual Respondents authorized and directed Link Canada to relinquish the entirety of its operating assets to Link Snacks at no cost and with no benefit to Link Canada, LSI Holdings, or Link Global.

22. I refer to these actions as the "**Theft of Link Canada Claims**". To effect these claims, the Individual Respondents and Link Snacks:

(a) set up a new company in Canada, LSI Enterprises ULC, that was wholly owned by Link Snacks;

a) set up a new company in Canada, LSI Enterprises ULC, that was wholly owned by Link Snacks;

(b) transferred Link Canada's employment agreements to the new company;

(c) transferred Link Canada's leases to the new company; and

(d) seized all of Link Canada's customer information, and transferred it to the new company.

23. The material result of the Theft of Link Canada Claims was to deprive the shareholdings in Link Canada of all their value, to the benefit of Link Snacks.

24. Link Canada no longer has any employees and is no longer in business.

25. I amended my *Link II* complaint in May 2016 to add the Theft of Link Canada Claims, a true copy of which is attached to this Affidavit as Exhibit "F".

26. I will discuss the *Link II* proceedings in more detail below. The Transfer Pricing Claims and Theft of Link Canada Claims will be collectively referred to as the "**Corporate**

Misappropriation".

Appointment of Receiver

27. As part of an earlier dissolution proceeding involving Link Global, a receiver was appointed to liquidate the assets of Link Global and its subsidiaries, including Link Canada.

28. By Order dated October 5, 2009, the Wisconsin Circuit Court appointed Peter F. Herrell of Eau Claire, Wisconsin as the receiver (the "Receiver"). At the time of this October 2009 appointment, Mr. Herrell was with the law firm Wiley Law S.C. of Eau Claire and Chippewa Falls, Wisconsin. Mr. Herrell is now with the law firm Nodolf Flory, LLP in Eau Claire.

29. A true copy of the October 5, 2009 Order Appointing Receiver is attached to this Affidavit and marked as Exhibit "G".[13]

Evidentiary objections

[14] Let me next briefly deal with evidentiary objections raised by the parties.

1. Jay argues (in his Reply brief at page 2) that paragraph 15 of Brian P. Norton's affidavit, and paragraph 34 of John Hermeier's affidavit, are inadmissible hearsay and should be struck. I agree.

[15] In summary, John Hermeier's wife testified in the Wisconsin proceedings that sometime before 2008, Jay twice called her to urge her that John needed to talk to Jack and convince him to stop his efforts to disadvantage Jay, otherwise he was

[13] The court has numerous affidavits available to it as evidence. By email sent September 22, 2020, counsel for the Respondents noted that three corrections were required to be made to the affidavit of Brian P Norton filed June 19, 2020. This email and attachment constitute Exhibit 1 in this Application. The parties have agreed not to conduct any cross-examination on any of these affiants. The parties have also stipulated some facts by agreement in a letter dated August 24, 2020: "I am pleased to advise the Court that the parties have agreed to mutually abandon all requests for cross-examinations of the affidavits. This agreement has been reached on the basis that the Applicant will stipulate to the following dates: May 24, 2006 – Jay Link's resignation from the Board of Link Snacks Global Inc.; January 30, 2007 – Jay Link's removal as an officer and director of the subsidiaries of Link Snacks Global Inc. (including Jack Link's Canada Company and LSI Canada Holdings Inc.); April 25, 2018 – Resignations as Directors of Jack Link's Canada Company by Jack E. Link, Troy Link and John Hermeier; June 27, 2018 – Appointment of Peter Herrell as sole Director of Jack Link's Canada Company."

going to "make our lives a living hell" and their family could lose everything if Jay rather than Jack was successful in the litigation.

[16] Civil Procedure Rule ["CPR"] 5.17 states:

> The rules of evidence, including the rules about hearsay, apply on the hearing of an application and to affidavits filed for the hearing except a judge may, in an *ex parte* application, accept hearsay presented by affidavit prepared in accordance with Rule 39 – Affidavit.

[17] Justices Warner and Norton of this Court considered CPR 5.17 in *Hutchinson v RL MacDonald investment Ltd*., 2018 NSSC 248, and *King v Gary Shaw Alter Ego Trust,* 2020 NSSC 288.

[18] Counsel agreed that pursuant to section 20 of the *Nova Scotia Evidence Act*, no formal authentication of the Wisconsin court proceedings transcripts were required. I observe that while the evidence is inadmissible coming from Julie Hermeier, the gist of it is admissible from John Hermeier. Notably, the latter states: "Jay threatened me on several occasions that if Link I went to trial, I could lose everything."

2. The Respondents argue that the affidavit of Andrew Erlandson (sworn June 1, 2020, and filed June 22, 2020) is improper reply evidence, or a form of case splitting. At footnote 3, page 24 of its brief: "[it] is improper as it is not limited to 'new points raised' by the Respondents' affidavits: Civil Procedure Rule 5.05(4)… The Respondents were unable to provide new evidence in response. That

> fact notwithstanding, and as set out above, the Erlandson affidavit is wholly irrelevant to the issues in this proceeding and offers no opinion on Nova Scotia law." I disagree.[14]

[19] Mr. Erlandson exclusively references Wisconsin law. He states at paragraphs 18 and 20 of his affidavit:

> Having reviewed the Wisconsin Circuit Court record, it would be unreasonable to conclude that Jay was dilatory in bringing in pursuing the subject causes of action, or that he received poor or neglectful legal representation… In my opinion, it is unlikely that the Wisconsin Circuit Court would consider applying the statute of limitations defense in this matter, until the cause proceeded to the merits stage.

[20] His evidence could be said to support the following statements in Jay's affidavit:

> 81 – I have been diligently trying to pursue these claims in Wisconsin for several years. I have interpreted some of the directions from the Circuit Court and the Court of Appeals to be inconsistent or in conflict, but I have tried to comply with them in each request I have made to the Receiver in the hopes that he would pursue the claims of Corporate Misappropriation or authorized me to do so.…
>
> 84 – The Directors of Link Canada [the Individual Respondents] have also been notified of my intention to bring this proceeding. [They] have been involved in the Wisconsin proceedings [Link II and the Receivership Proceeding] and have argued in those proceedings that the only way I can bring a derivative action on behalf of Link Canada is if I seek leave from the Supreme Court of Nova Scotia. The Individual Respondents' Wisconsin counsel have also been copied on my lawyers' correspondence to the Receiver.

[21] To the extent that the complaint may be seen to be the Applicant splitting his case, I accept his argument that "until being served with the Respondent's Notice of

[14] See the requirements for expert evidence in CPR 55 and the pronouncements of the Supreme Court of Canada in *White Burgess Langille Inman v Abbott and Haliburton Co*., 2015 SCC 23. Both attorneys Erlandson and Smigelski comply in their affidavits with this requirement as buttressed by the representations of counsel, which I accept.

Contest and Affidavits on May 22, 2020, the Applicant (who had already filed his Affidavit, and the original Erlandson Affidavit) was not aware the Respondents would be relying on a limitations defence at the leave stage. As such, in this context, the Second Erlandson affidavit is proper in order to respond to the limitations issue as raised by the Respondents after such time as the Applicant's primary evidence was prepared and served."

A consideration of the prerequisites for granting leave to proceed with a derivative action

1 - Should I assess the effect of the *Limitation of Actions Act* upon the derivative action at this stage or should it be deferred until after the issue of leave to commence a derivative action is decided? I will assess its effect at this stage.

[22] The Respondents argue that Jay's proposed derivative action is so certainly statute-barred by the *Limitation of Actions Act*, c. 35, S.N.S. 2014 (effective September 1, 2015), relying on section 23 thereof (the transitional provision), that I have all I need to decide that issue conclusively; alternatively they suggest that I consider that the derivative action is statute - barred as part of my analysis of the statutory criterion that "it appears to be in the interests of the company… that the action be brought….".[15]

[15] In *Budd*, Justice Hamilton stated: "Granting leave to commence a derivative action is a discretionary remedy arising out of equitable principles… leave should not be granted where there is an adequate alternate remedy available to the complainant…" I asked counsel whether in such leave applications I can consider other equitable principles beyond the matter of "adequate alternate remedy". As I understood their positions, I should not. This

[23] I bear in mind that the basic facts alleged include breaches of fiduciary duty alleged against the Individual Respondents involving the time interval from 2009 to 2016. Our *Limitation of Actions Act* is a substantial rewriting of its predecessor and became effective on September 1, 2015. Thus, there is also an issue as to which Act (or perhaps Wisconsin law) should be applicable, if not both, during their respective effective dates.

[24] Jay says that "the limitations analysis in this case is not as straightforward as the Respondents suggest and involves multiple issues that should be left for the trial judge to determine". For example:

1. what substantive law applies to the derivative claims? [A choice of law issue – I conclude Nova Scotia law applies]
2. What substantive law applies to the limitation period? [A choice of law issue – I conclude Nova Scotia law applies]
3. Under the governing law, what is the applicable limitation period?
4. When did the limitation period start to run?

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position is generally borne out in the jurisprudence, such as where it is argued as an equitable defence that the applicant did not come to the court with "clean hands": Eg. *Journet v Superchef Food Industries Ltd.* , [1984] QJ No. 15 (SC); although see comments of Justice Mah in the context of an "oppression" case at para. 27: *Munter v Gilchrist*, 2020 ABQB 595. The parties also agreed, and it appears, that there is no alternative remedy available to Jay.

5. Was the limitation period "tolled" or suspended at any point?

6. Has the limitation period expired? [If Nova Scotia law applies, then yes it has]

[25] Although it has not been endorsed by courts in Canada to my knowledge, Jay's counsel cites an interesting article that at the time of publication stated in its executive summary:

> Limitation periods are an integral and significant aspect of the litigation process in Canada. Although the application of limitation periods may often seem harsh, they are generally considered to be beneficial by bringing stability to society and by providing an incentive to plaintiffs not to 'sleep on their rights'. However, in corporate derivative actions… the application of a limitation period presents certain issues that could result in such goals not being advanced. Specifically, two main issues arise, namely: who is the claimant for the purposes of limitation periods, and how do limitation periods apply to leave applications? *The authors propose that the Canadian judiciary should adopt the adverse domination doctrine, applying the majority test, and explicitly hold that the filing of the leave application is sufficient to bring the derivative action within the limitation period*. This approach would be consistent with the separate corporate existence principal and the purposes underlying limitation periods, as well as providing certainty and predictability to the adjudication of derivative action claims. - Robert W Thompson QC, Scott T Jeffers and Codie L Chisholm – "The limits of derivative actions: The application of limitation periods to derivative actions" (2012) 49:3 Alberta LR 603.
>
> [My italicization added]

[26] If the limitations defence argument is addressed by a trial court here in Nova Scotia using Nova Scotia law, Jay will have the burden of proving his claim was brought within the applicable limitation period - s. 9 of the *LAA*. Here, Jay filed the leave application on March 12, 2020.

[27] Legal claims are most reliably and precisely identifiable when a Notice of Action including a Statement of Claim are filed with the court. In my opinion, henceforth, at the time they file their leave Application, applicants seeking leave to file Derivative Actions should provide a reliable draft of the Statement of Claim for which they seek approval.[16]

[28] The Respondents' position is summarized at page 1 of their brief:

> This Application should be denied because it is:
>
> 1) time-barred by the applicable two-year Nova Scotia limitation period; …
>
> b) by the Applicant's own admission, all material facts giving rise to those two Corporate Misappropriation Claims were known to the Applicant by at least May 2016;

[16] Jay's written arguments (paras. 1-24 and 140) only reference breaches of "fiduciary duties" by the Individual Respondents when discussing his proposed claims in Nova Scotia. His cited authorities do not directly deal with an "unjust enrichment" claim in similar circumstances. In oral reply argument, Jay's counsel stated that his proposed action will *also* allege "*unjust enrichment*" as against Link Snacks. I realize that in Wisconsin he added an "unjust enrichment" claim against Link Snacks in his Third Amended Complaint- Exhibit "Y" Norton affidavit. In my opinion, in future, it *should be a requirement* that applicants for leave to commence derivative actions *file with the court* a proposed *draft Statement of Claim* to ensure fair notice to respondents, and allow more precise consideration of the issues arising in such cases by the parties and the court. I recognize that the "Grounds for Relief" in the Notice of Application herein do provide some articulation of the potential content of a Statement of Claim. However, Jay himself characterized his claim in his affidavit as follows: "I am seeking derivative leave because I believe that Jack, Troy, and Hermeier (the "Individual Respondents") have breached their fiduciary duties to Link Canada by engaging in acts of unlawful corporate misappropriation. I assert that the Individual Respondents and Link Snacks owe compensation to Link Canada for their misconduct." I agree with the Respondents that the main claim here is a breach of fiduciary duty as against the Individual Respondents, and that while "unjust enrichment" can constitute a distinct legal claim, in these circumstances, it is better characterized as the Respondents say - a "by-product" associated with the main claim. Link Snacks is properly viewed as the nominal beneficiary of the alleged breaches of fiduciary duty. More significantly, even if unjust enrichment were treated as a freestanding distinct claim in a proposed Statement of Claim, the material facts underlying that claim against Link Snacks overlap entirely with the breach of fiduciary duty claims against the Individual Respondents. See also Justice Brown's helpful discussion of "unjust enrichment" in *ALC Inc. v. Babstock*, 2020 SCC 19, at paras. 28-29, 32 and 69-70. I observe that in both the July 23, 2019, and November 5, 2019, decisions by the Wisconsin Court of Appeal (Exhibits "PP" and "VV" Norton affidavit), where a somewhat similar claim was made, the court stated in relation to the pleadings it was addressing, at paragraph 2, footnote 3: "Jay's "fair value claim" is not actually a distinct claim. Rather it is a theory of damages pertaining to his breach of fiduciary duty claim."

> c) though ignorance of the law does not toll a limitation period, the Applicant was aware, well prior to expiration of the Nova Scotia two-year limitation period, that it was necessary to obtain leave from the Supreme Court of Nova Scotia in order to commence a derivative action asserting the Corporate Misappropriation Claims on Link Canada's behalf; and
>
> d) the Applicant chose not to file this Nova Scotia application until nearly 4 years after he had discovered all of the material facts.

[29] The Respondents go on to point out in relation to Jay's request that a derivative action in Nova Scotia should apply Wisconsin law, that the threshold question "is whether Nova Scotia or Wisconsin law applies to a claim for breach of fiduciary duties brought on behalf of a Nova Scotia corporation against its own directors relating to alleged actions taken to adversely affect Link Canada in its ability to sell products in Canada."

[30] Lastly, Jay submits in his Reply brief:

> 1 - … The court should not make a summary determination on the governing law, including the applicable limitation period, at the leave stage …
>
> 2 - … It would be inconsistent with the requisite liberal approach to deny leave [at this time] on this basis [whether the governing law is Nova Scotia or Wisconsin], without the benefit of a full record of evidence and submissions on this issue addressing *inter alia* the impact of the Wisconsin-based corporate structure on the governing law, and the impact of the Wisconsin proceedings on the running of the limitation period.
>
> 3 - … [Jay] disagrees that the law of the place of corporate incorporation necessarily applies to dispositive effect in the circumstances, where the alleged misconduct occurred in Wisconsin and where the other relevant corporations are based in Wisconsin.

[31] Procedurally, this is a Notice of Application in Chambers per CPR 5.03. It is the first step in what could be a very lengthy proceeding. I acknowledge that I have no proposed Statement of Claim before me. Nevertheless, the Court has a clear understanding of the claims that are being made, and the benefit of extensive evidence and argument in relation to all the necessary procedural and substantive arguments for me to be in a position to consider the limitation period issue, not as a freestanding determination of what is the limitation period herein, but as a component of my analysis regarding whether Jay has satisfied me of each of the relevant factors in section 4 of the Third Schedule of the *Companies Act*, as interpreted in the binding and persuasive jurisprudence.[17]

[32] I will address the limitations period defence within my analysis of whether the statutory preconditions have been met. In summary, I am not satisfied that Jay has demonstrated that all the necessary preconditions have been met, and I therefore decline to grant leave to file a derivative action here in Nova Scotia. Let me explain this in more detail.

[17] Justice Bryson has stated that for determinative preliminary issues courts are in a position to rule on such matters when the essential facts are known and not in dispute – *Canadian Elevator Industry Education Program (Trustees of) v Nova Scotia (Elevators and Lifts)*, 2016 NSCA 80, at paras. 72-74.

2 - The statutory preconditions to granting of leave to file a derivative action in Nova Scotia[18]

[33] First, I'll say a brief word about fiduciary duties of directors of Nova Scotia companies.

[34] As all counsel and I agreed: in proceedings using the law of Nova Scotia, such fiduciary duties exist by virtue of, and reference to, the common law in Nova Scotia.[19]

[35] Section 99 of the *Companies Act* deals with conflicts of interest:

> **99 (1)** Subject to this Section, it shall be the duty of a director of a company who is in any way, whether directly or indirectly, interested in a contract or proposed contract with the company to declare the nature of his interest at a meeting of the directors of the company.

---

[18] In assessing whether these conditions have been met, I must consider the evidence before me. The evidence before me includes affidavits. No affiant was cross-examined. As pointed out by Justice Hamilton for the court in *Budd v Bertram*, 2018 NSCA 95, *the wording of* the Third Schedule of the *Companies Act*, "should be given a liberal interpretation in favour of the applicant… A judge hearing a leave application is *not called upon to determine questions of credibility or to resolve [the ultimate trial] issues in dispute and ought not to try*. These are matters for trial… The *threshold the applicant has to meet is low as the test is that it 'appears' to be in the interests of the company, not that it is in the interests of the company."* However, in drawing conclusions about whether, *based on the evidence*, I am satisfied that the statutory criteria have been met or not, it is proper for me to come to conclusions about credibility, and the inferences to be drawn from the evidence that I accept. Jay has the persuasive and evidentiary burden. In DH Peterson and Matthew J Cumming, *Shareholder Remedies in Canada*, [LEXIS-NEXIS Canada Inc., Toronto Ontario] [loose-leaf-service updated to August 2020], the authors state, at page 16-2: "In the CBCA type legislation, the court may make an order permitting a person to commence or intervene in a derivative action where it is 'satisfied' that the statutory elements described below are met… Unless provided otherwise, it is presumed that a civil burden of proof is required, with the onus of proof on the person seeking leave to commence or intervene in a derivative action.… It has been suggested that the burden of proof is a 'high' onus rather than a 'low' onus. It is submitted that a civil standard in the balance of probabilities is a 'high' onus, and it is the standard the courts are experienced with, and of a sufficiently high level to prevent frivolous and vexatious proceedings, but not so high as to deter leave for legitimate derivative actions". I am satisfied that this reasoning can also be applied in the context of the NS CA.

[19] In the context of statutorily specified duties, these were commented upon in *People's Department Stores Inc. (Trustee of) v Wise*, [2004] 3 SCR 461; and generally in *BCE v 1976 Debentureholders*, 2008 SCC 69 – which incidentally led to the amendment of the *Canada Business Corporations Act*, effective June 21, 2019, permitting directors to consider broader interests than just those of shareholders.

> **(2)** In the case of a proposed contract the declaration required by this Section to be made by a director shall be made at the meeting of the directors at which the question of entering into the contract is first taken into consideration, or if the director was not at the date of that meeting interested in the proposed contract, at the next meeting of the directors held after he became so interested, and in a case where the director becomes interested in a contract after it is made, the declaration shall be made at the first meeting of the directors held after the director becomes so interested.
>
> **(3)** For the purpose of this Section, a general notice given to the directors of a company by a director to the effect that he is a member of a specified company or firm and is to be regarded as interested in any contract which may, after the date of the notice, be made with that company or firm shall be deemed to be a sufficient declaration of interest in relation to any contract so made.
>
> **(4)** Any director who fails to comply with this Section shall be liable to a penalty not exceeding one hundred dollars.
>
> **(5)** Nothing in this Section shall be taken to prejudice the operation of any rule of law restricting directors of a company from having any interest in contracts with the company.

[36] The general ambit of the fiduciary duties of directors of Nova Scotian companies is discussed by Sarah Bradley in her *Nova Scotia Companies Act and Commentary* (Lexis-Nexis Canada Inc., Markham Ontario, 2015):

> **Introduction to Nova Scotia Companies**
>
> The *Nova Scotia Companies Act* is one of the oldest general incorporation statutes still used in Canada today for business incorporations… [the NS CA] is an example of the traditional English system of incorporation, in which the memorandum of association is the fundamental constating document and it, along with the articles of association are contractual in nature. In the memorandum system, the corporation is conceived of as a contractual relationship among its members that is granted legal personality through the statute. At one time, many Canadian jurisdictions utilized this "memorandum of association" system, but during an era of widespread statutory reform in the 1970s and 80s almost all replaced it with the "statutory division of powers" system, as exemplified by the *Canada Business Corporations Act*. In contrast to the contractual memorandum system, in the statutory division of powers system the corporation is a legal entity granted powers under that statute that are to be exercised by the persons and in the manner prescribed in the statute. The principal practical difference between the two systems, described more fully below, relates to the role and powers of the Board of Directors, which are set out in the memorandum of

> an NS CA company and are scarcely mentioned in the statue itself… The NS CA is therefore an incorporation statute with an unusual provenance and a long history, which is unique in many respects, though rarely intuitively navigable. (pp. 1-2)

[37] Bradley goes on to discuss the "Unlimited Liability Company" under the NS CA at page 6:

> Under the NS CA a company may be incorporated as 'a company not having any limit on the liability of its members', referred to in the Act as an 'unlimited company', and often in common discourse as a "ULC"…. understanding its application, and the corresponding risk to investors in ULC's, requires a careful consideration of the Act and its history. Today, limited liability is an almost universally observed characteristic in corporate law… However, early in the development of corporate law in the United Kingdom and North America, incorporation statutes did not feature limited liability and the concept was regarded with some suspicion by business creditors, the public, the legislatures and the courts. This suspicion arose in part from some early scandals, and also perhaps from a lack of familiarity with the concept of limited liability and a general sentiment that a moral hazard was created when business people were not held liable for the debts of their businesses. As a result of this early suspicion, and presumably the desire of some business people to allay the concerns of creditors by bonding the reputation to that of their business, once limited liability was introduced into early incorporation statutes in the UK (including those upon which the NS CA is based), they continued to provide for the creation of companies that offer the benefits of separate legal personality but did not feature limited liability. Nova Scotia is now the only jurisdiction in Canada to retain the unlimited liability company throughout its corporate law history… Although it has been possible to incorporate companies with unlimited shareholder liability in Nova Scotia for more than 100 years, for most of the 20th century, such companies were as unheard of in Nova Scotia as they were everywhere else… Then, in the 1990s, thanks to the evolution of US tax laws and the pioneering work of a few Nova Scotia lawyers, Nova Scotia ULC's experienced a dramatic and sustained burst of popularity, becoming more frequently used than they had ever previously been. At the heart of this Renaissance was the distinctive treatment of ULC's received under US tax laws. Generally, for the purposes of Canadian tax law, an NS CA company, whether liability is limited or unlimited, is recognized as a corporation and a separate taxpayer, liable to pay tax on its income and gains and to realize its own losses. For the purposes of US tax laws however, an entity whose members have unlimited liability for its debts has been considered to be an entity which could elect to have its income, gains and losses 'flow-through' to its shareholders, and thus used to offset the shareholders other income, gains or losses for US tax purposes. This dual nature of an unlimited company has led to Nova Scotia ULC's often being referred to as 'hybrids' for US tax purposes… Recent changes [coming into effect January 1, 2010] to US tax law and the tax treaties between Canada and the United States have affected how Nova Scotia ULCs are used to effect these results.

[38] Bradley discusses directors' duties at page 57:

Directors' duties

The duties owed by Directors to the Corporation they serve can be generally described under three broad categories: the first is the duty of obedience, or the duty to act within one's powers, in compliance with the Act and the constating documents of the company; the second is the duty to act with reasonable care; and the third is to act with the loyalty and good faith of the fiduciary. These duties are not codified explicitly in the NS CA as they are in many other jurisdictions. Rather they are owed [by] directors of NS CA companies exclusively by operation of the common law.… The duties of directors at common law are described in an extensive and complex body of jurisprudence, which Nova Scotia courts have rarely had the opportunity to consider. Accordingly, they can be determined principally by considering older Canadian cases and cases from other jurisdictions such as the UK. Recent Canadian cases may also be relevant to the determination of these duties, but in applying these more modern cases in the context of the NS CA companies, one must remain alert to the fundamental distinction between the duties that arise from the statutory provisions of other jurisdictions, and those that arise from the common law.

The following paragraphs offer a brief summary of these common law duties as they apply to the directors of Nova Scotia Companies.

It is well settled, both at common law and under the BCA statutes, that the duties of a director are owed to the corporation itself, and not to the shareholders or any other constituency.

The duty of obedience is relatively straightforward. The director of a company is obliged to act within the powers granted to him or her by the Act and the constating documents of the company, and to comply with the terms set out therein. …

The common law duty of care imposes an obligation on directors to carry out their work on behalf of the company with the requisite degree of care and skill…

The common law duty of loyalty has a number of components that were summarized by Millet LJ in the leading English case of *Bristol and West Building Society v Mothew*, [1996] 4 All ER 698 (CA), who observed that a director has a duty to 'act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary. **There is clearly a considerable degree of overlap between the no profit, no conflict and no benefit imperatives, though the underlying premise is**

also clear: the director must always act in good faith and subordinate his or her own interests to the interests of the company.

[My bolding added]

[39] The statutory preconditions can be found in section 4 of the Third Schedule of the *Companies Act*:

(1) Subject to subsection (2) of this section, a complainant may apply to the court for leave to bring an action in the name and on behalf of the Company or any of its subsidiaries, or intervene in an action to which any such body corporate is a party, for the purpose of prosecuting, defending or discontinuing the action on the behalf of the body corporate.

(2) No action may be brought and no intervention in an action may be made under subsection (1) of this section unless the court is satisfied that

a) the complainant has given reasonable notice to the directors of the Company or its subsidiary of his intention to apply to the court under subsection (1) of this section if the directors of the Company or its subsidiary do not bring, diligently prosecute or defend or discontinue the action;

b) the complainant is acting in good faith; and

c) it appears to be in the interests of the Company or its subsidiary that the action be brought, prosecuted, defended or discontinued.[20]

[20] I agree that "In the absence of evidence to the contrary, the statutory condition [i.e. s. 4(2)(c) *Companies Act*, whether "it appears to be in the interests of the company"] should give rise to a presumption that the Directors have exercised reasonable and sound judgment before leave is granted" (para. 21, *Chandler v Sun Life Financial Inc.*, [2006] OJ No 451 (SC) (Commercial List) per C L Campbell J). I have evidence (e.g. the uncontradicted statements in the Hermeier affidavit at paras. 22, 41-69, regarding the termination of distribution of Link Snacks' products by Link Canada, and in relation to the Transfer Pricing Claims) before me that Link Snacks had *no contractual obligations* to Link Canada, *inter alia* including *to not terminate* the distribution of product to Link Canada, since the distribution of Link Snacks' products in Canada was at the sole discretion of Link Snacks decision-making, I conclude that the Officers/Directors of Link Canada had no control over the costs it paid for the Link Snacks' products, (relevant to the "Transfer Pricing Claims") -and no legal recourse (other than perhaps to refuse to buy the Link Snacks' products, which presumably would mean the business could not carry on as an "ongoing concern"); and no legal recourse over the continued distribution of Link Snacks' products via Link Canada - relevant to the "termination" of the distribution by Link Canada of Link Snacks' products. In light of the purposefully designed integrated corporate structure of the Link group of companies, I allow for the possibility that what might otherwise be seen in isolation as inflated (transfer prices) cost prices that Link Canada paid to Link Snacks, in context may have merely involved legitimate attempts to transfer profits to a jurisdiction with less onerous taxes (see para. 44, Hermeier affidavit); or in the case of an unlimited Nova Scotia company, to allow company losses to flow through to the shareholders permitting them tax advantages. Arguably, Link Canada's Directors may have had some control over the assets that Jay says were transferred from

[40] Jay is clearly eligible as a "complainant" per section 7(5) of the Third Schedule. The parties disagree on whether:

1. Jay has given reasonable notice to the directors of the company… of his intention to apply to the court under subsection 4(1);

2. Jay "is acting in good faith; and

3. It appears to be in the interests of the company that the action be brought, prosecuted, defended or discontinued.

s. 4(2)(a) - Has reasonable notice been given?

[41] Jay says that he has given reasonable notice to Peter Herrell, who was appointed as sole Director of Link Canada, by the Wisconsin court on June 27, 2018. He cites an email to the Receiver, March 10, 2020.[21] While the email does not expressly say that Jay has the intention to apply to the [Nova Scotia Supreme] Court under [s. 4(1) Nova Scotia *Companies Act* Third Schedule], in all the circumstances,

Link Canada to Link Snacks at allegedly undervalued amounts – the "Theft of Link Canada Claims". On the evidence that I accept, of the alleged breaches of fiduciary duty by the Directors of Link Canada the more compelling claim of breach of fiduciary duty is in relation to the "Theft of Link Canada Claims". In relation to the "Theft of Link Canada Claims", the evidentiary burden is on Jay to satisfy the court that arguably Link Canada assets were transferred to Link Snacks at undervalued amounts. Those claims allege events that relate to the period 2015 and onward. There is no evidence that Jay had a corporate position with, or otherwise apparent access to, any of the Link group of companies after 2009, and notably he states no specific evidentiary basis for his beliefs regarding the Theft of Link Canada Claims (paras. 21 – 23, affidavit) or that "the value of Link Canada's claim, if the Corporate Misappropriation is proven, could be around 80 million –100 million US$".

[21] Exhibit "CC" to Jay's affidavit.

the notice of his intention, though not expressly stated, is sufficiently conveyed to meet the statutory requirement.

s. 4(2)(b) - What is 'acting in good faith', and has Jay satisfied the court that he is acting in good faith?

[42] Let me first examine what the jurisprudence reveals about how a court should define and assess this factor in the case of an application for leave to file a derivative action.

[43] In *L+B Electric Inc. v Oickle*, 2006 NSCA 41, our Court of Appeal considered the "acting in good faith" requirement. Justice Hamilton speaking for the court stated:

> 53 I will deal first with their argument relating to good faith. The judge found that the "onus" on Mr. Oickle to prove that he was acting in good faith was to satisfy the court by a preponderance of evidence, not some higher burden:
>
> > [52] In my respectful opinion, it is not appropriate to require the applicant to meet a burden that is any higher than what the statute provides. The statute provides "No action may be brought ... under subsection (1) unless the court is satisfied that ... (b) the complainant is acting in good faith". This text is consistent with the ordinary rules on onus and burden. The proponent bears the onus of satisfying the Court. The Court will be satisfied by a preponderance of evidence. I have already discussed the history of this legislation towards ascertaining its purposes and scheme (see paras. 34 to 42 above). With great respect for the contrary view expressed by Puddester, J. in *Tremblett*, [1993] N.J. No. 348 the history, purposes and scheme of this legislation do not support the imposition of a higher burden than the statutory text provides. Particularly, there is no indication of Parliamentary or Legislative intent to restrict access to the derivative action out of deference to the principles of indoor management or majority rule.

54 The appellants have not argued that the judge erred in applying the ordinary burden. Accordingly, for the purposes of this appeal I have assumed, without deciding, that this is the correct burden.

…

59 As set out by D.H. Peterson, *Shareholder Remedies in Canada* (Markham, ON: LexisNexis, 1989) at p. 17.22 "good faith" is a question of fact:

> **s.17.39 Good faith is said to exist where there is *prima facie* evidence that the applicant is acting with proper motives, such as a reasonable belief in its claim, and is ultimately a question of fact to be determined on all of the evidence and the particular circumstances of the case.**

60 This principle is restated in *Winfield v. Daniel* (2004), 352 A.R. 82:

> para. 16 Section 240(2)(b) of the Act requires that the Court be satisfied that the complainant is acting in good faith. Good faith is said to exist where there is *prima facie* evidence that the complainant is acting with proper motives such as a reasonable belief in the merits of the claim. Good faith is a question of fact to be determined on the facts of each case. **The typical approach by the Courts is not to attempt to define good faith but rather to analyse each set of facts for the existence of bad faith on the part of the applicant. If bad faith is found, then the requirement of good faith has not been met:** D.H. Peterson, *Shareholder Remedies in Canada*, (Markham, ON: LexisNexis, 1989) at 17.39.

…

62 In reaching his decision the judge considered relevant factors. There was evidence before him from which he could conclude that Mr. Oickle was acting in good faith. The appellants have not satisfied me that this finding by the judge was a palpable and overriding error.

63 The judge took into consideration that Mr. Oickle had been sued by the Company. He stated in the last sentence in para. 53 of his decision quoted above in para. 55 above; "I must consider all of the circumstances, including that the proposal to bring this suit follows upon the proponent having been sued for his alleged wrongdoing towards the company." He also considered that Mr. Oickle had a self-interest in bringing the derivative action but found this did not exclude a finding of good faith. This position is supported by *Title (Estate) v. Harris* (1990), 67 D.L.R. (4th) 619 (Ont. H.C.J.); *Winfield v. Daniel*, supra, para. 20; and *Schafer v. International Capital Corp.* (1996), 153 Sask. R. 241 at para. 32.

64 **The judge considered whether there was a genuine issue for trial in the derivative action and whether the proposed action was frivolous or vexatious. These are relevant factors in assessing the issue of good faith,** *Winfield v. Daniel*, supra, at para. 17 and 27; and *Re Marc-Jay Investments Inc. and Levy* (1974), 50 D.L.R. (3d) 45 (Ont. H.C.). **In para.**

47 of his decision quoted in para. 56 above, the judge reviewed the evidence that led him to conclude that there was a genuine issue for trial. There is nothing unjust about the judge's determination on the facts of this case that the Company's resources should be equally supportive of both parties.

65 The fact some of the claims in the derivative action are the same as those in Mr. Oickle's counterclaim is not determinative of bad faith, *Winfield*, *supra*, para. 20. While the claims are similar, the remedies sought in the derivative action are different from those sought in the counterclaim. The derivative action seeks a declaration that Mr. Bunnell's and Ms. Fraser's employment with the Company be terminated for cause and that the termination fell within the section of the shareholders' agreement that would cause the forfeiture of their shares of the Company. It seeks a mandatory injunction requiring Mr. Bunnell and Ms. Fraser to sell their respective shares to the Company for $1.00 in accordance with the forfeiture provisions of the shareholders' agreement. It seeks a permanent injunction restraining Mr. Bunnell and Ms. Fraser from further participation in the affairs of the Company. These remedies were not available to Mr. Oickle in his personal action.

66 In addition, **the only avenue available to Mr. Oickle to pursue remedies against Ms. Fraser was through the derivative action** because the judge found, and his finding was not appealed, that the rule is *Foss v. Harbottle*, (1843), 2 Hare 461, 67 E.R. 1989 (Ch.) prevented Mr. Oickle from adding Ms. Fraser as a party to his counterclaim as he had sought to do:

> [10] The facts alleged by Mr. Oickle do not support any cause of action he personally may have against Ms. Fraser personally.
>
> [11] The law articulated in *Foss v. Harbottle*, (1843), 2 Hare 461, 67 E.R. 1989 (Ch.) was under severe criticism by the mid-twentieth century. Professor Dickerson referred to it as "that infamous doctrine" in Canada, *Proposals for a New Business Corporations Law for Canada* by Robert W.V. Dickerson, John L. Howard and Leon Getz, vol. 1 (Ottawa: Information Canada, 1971) at p. 161. Professor Gower himself wrote of "The major absurdity of the *Foss v. Harbottle* rule" in L.C.B. Gower, The Principles of Modern Company Law, 3rd ed. (London: Stevens & Sons, 1969) at p. 582. However, the problem was not with the basic law in *Foss v. Harbottle*. The problem was with the lengths to which the courts, including the court in *Foss v. Harbottle* itself, had gone in making formalized and categorical rules that were supposed to give effect to the basic law in *Foss v. Harbottle*. The basic law was that a shareholder cannot sue for diminished value of shares or for any other recovery on account of a wrong done to the corporation. Any suit is to be brought by the corporation "or in the name of someone whom the law has appointed to be its representative" (*Foss v. Harbottle* at p. 490 in the Hare report or at p. 202 in the English Reports). That element of the common law was re-affirmed by the Supreme Court of Canada at the very time that legislative reform was coming to Canada: *Burrows and others v. Becker and others* (1968), 70 D.L.R. (2d) 433 (SCC), p. 441. And, it remains sound to this day as long as one allows for the modification brought about by legislation creating derivate actions. "[I]ndividual shareholders have no cause of action for any wrongs

> done to the corporation and ... if an action is to be brought in respect of such losses, it must be brought either by the corporation itself (through management) or by way of a derivative action.": *Hercules Management Ltd. and others v. Ernst & Young and others* (1997), 146 D.L.R. (4th) 577 (SCC), para. 59.
>
> [12] The claims against Ms. Fraser allege wrongs she is said to have done to the company. Not one of these allegations involves "a wrong done to a shareholder *qua* shareholder" in the meaning of *Hercules Managements* at para. 62. The claims allege wrongs done to the corporation which could only affect Mr. Oickle through the value of his shares. Consequently, I decline to join Ms. Fraser as a defendant in the existing litigation.
>
> 67 Accordingly, the appellants have not satisfied me that the judge erred in finding Mr. Oickle had met the second criterion in s. 4(2)(c) of acting in good faith.
>
> [My bolding added]

[44] In a nutshell, our Court of Appeal has endorsed an approach that would see me not attempt to define good faith, but rather examine the facts I find, to determine if there is sufficient evidence of bad faith on the part of Jay. If bad faith is found, then the good faith requirement has not been met. Good faith is said to exist where there is *prima facie* evidence that the Applicant is acting with proper motives, such as a reasonable belief that the claim is sustainable. As the Applicant, Jay bears the burden of proof on a balance of probabilities, that he is "acting in good faith".[22]

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[22] I agree with Justice Baynton's statement in *International Capital Corp. v Schafer*, [1996] SJ No.770 at para. 32: "The fact alone that the applicant has a personal interest in the outcome of the derivative action is not evidence of bad faith if that personal interest is related to or is not contrary to the interests of the corporation. But a personal interest in the derivative action that is unrelated to or is contrary to the interests of the Corporation, is an indication of bad faith.". In *Jahnke*, the Court of Appeal stated at paragraph 67: "Justice Baynton's overall approach to s. 232(2)(c) was endorsed by this Court when it dismissed the appeal from his decision by briefly saying "[w]e are not persuaded that the learned chambers judge's order was based on any misunderstanding of the law". See: *Schafer v*

[45] Relevant factors to the good faith inquiry include considerations such as whether there is a genuine issue for trial in the derivative action or whether the proposed action is frivolous or vexatious; or, as the court in *Oickle* stated at paragraph 77: "whether there was an arguable issue raised by the proposed derivative action" or "the standard is that 'the intended action does not appear frivolous or vexatious and could reasonably succeed'."[23]

[46] There is a further useful articulation of the "good faith" requirement by the Alberta Court of Appeal in *Valgardson v Valgardson*, 2012 ABCA 124:

> 20 The question of good faith requires the court to ensure that the proposed action is not frivolous or vexatious: … **There is both a subjective and objective component to the requirement of good faith. The subjective aspect requires that the applicant believes the proposed derivative action has merit. This guards against actions spurned by self-interest or private vendetta. But even where the applicant believes that the proposed action has merit, the court must still consider whether objectively viewed the action is not frivolous and vexatious.**

International Capital Corp., [1997] 8 WWR 412 (Sask CA). Since that time, the Court of Queen's Bench has regularly turned to *Schafer* in determining whether to authorize derivative actions."

[23] Glube CJTD, adopted the following characterizations of "vexatious" in *MacCulloch v. MacCulloch Estate*, [1992] NSJ No. 309: "(a) the bringing of one or more actions to determine an issue which has already been determined by a court of competent jurisdiction constitutes a vexatious proceeding; (b) where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief, the action is vexatious; (c) vexatious actions include those brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights; (d) it is a general characteristic of vexatious proceedings that grounds and issues raised tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings; (e) in determining whether proceedings are vexatious, the court must look at the whole history of the matter and not just whether there was originally a good cause of action; (f) the failure of the person instituting the proceedings to pay the costs of unsuccessful proceedings is one factor to he considered in determining whether proceedings are vexatious; (g) the respondent's conduct in persistently taking unsuccessful appeals from judicial decisions can be considered vexatious conduct of legal proceedings.".

> 21 A number of the factors relied upon by the chambers judge as evidence of lack of good faith ought properly to be characterized as neutral. **While the chambers judge found that the existence of the 2003 Action demonstrated animus between the parties, this is not indicative of the absence of good faith. Animosity between the parties is common in most litigation…** Further, duplication in relief between the derivative actions and the 2003 Action is not a basis for a finding of a lack of good faith: …
>
> …
>
> **25** And, while the chambers judge concluded that "there is a flavour throughout of an ongoing family dispute which has all the appearances of a private vendetta on the part of Blair Valgardson against his brothers" … **the existence of a private vendetta is only a secondary factor in determining the absence of good faith.**
>
> [My bolding added]

[47] Justice Campbell stated in *Chandler v. Sun Life Financial Inc.*, [2006] OJ No. 451:

> 22 I am not satisfied that it can be said on any basis that it is in the interests of the shareholders of the financial institutions that the action sought to be commenced proceed.
>
> 23 In *Royal Trust Corp. of Canada v. Hordo*, [1993] O.J. No. 1560, Farley J. made the following comment with which I agree:
>
> > *It seems to me that the Court should look to the "real" purpose and motivation of the application* and refuse the status of the complainant where the primary reason for seeking relief is the collateral purpose of furthering a pre-existing civil action.
>
> 24 The motion before me has focused on only one of the four statutory conditions. I am satisfied on the basis of only one of the necessary conditions that Chandler has not met the obligation of satisfying the Court that permitting his action to proceed on behalf of the institutions would in any way benefit those institutions.
>
> [My italicization added]

[48] A finding of "acting in good faith" may be made "where there is *prima facie* evidence that the complainant is acting with proper motives such as a reasonable

belief in the merits of the claim. Good faith is a question of fact to be determined on the facts of each case." The good faith inquiry is not limited to merely whether Jay has an honest and reasonable belief in the merits of the claim he proposes to make in the derivative action.

[49] Mere evidence of self-interest does not necessarily exclude a finding that Jay is acting with proper motives: *Richardson Greenshields of Canada v Kalmacoff*, (1995) 123 D.L.R. (4th) 623 (Ont. CA.). Nor does the mere evidence of the existence of a private vendetta by Jay necessarily exclude a finding that Jay is acting with proper motives. However, in a proper case, these factors can individually or collectively weigh in favour of a finding of bad faith. This is such a case.

[50] Jay, in his own name, pursued a panoply of litigation in Wisconsin against the Individual Respondents and Link Snacks since 2005.[24] Generally speaking, in those various lawsuits Jay was not successful.

[51] On August 8, 2008, the Link I court concluded:

> When faced with changes in his job responsibilities, Jay disobeyed the chief executive officer [of Link Snacks, his father Jack] and refused to ever submit to [his] direction… Jay threatened to harm the corporation, to seek vengeance, and to hamper the business of Link Snacks Inc.; Jay threatened with the foulest of language to cut off the raw supply of beef product necessary for the continued existence of the business [i.e. Link Snacks]…; "notwithstanding the clear and unequivocal obligations Jay had in the 1995 Buy – Sell agreement entered into, Jay entered into a transaction with J and F… the largest beef

[24] Para. 10, Norton affidavit.

> producer in the world [which] would have the option to purchase shares in all of the Link -related companies and thereby become that very large "third party" that can interfere with the management and control of Link Snacks… J and F has the option to purchase any shares, any interest, that Jay has or may acquire in the Link -related companies… Jay breached the Departure Agreement by instead of exercising good faith in the negotiation for the sale of his shares pursuant to the agreement he signed he proposed that he purchase Jack and Troy's shares… Jay disclosed confidential business information that is almost impossible to determine the value as to that disclosure of confidential information.[25]

[52] In the South Dakota Action, Jay sought dissolution of LSI, and "sought to recover the same damages from Jack, Troy and Hermeier that he sought to recover from them in Link I for alleged breaches of fiduciary duties to him as officers and directors of LSI. On December 2, 2009, the South Dakota Court dismissed Jay's claims for breach of fiduciary duty. The court also made specific findings that "Jay had consistently tried to destroy LSI and was found to have breached his fiduciary duties to LSI either intentionally or in reckless disregard of LSI's rights." It re-iterated "in fact, Jay Link has consistently tried to destroy the company'."[26]

[53] I accept the following evidence of John Hermeier, on the question of the best interests of Link Canada and whether Jay is acting in good faith:

> 29-Jay stated to me, at or about the time of his departure, that if Jack and Troy did not accept his terms, Jay would make life miserable for [them and] Link Snacks with a bunch of lawsuits which he had ready to file. He threatened that management would be spending all of its time responding to his lawsuits and would have no time to operate the business. His stated goal

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[25] Exhibit "C", Norton affidavit

[26] Paras. 21-22, Norton affidavit.

was to 'bring the company to its knees' through the litigation process. The termination of Jay's employment triggered the buyout provision of a 'Buy-Sell Agreement'… between Link Snacks and its shareholders, Jack, Troy, and Jay, which obligated Jay to sell his Link Snacks' shares back to the Corporation. Jay refused, and on September 23, 2005, Link Snacks, Jack and Troy filed a lawsuit against Jay and the Wisconsin Circuit Court for specific performance of the Buy-Sell Agreement and damages for Jay's breaches of fiduciary duty. This lawsuit is known to the parties as 'Link I'…. [On November 17, 2005] Jay filed counterclaims in Link I against Jack, Troy, and Link Snacks, [and others and]… filed a second lawsuit in the State of South Dakota against Jack, Troy, and me … Jay falsely claimed that Jack, Troy, and I breached their fiduciary duties to Jay. The court dismissed all claims in the South Dakota Litigation. Jay threatened me on several occasions that if Link I went to trial, I could lose everything… Link I went to trial in 2008 and on July 9, 2008, the jury returned its verdict on the parties legal claims.

The jury found that: i) Jay breached his fiduciary duties to Link Snacks and another Link owned company; ii) I did not breach my fiduciary duties to Jay; iii) Troy technically breached his fiduciary duties to Jay, but that those breaches because Jay zero dollars in damages; and iv) Jack breached his fiduciary duties to Jay. The jury awarded reciprocal punitive damages awards of $5 million against each of Jack and Jay…

On December 6, 2010, Jay filed another lawsuit against Link Snacks, Jack, Troy, and me in the Circuit Court of Washburn County Wisconsin… This lawsuit is known to the parties as 'Link II'. Among Jay's 2010 claims was his assertion that the transfer pricing policies were unfair and priced in a manner that constituted a breach of fiduciary duty…

After the termination of Link Canada's distribution arrangement (explained in detail below) on May 10, 2016 Jay amended the Link II lawsuit to also allege a further breach of fiduciary duty by Jack, Troy, and I, resulting in injury to Link Canada stemming from this termination…

I understand that this is the same claim Jay has described in his Notice of Application in Chambers and his affidavit as the "Theft of Link Canada claims', which Jay seeks to assert against the Respondents on Link Canada's behalf in these proceedings… Again, Jay asserted the additional 2016 claims in the Link II lawsuit directly in his own name…

I have known Jay since 2002. Based on my experience personally working with Jay at Link Snacks, my personal interactions with Jay, the statements Jay has made to me, and my observations of his demeanour, it is my belief that Jay is driven by personal *animus* toward his father, brother, Link Snacks, and me, and not by a genuine concern for Link Canada.[27]

[27] In drawing conclusions about whether I am satisfied that the statutory criteria have been met or not, I must examine the evidence, and base my decision thereon. That does require me to resolve conflicting evidence relevant and material to whether the statutory criteria are met. In relation to the question of good/bad faith, which relates to the leave requested to commence a derivative action, I must therefore consider conflicting evidence, whereas I must

[54] Jay swears that "I *believe* that Jack, Troy, and Hermeier (the "Individual Respondents")… have breached their fiduciary duties to Link Canada by engaging in acts of unlawful corporate misappropriation. I *assert* that the Individual Respondents and Link Snacks owe compensation to Link Canada for their misconduct" (para 17). Under the heading "Criteria for Derivative Leave" Jay states:

> 81-I have been diligently trying to pursue these claims in Wisconsin for several years. I have interpreted some of the directions from the Circuit Court and Court of Appeals to be inconsistent or in conflict, but I have tried to comply with them in each request I have made to the Receiver in the hopes that he would pursue the claims of corporate misappropriation or authorized me to do so.
>
> 82-It is my position that a derivative action would be in the interests of and would benefit Link Canada, because Link Canada's claims are an outstanding issue in the receivership of its grandparent, Link Global.

[55] Jay's above-noted statements are the most express examples in his evidence regarding whether he, has an honest belief that the derivative action has merit, and is acting in good faith.

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not do so in relation to "matters for trial" which relate to the merits underlying the claims in the litigation itself (see *Jahnke* at para 63 and *Budd* at para. 35: "a judge hearing a leave application is not called upon to determine questions of credibility or to resolve the issues in dispute and ought not to try. These are matters for trial …"). I recognize the limitations that I face in this case where no cross-examination has occurred. Nevertheless, I am entitled to draw inferences from the affidavits filed and stipulations and admissions made in the Notice of Contest, and, if necessary and appropriate, come to conclusions about what aspects of the disputed relevant evidence I accept.

[56] He has made no specific statements to refute, and presented no specific evidence to counter, that of John Hermeier, who clearly, and credibly in my opinion, asserts that Jay's primary motivation is personal *animus* against his father, his brother, Link Snacks, and Mr. Hermeier.

[57] Jay has been capable as a complainant of starting this Application for leave to file a derivative action since he became aware of what he calls "The Transfer Pricing Claims" since, at the latest, December 2010, and the "Theft of Link Canada Claims" since at the latest, May 2016. He gives no credible explanation as to why he did not start proceedings for such claims in Nova Scotia in his own name (or that of the corporation) during those years following his discovery of the material facts underlying these claims between December 2010 and May 2016, all the while having ongoing access to legal counsel. He has not asserted that he has had negligent legal advice.

[58] I conclude that since he discovered the material facts in December 2010 and May 2016, respectively, Jay knowingly decided not to bring an application for leave to pursue a derivative action in Nova Scotia.

[59] I conclude that Jay is seeking leave before this Court, as part of a pattern of vengeful conduct he has unremittingly evinced since at least 2005, as against his

father Jack, his brother Troy, and, incidentally, John Hermeier. A review of the extensive evidence of the history of the parties vis-à-vis the various corporations that were part of the Link group of companies, the origins of these disputes reaching back to at least 2005, and the evolution of that dispute, suggests there is long-standing enmity by Jay against the Individual Respondents. However, that factor by itself is not determinative of the "good faith" dispute herein.

[60] The uncontradicted evidence also reveals that only Jay personally has to gain from a grant of leave to proceed with the derivative action. There are no other shareholders who could complain. Jay has pledged to the Receiver that he will personally pay the legal fees of the derivative action throughout.[28] Similarly, while the Respondents include Link Snacks Inc., Jay's focus has clearly been on the Individual Respondents. At all material times, the only shareholders of Link Snacks have been Jack, Troy and Jay. The only shareholders of Link Global (and effectively Link Canada) were Troy and Jay. Even the unjust enrichment claim vis-à-vis Link Snacks is premised on the breaches of fiduciary duty by the Individual Respondents. Therefore, the litigation is fairly characterized as, in essence, a personal dispute with

[28] I bear in mind what the Ontario Court of Appeal stated regarding the particular facts of *Richardson Greenshields*: "The fact that this shareholder is prepared to assume the costs and undergo the risks of carriage of an action intended to prevent the Board from following a course of action that may be *ultra vires* and in breach of shareholders' rights does not provide a proper basis for impugning its *bona fides*. In my opinion, there is no valid reason for concluding that the good faith condition specified in s. 339(2)(b) has not been satisfied."

the trappings of corporate structures – it is really Jay versus Jack, Troy, and John Hermeier.

[61] I further conclude that Jay is, and has been, acting *only* in his own personal interest throughout. Only he and Troy are shareholders of Link Global. The proposed derivative action is not intended to benefit Link Canada in any real sense. It could have been seen to benefit if it was truly conceived to be an independent entity, and to otherwise have been on an independent path as a "going concern", but the circumstances of this case cause me to conclude that is not so. It is primarily intended to benefit Jay, and to incidentally prejudice Jack, Troy, and John Hermeier.

[62] Nor has Jay presented any evidence to refute Mr. Hermeier's evidence that the transfer pricing charges to Link Canada were fair and reasonable (Hermeier affidavit, para. 44), or that the termination of Link Snacks' non-contractual distribution arrangement with Link Canada was done for legitimate business reasons, with eight months advance notice and without objection by the Court-appointed Receiver. The Receiver and Jay were both advised of, and their input

sought regarding, Link Snacks' intention to terminate its distribution arrangements with Link Canada on June 1, 2015 (paras. 45 - 69).[29]

[63] The Receiver did not respond to the Link Snacks' proposal. Mr. Hermeier states, at paragraph 71 of his affidavit:

> The person who was and remains in a position to independently determine whether it would be in Link Canada's best interest to pursue the claims at issue is the Receiver. He has always had the power and authority to vote the shares of Link Global and LSI Canada Holdings to elect the Directors of Link Canada and as set forth in the affidavit of Brian Norton, he has known about Jay's allegations concerning wrong done to Link Canada since at least July 2017. Yet, the Receiver has never caused Link Canada to file a direct action and has repeatedly refused Jay's request that he do so.

[64] The Receiver was initially appointed by Order dated October 5, 2009, in relation to Link Snacks Global Inc.[30] The Receiver's position is revealed in the evidence before the Wisconsin Court:[31]

> Statement of Pete Herrell, Receiver for Link Global – dated August 14, 2017:
>
> **I am the court-appointed Receiver for Link Global Inc.** As Receiver for Link Global, I am responsible for liquidating 'all or any part of the assets of the corporation wherever located'.
>
> … **Link Global is a holding company; its assets are its subsidiaries**… Some assets of Link Global are still operating… Other subsidiaries of Link Global, however are now defunct. Liquidating those companies is simpler: my role is to ensure that their remaining

[29] Jay has not alleged that the termination of the distribution agreement was unlawful *per se*, but he does attribute its termination to the conflict of interest of the Individual Respondents. He claims the Respondents permitted asset transfers from Link Canada to Link Snacks "at no cost" (para. 21, Jay's affidavit).

[30] Exhibit "G", Jay's affidavit.

[31] Exhibit "X", Norton affidavit.

assets are marshaled, converted to cash, and distributed to creditors or shareholders. Link Global's Canadian operations fall into the second category.

Link Global is the sole owner of LSI Canada Holdings Inc., which in turn is the sole owner of Jack Link's Canada Company ("Link Canada"). These companies are defunct and nonoperating; their only hard assets are a few million dollars in cash.

Counsel for Jay Link have informed me that Link Canada may possess another asset: causes of action against its Directors for breach of fiduciary duties in connection with transfer pricing and the cessation of Link Canada's operations. Jay's counsel report that these claims, if successful, could result in a damages award of more than $80 million to Link Canada. Any recovery would be distributed to the Receivership estate, along with other remaining cash in Link Canada's accounts. I have not reviewed the evidence in support of these claims, and I cannot vouch for their merits… I am however, in a position to confirm that the best interests of Link Global and its defunct Canadian subsidiary are to liquidate all remaining assets and distribute them. **If Link Canada's assets include substantial causes of action that have not yet been adjudicated on their merits, as Jay contends, then liquidating those assets requires someone to litigate those causes of action.**

Jay Link and his counsel are in the best position to litigate those causes of action involving Link Canada. They report that they have developed the claims, reviewed the discovery, retained experts and the consultants, and prepared the case for trial. It would be wasteful to the Receivership for me to redo their work or try to build the case from scratch. Jay has paid his own legal and expert fees to date and has pledged to continue paying those fees to pursue the claims on Link Canada's behalf. He has further represented that he will only seek reimbursement of those fees from Link Canada if the company's recovery exceeds the amount of the fee request. Therefore, there is no financial risk to the companies or the Receivership and allowing Jay to proceed with those claims.

If a jury finds that the claims have merit then the Receivership will gain the financial benefit of the damages award. If a court or jury finds the claims lack merit, then the Receivership's finances will not be affected one way or another.

For all these reasons, I believe it makes sense for Jay Link and his counsel to proceed with the causes of action they have developed on Link Canada's behalf. Regardless of whether those claims are successful, it is in the best interest of these companies to wind up and liquidate their assets – including any damage claims that have not yet been fully adjudicated.

[My bolding added]

[65] What is particularly significant about this document is the Receiver's statement to the court on August 14, 2017:

> **Jay Link and his counsel are in the best position to litigate those causes of action involving Link Canada**. They report that they have developed the claims, reviewed the discovery, retained experts and the consultants, and prepared the case for trial. It would be wasteful to the receivership for me to redo their work or try to build the case from scratch. **For all these reasons, I believe it makes sense for Jay Link and his counsel to proceed with the causes of action they have developed on Link Canada's behalf.**
>
> [My bolding added]

[66] Thus, certainly by August 14, 2017, Jay not only knew the material facts in relation to the proposed derivative action in Nova Scotia, which, I might add, I am satisfied he knew by December 2010 (regarding the Transfer Pricing Claims) and by May 2016 (regarding the Theft of Link Canada Claims), but he had "developed the claims, reviewed the discovery, retained experts and the consultants, and prepared the case for trial."[32] He certainly knew on or before July 20, 2017 that the Wisconsin Circuit Court considered the claims at issue here to be those of Link Canada.[33] The Wisconsin Court of Appeals dismissed his appeal, stating:

> The proper means to seek redress for the injuries alleged in Jay's Second and Third Amended Complaints would have been either a direct action by Link Canada or a derivative action

[32] I appreciate that his reference that Jay "had developed the claims, reviewed the discovery, retained experts and the consultants, and prepared the case for trial" was perhaps in preparation for having the litigation conducted in Wisconsin.

[33] Underlying documents include: Exhibits "S" and "T"/ Order at Exhibit "CCC" - Norton affidavit; which order was appealed to the Wisconsin Court of Appeal on September 6, 2018 – Exhibit "T" Jay's affidavit; rendered a decision dated July 23, 2019 [Exhibit "PP" Norton affidavit/ see also Exhibits "BB" Jay's affidavit/ "VV" Norton affidavit, that suggests a November 5, 2019 revision, but without effect in substance.

> filed on its behalf. It is undisputed that Link Canada is a Nova Scotia corporation. 'In any derivative proceeding in right of a foreign corporation, the matters covered by… [i.e. derivative standing] shall be governed by the laws of the jurisdiction of the incorporation of the foreign corporation'. The parties agree that Nova Scotia law requires a shareholder to obtain leave of the Supreme Court of Nova Scotia in order to bring a derivative action on the corporation's behalf. The parties further agree that Jay has not obtained permission from the court to bring a derivative action on behalf of Link Canada.".

[67] The Supreme Court of Wisconsin, the state's highest appellate court, denied a petition for review of the Court of Appeal's decision on May 19, 2020.[34]

[68] Jay was oriented toward having the Link Canada claims dealt with in Wisconsin – see the comments in an email of November 3, 2017 (that leave was required to commence a derivative action in Nova Scotia).[35] Jay's lawyer wrote to the Receiver on that date:

> All we ask is if that is your decision, please tell us in writing that you have decided not to take any action on the derivative demands… If you decide not to do anything, you will have committed this receivership to being open for at least another two years and probably longer. **The reason is that in order for Jay to pursue his claims derivatively, he has to get permission from the Nova Scotia Court to proceed on behalf of Link Canada.** We believe that process could take at least 12 to 18 months (to get through the circuit court and appellate proceedings) before we would be back in front of a Wisconsin trial court on the merits.
>
> [My bolding added]

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[34] Tab 11 Applicant's Book of Authorities.

[35] Exhibit "WW" Norton affidavit.

[69] Jay could have filed an application for leave to proceed with the derivative action in Nova Scotia at any time after December 2010 (Transfer Pricing Claims) and May 2016 (Theft of Link Canada), respectively. He decided *not* to bring an application for leave to file a derivative action in Nova Scotia until 2020. His primary motivation for now doing so is for his personal benefit, and because he has been foreclosed from personally benefiting in the Wisconsin proceedings.

[70] Jay has not asserted that he was unaware of the limitation period implications of his delay in filing for leave to proceed with a derivative action in Nova Scotia. I conclude that he was aware that there was a real risk that he would be foreclosed from proceeding by virtue of a limitation period.

[71] The burden is upon Jay to establish he is "acting in good faith". I find that a *prima facie* case of bad faith on the part of Jay has been established. It is not displaced by any evidence that I accept. I conclude that more likely than not, Jay is not "acting in good faith", and, more specifically, he was not acting in good faith when he filed his March 12, 2020 Application for leave to proceed with a derivative action in Nova Scotia.

s. 4(2)(c) - Has Jay established that "it appears to be in the interests of the company… that the action be brought…."?

[72] In *Budd v Bertram*, 2018 NSCA 95, the Court had occasion to address the ambit of s. 4(2)(c) of the Third Schedule, and specifically "the financial effect on the company of the proposed action proceeding or not proceeding" as a relevant factor in relation to whether "it appears to be in the interests of the company…". On appeal, the appellants argued that the hearing judge erred by not considering the costs and benefits to the corporation of proceeding or not proceeding with the proposed action. Justice Hamilton stated:

> 38 Starting with *Primex* it appears, courts also began to explicitly refer to the need for a judge, when considering what appears to be in the interests of the company, to weigh the potential relief if the proposed derivative action were successful against the cost and inconvenience that the action may pose to the company:
>
> > 49 ... The Court should determine whether the proposed action has a reasonable prospect of success or is bound to fail. If it is asserted that the proposed defendants in the derivative action have a defence to the claim, the Court must decide whether such a defence is bound to be accepted by a trial judge following the completion of the trial of the derivative action. It is not necessary for the applicant to show that the action will be more likely to succeed than not. **As noted in the Dickerson Report, the Court should also be satisfied that the potential relief in the proposed action is sufficient to justify the inconvenience to the company of being involved in the action**.
> >
> > [emphasis added]
>
> …
>
> 40 In *L + B Electric,* Justice Moir of the Supreme Court of Nova Scotia suggested it is necessary to consider costs, both financial and intangible [in determining whether to grant leave to a derivative action proceeding]….

[73] Justice Hamilton went on to say:

> 44 The Court in *Jahnke*, referring to some of these cases, stated:

> [68] ... *I should clarify that the "interests of the corporation" inquiry is not tightly restricted to nothing more than an assessment of the apparent strength of the proposed action. This is because, as recognized in the Dickerson Report itself, there are circumstances when it would clearly not be advisable for a corporation to pursue a claim even where success seems almost certain.* I have in mind here, for example, situations such as those where an action will cost far more to prosecute than it can possibly yield in damages, where pursuing a claim will harm important and ongoing business relationships, or where going to court will generate problematic publicity for the corporation. In all of these sorts of situations, *the narrow question of whether a claim is arguable will not properly answer the question of whether that claim is in the interests of the corporation.* This is not a new idea. Cases where a court has been prepared to consider more than just the chances of success for a proposed action include *Schadegg v Alaska Apollo Resources Inc*., 1994 CarswellBC 2132 (BC Sup Ct), *Melnyk v Acerus Pharmaceuticals Corporation*, 2017 ONSC 1285 (CanLII), *Maxwell v Schuman*, 2005 BCSC 1430 (CanLII), *Discovery Enterprises Inc. v Ebco Industries Ltd*. (1997), 1997 CanLII 4375 (BC SC), 40 BCLR (3d) 43 (Sup Ct), and *Primex Investments*. **Thus, while the strength of the proposed action is the central consideration in any s. 232(2)(c) inquiry, it is not the only consideration or, necessarily, the deciding consideration.**
>
> [emphasis added]

…

45 *I adopt the position of the Saskatchewan Court of Appeal set out in paragraph 68 of Jahnke. The central consideration in any s.4(2)(c) inquiry is the strength of the proposed action, but that it is not the only or, necessarily, the deciding consideration.*

46 That said, in most cases another consideration should be the financial effect on the company of the proposed action proceeding or not proceeding. This seems to flow from the very nature of companies incorporated under the *Act*, that earning a profit is in the company's interest. However, there may be cases where a consideration of costs and benefits will be less important, for instance where the issue is whether directors are in breach of their fiduciary duties due to being in a conflict of interest position; *Richardson*, para 32.

[My italicization added]

[74] Justice Hamilton in *Budd* also referenced the following:

42 The Court in *Melnyk v. Acerus Pharmaceuticals Corporation*, 2017 ONSC 1285, approved on appeal, 2018 ONSC 1353 (Div Ct) accepted the principle that, at least for a company traded on the TSX, the "interests of the company" test requires a consideration of

> the maximization of the value of the company and noted that each case must be assessed on its own facts (para. 43).

[75] Each case must be determined on its own unique facts. Jay has the evidentiary and persuasive burden on this Application.

[76] I suggest that in appropriate cases, a general distinction could be, and specifically here should be, drawn between derivative actions in relation to publicly traded corporations and those respecting privately held corporations. The "interests of the corporation" inquiry for a privately held corporation may not require similar weight be placed on the maximization of the value of the company factor in relation to a proposed derivative action, as would be in the case of a publicly traded corporation, oriented towards a constant focus on the maximization of the value of the company for a multitude of investors with that expectation, in assessing whether proceeding with a derivative action is "in the interests of the company."

[77] Link Canada is neither a publicly traded company, nor one with limited liability.

[78] Moreover, in relation to a group of operationally integrated companies which were all established, and closely held, by the same small group of individuals, some allowance must be made for the reality that they were intended to work together "hand in glove", in order to further their collective interests. Within such groups,

there are often dominant or controlling companies, who are ultimately intended to be the primary beneficiaries of their collective actions. Inherently, this form of organization may occasionally require decisions that make some companies appear to be disadvantaged, in order that others are advantaged.[36] The Link group of companies, as described at paragraphs 15 – 25 of the Brian P. Norton affidavit are an example of such a form of organization.

[79] I infer that the shareholders of the Link group of companies, and particularly Link Snacks, are also interested in maximizing the value of the companies collectively. Decisions oriented at maximizing the value of the companies collectively also require sound business judgment.

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[36] In *BCE v. 1976 Debentureholders*, 2008 SCC 69, (see especially paras. 58-9), the Court addressed whether directors of a *CBCA* company acted in "oppression" of the interests of stakeholders other than shareholders. It stated that the appropriate enquiry is: does the evidence support the *reasonable expectation* asserted by the claimant? And *was that expectation violated* by conduct falling within the terms, 'oppression', 'unfair prejudice' or 'unfair disregard' of a relevant interest? In relation to the first question it noted that *useful factors* from the case law determining *whether a reasonable expectation exists include*: general commercial practice; *the nature of the corporation; the relationship between the parties; past practice*; steps the claimant could have taken to protect itself; representations and agreements; and the fair resolution of conflicting interests between corporate stakeholders. For the second question, a claimant must show that the failure to meet the reasonable expectation involved unfair conduct and prejudicial consequences under s. 241 of the *CBCA* ("oppression"). The directors are required to resolve a situation of conflicting interests in accordance with their fiduciary duty to act in the best interests of the company, having regard to all relevant considerations including the need to treat affected stakeholders in a fair and equitable manner. The court accepted that a relevant consideration in assessing the director's choices in resolving conflicts among stakeholders is that deference should be accorded ("business judgment rule") to their *decisions made in good faith based on the reasonable expectations of those affected*. While the oppression remedy and derivative action share overlapping aspects such as the reasonable expectations of shareholders, they nevertheless remain conceptually distinct: See, e.g. see *Rea v Wildeboer*, 2015 ONCA 373 at para. 36; *Ernst & Young Inc. v Essar Global Fund Limited*, 2017 ONCA 1014 at paras 128-148 and 152.

[80] In the case at Bar, John Hermeier has set out in evidence the reasoning behind arguably sound business judgments in relation to decisions that Jay suggests are breaches of fiduciary duty by the directors of Link Canada.

[81] I bear in mind that Justice Hamilton stated in *Budd* at para. 46:

> However, there may be cases where a consideration of costs and benefits will be less important, for instance where the issue is whether directors are in breach of their fiduciary duties due to being in a conflict of interest position …

[82] Moreover, as the Court stated in *Richardson Greenshields of Canada Ltd. v. Kalmacoff*, [1995] O.J. No. 941 (C.A.):

> 21 In deciding whether leave should be granted, it should be borne in mind that a derivative action brought by an individual shareholder on behalf of a corporation serves a dual purpose. First, it ensures that a shareholder has a right to recover property or enforce rights for the corporation if the directors refuse to do so. Second, and more important for our present purposes, it helps to guarantee some degree of accountability and to ensure that control exists over the board of directors by allowing shareholders the right to bring an action against directors if they have breached their duty to the company: M. A. Maloney, "Whither the Statutory Derivative Action?" (1986), 64 Can. Bar Rev. 309.

[83] Though the issue in dispute is whether the Individual Respondents were in breach of their fiduciary duties as Directors and Officers of Link Canada due to being in a conflict of interest position vis à vis Link Canada, each case must be determined on its own unique facts.

[84] In *Directors' and Officers' Liability in Canada*, Lexis-Nexis Canada Inc. 2015 [up-to-date as November 2015], Helen A. Daley and Simon Bieber state, in relation to derivative actions at p. 48:

> In circumstances where a simple deadlock has arisen between two individuals who control the corporation's decisions, the court will be loath to 'take sides' by enabling one of them to bring an action in the Corporation's name. This is particularly so when there is no evidence of any alleged wrongful activity on the part of the individual who does not wish to authorize the Corporation to bring the action. …

[85] The authors cite *Maxwell v. Schuman*, [2005] B.C.J. No. 2188 (S.C.), where Justice Rice stated:

> 35 The case does not involve the kind of wrongful activity of people in control that usually warrants a derivative action. It is two controlling individuals and their law firms who are stuck in negotiations. They can and should resolve it directly without one side commandeering the companies to join his side.
>
> 36 If the companies were acting at arms-length to the individuals involved, a better argument might be made. But that is not the case. It is essentially a dispute between Mr. Maxwell and Mr. Schuman.
>
> …
>
> 40 In this case, Mr. Maxwell's allegations of an oral agreement may in strict literal terms amount to something that is arguable, and I do not find that his allegations are simply frivolous and vexatious. *However, based on the authorities cited above, I find that there must be some sense of reasonableness in the allegation. With no more than a bald statement which Mr. Schuman flatly denies, a reasonable chance of success is called into question.* But the case here is more tenuous than that.
>
> 41 Key to Mr. Maxwell's case is the specific allegation that Mr. Schuman agreed to a term that would enable Mr. Maxwell and his law firm to vacate the Building leaving Mr. Schuman unconditionally responsible for double the rent that he was paying before. *With no explanation as to why or how that was clearly the agreement, it defies common sense. It is bound to fail.*

> 42 *Mr. Taylor says that to consider that point is to venture into considering the merits of the case. I disagree.* The Court must examine whether in the circumstances, the allegations are believable enough to be arguable. *The purpose of considering the respondent's version of the facts is to test the reasonableness on its face of the petitioner's version.* (*Discovery Enterprises Inc. v. Ebco Industries Ltd.* (1998), 50 B.C.L.R. (3d) 196, 109 B.C.A.C. 255 at para. 12.) In my opinion, the petitioner does not have an arguable case. The case does not stand a reasonable chance of success. I would dismiss the application with costs to the respondents.
>
> [My italicization added]

[86] An assessment of the costs and benefits to Link Canada, and correspondingly whether "it appears to be in the interests of the company", are somewhat artificial inquiries in the sense that the unlimited liability company was created solely to distribute Link Snacks' products in Canada as part of a tightly controlled group of related companies, and purposefully ceased operations in 2016. As stated by John Hermeier, at para. 69 of his affidavit:

> Afterwards, Link Canada ceased all operations. This business decision was based on the fact that Link Canada had: (i) no distribution agreement with Link Snacks; (ii) no manufacturing facility to produce product; (iii) no intellectual property; (iv) no expertise or ability to distribute other products; and (iv) no or inadequate capital to retool or develop a new business line. Link Canada was set up by Jay and others to distribute Link Snacks' product and nothing else. Once its distribution relationship with Link Snacks ended, there was no reason for it to continue operating.

[87] Link Canada's only potential asset of consequence is Jay's proposed derivative action herein. If successful, it would appear that only Jay and Troy would

be the beneficiaries thereof, as they are effectively the only shareholders who could benefit.[37]

[88] I agree that "in the absence of evidence to the contrary, the statutory condition [i.e. s. 4(2)(c) *Companies Act*, whether "it appears to be in the interests of the company"] should give rise to a presumption that the Directors have exercised reasonable and sound judgment before leave is granted".[38] However, I need not rely on the un-rebutted presumption, because I have uncontradicted evidence which credibly explain, when seen in context, that reasonable decisions were made by the Directors and Officers of Link Canada vis-à-vis Jay's "Transfer Pricing Claims" and "Theft of Link Canada Claims" – including the Hermeier affidavit at paras. 22-25 and 44-69.[39]

[89] This conclusion significantly impacts the decision as to whether allowing the derivative action to proceed "appears to be in the interests of the company".

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[37] Jay has stated that although as shareholders each has a 50% interest in Link Canada, in a deadlock, Troy's vote is the tie-breaker – Jay's affidavit at para. 11.

[38] Para. 21, *Chandler v Sun Life Financial Inc.,* [2006] O.J. No. 451 (S.C.) (Commercial List), per C L Campbell J.

[39] Jay claims that the Directors of Link Canada "started to operate [it] as a subservient subsidiary of Link Snacks … an entirely different and separate corporate chain." He does not specifically allege that they made decisions that favoured their personal interests.

[90] Under the rubric of whether "it appears to be in the interests of the company" to grant leave, it is appropriate for me to consider the strength of the proposed derivative action. This factor includes a consideration of whether there is an arguable case to be made, and, incidentally, an inquiry into the costs and benefits to the company of the derivative action proceeding, though this is arguably less important where the issue is whether directors are in breach of their fiduciary duties due to conflict of interest.

[91] Furthermore, regarding the strength of the proposed derivative action, I will next examine the Respondents' claim that the action is statute-barred by the *Limitation of Actions Act*.[40]

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[40] It is acceptable for courts to examine the sustainability of the merits of litigants' claims in the context of motions for summary judgment (CPR 13.03 – On Pleadings and 13.04 – On Evidence). This application for leave is close in character to a motion for summary judgment on evidence. Such procedures are useful, as Justice Brown stated for the Court in *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19, at para 18: "…this court has recognized in *Hyrniak v. Maulden*, 2014 SCC 7…[w]here possible, therefore, courts should resolve legal disputes promptly… [This] includes resolving questions of law by striking claims that have no reasonable chance of success." In *Nova Scotia (Attorney General) v Luke,* 2017 NSSC 120, which involved an action on debt for default on a student loan, the student's defence was a bare denial. Summary judgment on evidence was granted. The only issue was a question of law: did the defendant have a real chance of success in pleading a limitations defence? As Justice Wright put it: "Whether that limitation period or any other limitation period applies to the facts of this case is plainly a question of law. In the recent decision of the Nova Scotia Court of Appeal in *Upham (c.o.b. M.U. Rhyno Renovations) v. Dora Construction Ltd. (appeal by Shannex Inc.)* [2016] N.S.J. No. 505, the amended Civil Procedure Rule 13.04 was thoroughly analysed and interpreted. In so doing, the Court of Appeal provided a blueprint for deciding summary judgment motions on evidence, consisting of five sequential questions to be posed by the court which are articulated at paragraph 34 of that decision. *In the present case, we are drawn to the third question of that analysis because here there is no genuine issue of material fact to be determined; rather, the challenged pleading requires the determination of a question of law.* That evokes the pivotal question of whether the challenged pleading has a real chance of success. It is for the responding party to show a real chance of success and if the party cannot do so, then summary judgment issues to dismiss the ill-fated pleading. To reframe *the pivotal question on this motion, does the defendant have a real chance of success in pleading a limitation of action defence?*" (paras. 11-14.) More *à propos*, in the case at bar, as stated by Justice Hamilton in *Budd* (para. 38) when she cited *Primex* (para. 49): "The

[92] In essence, if I conclude on the basis of undisputed or indisputable evidence, that there is a reasonable prospect of success to the Respondents' limitation of actions defence, then it militates against me finding the derivative action "is in the interests of the company."

[93] Jay suggests, *inter alia*, that there is uncertainty about the limitations defence, linked to the following questions:

1. What substantive law applies to the derivative claims? [I say it is Nova Scotia law]

2. What substantive law applies to the limitation period? [I say it is Nova Scotia law]

3. Under the governing law, what is the applicable limitation period? [This is governed by sections 8 and 23 of the *Limitation of Actions Act* - see the relevant conclusions below]

4. When did the limitation period start to run? [The limitation period likely began to run no later than December 2010 in relation to the "Transfer Pricing Claims" and no later than May 2016 in relation to the "Theft of Link Canada".]

5. Was the limitation period "tolled" or suspended at any point? [Neither limitation period was likely suspended.]

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court should determine whether the proposed action has a reasonable prospect of success or is bound to fail. If it is asserted that the proposed defendants…have a defence to the claim, the Court must decide whether such a defence is bound to be accepted by a trial judge…" [My italicization added]

6. Has the limitation period expired? [Yes, it likely has regarding: the "Transfer Pricing Claims" by no later than December 2016; and the "Theft of Link Canada Claims" by no later than May 2018]

The substantive law of Nova Scotia applies to the proposed derivative action claims (including to the limitation period issue)

[94] There is no suggestion that this Court is not the correct court to hear the leave application for filing of a derivative action. ("Court" as defined at s. 2, *Companies Act;* s. 7(2), Third Schedule). There is no disagreement that the *Nova Scotia Civil Procedure Rules* that apply to such proceedings. These are both matters of procedure. The Wisconsin Court of Appeals has confirmed that in Wisconsin proceedings, according to Chapter 180 of the Wisconsin Statutes governing Business Corporations: "In any derivative proceeding in the right of a foreign corporation, the matters covered by… [provisions regarding derivative standing] shall be governed by the laws of the jurisdiction of incorporation of the foreign corporation" - see also affidavit of Andrew Erlandson, sworn April 22, 2020.

[95] The derivative action is proposed to be taken on behalf of Link Canada. As a Nova Scotia corporation, it is governed by the Nova Scotia *Companies Act*. There is no disagreement that Nova Scotia common law defines the fiduciary duties of directors and officers under the *Companies Act*. Those are the core claims that will be advanced by Link Canada, a Nova Scotia corporation since 2002. Link Canada

was purposefully created to be operationally responsible for the distribution of Link Snacks' products *in Canada*. It continuously functioned to fulfil that responsibility until February 2016.

[96] The ultimate remedy Jay seeks is "compensation to Link Canada" for what he in his affidavit identifies as "Corporate Misappropriation" by Link Snacks and the Individual Respondents, arising from what he has characterized as the "Transfer Pricing Claims" and the "Theft of Link Canada Claims".

[97] This court clearly has jurisdiction *simpliciter*[41] (territorial and subject matter jurisdiction). Counsel have not suggested that Nova Scotia is a *forum non-conveniens*. Thus, what remains is the choice of law issue.[42] There is a stark choice regarding the applicable law governing the claims – Nova Scotia or Wisconsin.

Jay says Wisconsin law should govern

[98] Jay says Wisconsin law should govern the claims because "recent case law suggests that the *lex loci delicti* rule will apply to breach of fiduciary duty claims, including in the corporate misappropriation context. In this case, the law of the place of the wrong is more likely to be Wisconsin law than the law of Nova Scotia." (*Das*

[41] See *Tolofson v. Jensen*, [1994] 3 SCR 1022, at para. 40

[42] See *Tolofson* at paras. 41-42

v George Weston Ltd., 2017 ONSC 4129, at paras. 266 – 272, affirmed on other grounds 2018 ONCA 1053; *Alpha Resource Management Inc. v. Brown*, 2014 BCSC 1339, at paras. 26, 35, and 38.)

[99] I disagree. Both *Das* and *Alpha Resources* are distinguishable on the facts and unpersuasive in relation to the case at Bar. I find persuasive the position of the Respondents, that Nova Scotia law is the proper choice of law. Let me first provide comments on why I conclude that Jay's reliance on *Dicey's* Rule 230(c) is misplaced.

[100] Jay claims that this general rule requires that it be the law of Wisconsin, as reflected by Justice Perell's statement in *Das* that:

> 271 The Plaintiffs rely on **Rule 230(c)** of *Dicey, Morris and Collins on the Conflict of Laws* (15th ed.) (London: Sweet & Maxwell, 2012) **to place *the proper law of the breach of fiduciary duty claim in Ontario. Rule 230*** *is used to determine "the proper law of the obligation" and* ***provides that****:* (a) if the obligation arises in connection with a contract, its proper law is the law applicable to the contract; (b) if it arises in connection with a transaction concerning an immovable (land), its proper law is the law of the country where the immovable is situated (*lex situs*); and **(c) *if it arises in any other circumstances, its proper law is the law of the country where the unjust enrichment occurs***. In *Minera Aquiline Argentina SA v. IMA Exploration Inc. and Inversiones Mineras Argentina SA*, 2006 BCSC 1102, the Supreme Court of British Columbia adopted the principles set out in Rule 230(c) to make British Columbia law applicable to an unjust enrichment claim. **In *Macmillan Inc. v. Bishopgate Investment Trust Plc & Others*, [1995] EWCA Civ 55, the Court of Appeal for England used Rule 230(c) for a breach of fiduciary duty claim**.
>
> [My bolding added]

[101] First of all, I believe that Justice Perell's reference in paragraph 271 of *Das* must be a reference to the 14th edition, of Dicey, et al, where Rule 230, under the heading "Restitution" (also referred to as "Unjust Enrichment"), states, at p. 1863:

> 230(1) The obligation to restore the benefit of an enrichment obtained at another person's expense is governed by the proper law of the obligation.
>
> (2) The proper law of the obligation is (*semble*) determined as follows:
>
> a) if the obligation arises in connection with the contract, its proper law is the law applicable to the contract;
>
> b) if it arises in connection with the transaction concerning an immovable (land), its proper law is the law of the country where the immovable is situated (*lex situs*);
>
> c) if it arises in any other circumstances, its proper law is the law of the country where the enrichment occurs.[43]

[102] I next refer to the 15th edition of *Dicey, Morris and Collins on The Conflict of Laws*, Fourth Cumulative Supplement (2017), (up-to-date as of April 1, 2017). At page 2291 of the 15th Edition, under the title "Unjust Enrichment", and the subtitle "The position prior to the entry into force of the Rome II Regulation", a reference is

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[43] Before relying too heavily on this suggested Rule, let me point out that the reference to *semble* means "it appears" and is used in law or reports and textbooks to introduce the proposition of law which is not intended to be stated too definitively, as there may be doubt about it. The 15th edition of *Dicey* has Rule 230 under the heading "Contracts for the sale, hire, and pledge of movables"; furthermore Rule 257 is entitled "Choice of Law rules for Obligations arising out of Unjust Enrichment." Rule 257 (3) reads: *where the law applicable cannot be determined on the basis of clauses one or two, the law of the country in which the unjust enrichment took place applies.*".

made to the 14th edition and to the above-cited Rule 230. There, we find a number of cases cited, and the following comment:

> The Rule was not, however, to be applied inflexibly but provided guidance as to the proper law: … Although the authorities which approve the Rule were comparatively few, in other cases it was accepted without discussion … Certainly, no English decision held the Rule to be wrong. Nevertheless, *its application gave rise to complexity*; especially where equitable claims were concerned. *It is likely that those difficulties will be exacerbated under the Rome II Regulation, as the courts endeavour to fit equitable obligations within the rubric of the European autonomous meanings of legal concepts in the Regulation*.
>
> [My italicization added]

[103] It appears that what we in Canada and America generally refer to as "breach of fiduciary duties" by officers and directors of corporations are sometimes characterized by private international law as a form of "unjust enrichment", presumably in order to allow both common law and civil law jurisdictions to find the Rule useful. However, at page 2293 of the 15th edition of *Dicey* we find that this distinction has grown more significant over time:[44]

> "In English law, Unjust Enrichment at the expense of the claimant (Unjust Enrichment by subtraction) is an aspect of the law of Restitution. *Previous editions of this work adopted common law choice of law rules for Restitution, rather than specifically for obligations arising out of Unjust Enrichment.* The exact contours of the law of Restitution are a matter of debate and there are, in particular, disagreements as to whether Restitution for wrongdoing and proprietary Restitution are distinct claims; or are examples of a wider concept of Unjust and Enrichment. "Unjust enrichment" is a term widely used elsewhere in Europe and is a more appropriate than "Restitution" for the purposes of a European Regulation. Inevitably, the characteristics of obligations arising out of Unjust Enrichment is that they are concerned

[44] For the most recent discussion in Canada regarding unjust enrichment and restitution see Justice Brown's reasons in *Atlantic Lottery Corporation Inc. v. Babstock*, 2020 SCC 19.

> with the disgorgement of a benefit which necessarily requires one to have some regard to the remedies sought."

[104] One can understand how a book recently written from a UK perspective is heavily oriented towards factoring in the concepts of the civil law systems of the European Union. I conclude that for my immediate purpose, the usefulness of a simple reference to the Rules in *Dicey, Morris and Collins on The Conflict of Laws* is modest. This is particularly so because, in the case at Bar, the fiduciary duty is that of directors of a company, which has a legislative context and nature that is distinguishable from the fiduciary obligations that are in dispute in other contexts, such as in the *Das* case.

[105] However in *Das*, Justice Perell does helpfully comment on general conflict of laws principles which have been considered and accepted in *Canadian* courts:

> 2. Preliminary Points about the Choice of Law Issues
>
> 212 I shall begin the discussion in this part of my Reasons for Decision, which will discuss determining the choice of law for tort cases, by making four preliminary points that affect how an Ontario court decides what law to apply in a lawsuit involving foreign parties, events in a foreign country, foreign law, or foreign court judgments.
>
> 213 The first preliminary point is a matter of both terminology and substantive law. The domestic court (in the immediate case, Ontario's Superior Court of Justice) is known as the *lex fori*. *A domestic court will always apply its own procedural law*: *Tolofson v. Jensen, supra*, at para. 41. *The substantive rights of the parties to an action may be governed by a foreign law, but all matters appertaining to procedure are governed exclusively by the law of the forum, the lex fori: Somers v. Fournier* (2002), 60 O.R. (3d) 225 (C.A.).
>
> 214 There is sometimes an issue of what counts for procedural versus substantive law. *Limitation periods and statute-bars are matters of substantive law: Tolofson v. Jensen, supra.* Pre-judgment interest is a matter of substantive law: *Somers v. Fournier, supra*.

Remoteness of damages and *heads of damage are questions of substantive law, whereas the quantification or measurement of damages is a question of procedure governed by the lex fori: Somers v. Fournier, supra*; *Wong v. Wei*, [1999] BCJ No. 768 (BCSC); *Metaxas v. Galaxias*, [1990] 2 FC 400 (TD). The cap on non-pecuniary general damages (*Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229; *Thornton v. Prince George School District No. 57*, [1978] 2 S.C.R. 267; and *Arnold v. Teno*, [1978] 2 S.C.R. 287) is a procedural matter. Costs are a procedural matter governed by the *lex fori*: *Somers v. Fournier, supra*.

215 The second preliminary point is that *a domestic court will apply its domestic law for both procedural and substantive law matters, unless the parties make an issue of the choice of law.* The choice of law question does not arise unless one of the party raises the issue; if neither party makes an allegation about the choice of law, the domestic court resolves the dispute using domestic law, the *lex fori*: *Pettkus v. Becker*, [1980] 2 S.C.R. 834 at pp. 853-54. It is presumed that the foreign law is the same as the domestic law unless the content of foreign law is proven as a factual matter.

216 The third preliminary point is that *the choice of law issue is an aspect of the body of law known as conflicts of law or private international law, and although this body of law addresses several related problems, care must be taken not to conflate the discrete rules of conflict of laws.*

217 Thus, *conflict of laws addresses the jurisdiction simpliciter issue, the forum conveniens issue, the choice of law issue, and the enforcement of foreign judgments issue, and although the law for resolving these issues is rooted in common principles, values, and policies, historically there has been no consensus about the doctrinal theory to explain conflict of laws.* Over the centuries, around the world, there are many different theories and many different rules to respond to the conflict of laws issues, but the answers tend to involve discrete, but not necessarily doctrinally consistent rules, for determining jurisdiction *simpliciter*, *forum conveniens*, choice of law, and the enforcement of foreign judgments. Thus, in *Club Resorts Ltd. v. Van Breda, supra*, Justice LeBel stated at para. 16:

> 16.... [T]he framework established for the purpose of determining whether a court has jurisdiction may have an impact on the choice of law and on the recognition of judgments, and *vice versa.* Judicial decisions on choice of law and the recognition of judgments have played a central role in the evolution of the rules related to jurisdiction. None of the divisions of private international law can be safely analysed and applied in isolation from the others.

218 However, because there is no consensus about the doctrinal theory that underlies the different branches of conflicts of law, while one can learn from a rule in one area of conflicts of law, one should not jump to the conclusion that the answers will be consistent or uniform. As will appear in the discussion below, in the case at bar, the location of the wrongdoing for the purposes of the choice of law rule was a source of confusion because the arguments conflated the location of wrongdoing for the purposes of determining whether a court has

jurisdiction *simpliciter* from the location of the wrongdoing for the purpose of the choice of law rules.

219 In *Moran v. Pyle National (Canada) Ltd*., [1975] 1 S.C.R. 393 at para. 7, discussed further below, Justice Dickson noted that it was a mistake not to distinguish between a court's jurisdiction and choice of law, and he held that the rules for determining the place of a wrongdoing for jurisdictional purposes need not be those which are used to identify the legal system under which the rights and liabilities of the parties are to be determined. Thus, for jurisdictional purposes, a wrongdoing may have more than one single *situs* (which explains why there may have to be a forum *conveniens* analysis), but *there can only be one choice of law for the wrongdoing*. In her text, *Castel & Walker Canadian Conflict of Laws* (6th ed.), (Toronto: LexisNexis Canada Inc., 2005) (loose-leaf, 2016), Professor Janet Walker at para. 35.8 points out that in a jurisdictional determination, there is no need to make an exclusive determination, *but for a choice of law determination, there can only be one applicable law*. In *Moran v. Pyle National (Canada) Ltd*., Justice Dickson concluded that a manufacturer of a defective product could reasonably be expected to be sued in all of the jurisdictions in which its goods were distributed through normal channels of distribution, but Justice Dickson did not address the choice of law question in *Moran*.

220 In *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 at p. 109, an enforcement of foreign judgments case, Justice La Forest stated: "it is simply anachronistic to uphold a ... single *situs* for torts or contracts for the proper exercise of jurisdiction." In *Club Resorts Ltd. v. Van Breda*, *supra* at para. 34, Justice LeBel stated that satisfying the real and substantial connection test does not require that the connections with the province taking jurisdiction must be the strongest ones possible or that they must all point in the same direction.

221 The fact that there may be a real and substantial connection such as to satisfy the test for jurisdiction *simpliciter* does not determine the choice of law to be applied because *the power of a court to exercise jurisdiction does not automatically include the authority to apply the law of its own jurisdiction*, the *lex fori*: *Leonard v. Houle* (1997), 36 O.R. (3d) 357 (C.A.) at para. 12, leave to appeal to SCC refused, [1998] S.C.C.A. No. 19.

222 *The fourth preliminary point is that international private law and conflict of laws are largely a pragmatic and rule-oriented regime designed to provide certainty and to avoid ad hoc, case-by-case decision-making based on what is fair and just for a particular case.* In *Spar Aerospace Ltd. v. American Mobile Satellite Corp*., 2002 SCC 78, the Supreme Court held that comity, order, and fairness are, at best, vaguely defined principles that inspire the interpretation of private international law rules, but are not themselves binding rules of law. In *Club Resorts Ltd. v. Van Breda*, *supra*, at para. 13, Justice LeBel stated:

> 13.... *Justice and fairness are undoubtedly essential purposes of a sound system of private international law.* But they cannot be attained without a system of principles and rules that ensures security and predictability in the law governing the assumption of jurisdiction by a court. ...

[My italicization added]

[106] Generally speaking, and specifically in relation to the question of "choice of law", the jurisprudence and texts such as *Dicey, Morris and Collins on the Conflict of Laws*, attempt to make sense of private international law rules. These Rules are merely a "best effort" to create a reliable starting point for the adjudication of the interjurisdictional effects of the domestic law of nations. They can nevertheless provide helpful indications to litigants in such disputes because private international law rules have gained general acceptance by virtue of being *rooted in common principles, values, and policies*, which most align with the hoped-for comity, order, justice and fairness considerations that underlie the orderly operation of the international economy.

Nova Scotia is the proper choice of law (lex causae)

[107] In summary, according to general principles, as set out by Perell J in *Das*:

> A domestic court will always apply its own procedural law: *Tolofson v. Jensen*, supra, at para. 41. The substantive rights of the parties to an action may be governed by a foreign law, but all matters appertaining to procedure are governed exclusively by the law of the forum, the *lex fori*; Limitation periods and statute-bars are matters of substantive law: a domestic court will apply its domestic law for both procedural and substantive law matters, unless the parties make an issue of the choice of law; the choice of law issue is an aspect of the body of law known as conflicts of law or private international law, and although this body of law addresses several related problems, care must be taken not to conflate the discrete rules of conflict of laws; conflict of laws addresses the jurisdiction *simpliciter* issue, the *forum conveniens* issue, the choice of law issue, and the enforcement of foreign judgments issue, and although the law for resolving these issues is rooted in common principles, values, and

> policies, historically there has been no consensus about the doctrinal theory to explain conflict of laws.

[108] The domicile of a corporation is the jurisdiction in which it was incorporated- *National Trust Co. v Ebro Irrigation and Power Co.*, [1954] 3 D.L.R. 326 (Ont. H.C.) at para 45. The court also stated, at paragraph 35:

> It is well established that the domicile of a corporation is in the country in which it was incorporated. In *Cheshire on Private International Law*, 4th ed. 1952, at pp. 193-4, it is stated that: "*Questions concerning the status of a body of persons associated together for some enterprise, including the fundamental question whether it possesses the attribute of legal personality, must on principle be governed by the same law that governs the status of the individual, i.e. by the law of the domicil.* What this law is admits of no doubt if we reason upon the analogy of the individual. Every person, natural and artificial, acquires at birth a domicil or origin by operation of law. In the case of the natural person it is the domicil of his father, *in the case of the juristic person it is the country in which it is born, i.e. in which it is incorporated."* In support of this proposition the author cites Gasque v. Commissioners of Inland Revenue, [1940] 2 K.B. 80. The text proceeds: "*If it is a corporation, it can be so only by virtue of the law by which it was incorporated. It is to this law alone that all questions concerning the creation and dissolution of the corporate status are referred.* In the words of Lord Wright: 'English courts have long since recognized as juristic persons, corporations established by foreign law in virtue of the fact of their creation and continuance under and by that law. ... But if the creation depends on the act of the foreign State which involve the dissolution and non-existence of the corporation in the eye of English law. The will of the sovereign power which created it can also destroy it.' Lazard Bros. v. Midland Bank, Ltd., [1933] A.C. at p. 297."
>
> [My italicization added]

[109] This was approvingly referred to recently in *Zhang v Hua Hai Li Steel Pipe Co.*, 2019 ONSC 7465:

> 28 The question of ownership of the company is one that is governed by the law of China. *It is well-established that questions concerning the status of a body of persons associated together for some enterprise and all matters of internal management of the enterprise including the creation of share capital and related matters must be determined by the law of the domicile of the enterprise. If the enterprise is a corporation, its domicile is the country in which it was incorporated.* A local court may hear matters concerning ownership of shares

in a foreign corporation if it applies the law of the place of incorporation. See *National Trust Company Limited v. Ebro Irrigation and Power Company Limited et al.*, [1954] O.R. 463; *Phillips v. Avena*, 2006 ABCA 19 at paras. 81-82.

[My italicization added]

[110] Moreover, as the Court stated in *Cira v Gorman*, [2006] O.J. No. 436 (C.A.):

1 The commercial list judge concluded that the subject matter of the remaining relief in the application related to the internal governance of a Utah corporation.

2 We agree. The relief relates to shareholders' meetings, the disclosure of shareholders' lists and matters ancillary thereto. This relief is to be distinguished from relief related to any business activity carried on by Rico in Ontario.

3 In our view, the motion judge was correct in his statement that "the principles of comity dictate that courts in one jurisdiction will not issue orders purporting to direct or regulate the internal affairs or governance of a corporation incorporated in another jurisdiction".

[111] The motion judge had stated at para. 5:

It is in my view well established in law that the principles of comity dictate that courts in one jurisdiction will not issue orders purporting to direct or regulate the internal affairs or governance of a corporation incorporated in another jurisdiction. In *Incorporated Broadcasters Ltd. v. Canwest Global Communications Corp.*, [2001] O.J. No. 4882 (rev'd on other grounds, [2003] O.J. No. 560), Kiilleen J. stated:

> It is well established that matters of internal management of a corporation and questions affecting the status of a corporation should be determined by the courts of the corporation's domicile.
>
> A fixed lodestar of corporate law is that a corporation's domicile is its place of incorporation. As was said by Schroeder J. in National Trust Co. v. Ebro, [1954] O.R. 463 (H.C.) at p. 478:
>
> *It follows that the instrument of incorporation and the laws of a corporation's domicile govern not only its creation and continuing existence, but also all matters of internal management,* the creation of share capital, and related matters, *so that to determine questions affecting the status of a Canadian company and matters relating to its internal management reference must be had not only to* the letters patent creating it and any supplementary letters patent and its by-laws *but also to the powers and duties of the directors as set forth in s. 92 of The Companies Act*, R.S.C. 1952, C. 53.
>
> [My italicization added]

A brief comment on the analytical path to ascertaining the appropriate "choice of law".

[112] Jay's argument views the rules contained in *Dicey, Morris and Collins on The Conflict of Laws* as akin to a menu, such that one can merely examine the Rules superficially to see which one best exemplifies the flavour of the factual matrix in issue before the court.

[113] It is unwise for present purposes to merely accept Rule 230(c) in *Dicey* as applicable, without a deeper examination of the considerations that underlie the ultimate conclusions to be drawn as to the "choice of law". The substantive law that will govern a particular issue, and sometimes the entire dispute, is referenced as the *lex causae*.

[114] A succinct description of the required preliminary process was rendered by Lord Justice Staughton in one of three concurring sets of reasons in *MacMillan Inc. v Bishopsgate Investment Trust Plc & Ors* [1995] EWCA Civ 55. That case is notable in several respects. It stemmed from fraudulent actions animated by the British businessman Robert Maxwell in relation to shares in Berlitz International Inc., in which MacMillan Inc. had a majority holding. The shares were transferred out of MacMillan's name to Bishopsgate, which was a part of the Maxwell Group,

owned and controlled by Robert Maxwell and his family. As Lord Justice Staughton put it: "Thus, the property of MacMillan, a company which was in part publicly owned through its parent and no doubt had creditors of its own, was used to secure loans to the private side of the Maxwell Empire."

[115] Each of the three Justices relied on a different path of analysis to reach the same conclusion – that the trial judge was correct in concluding that the substantive law governing the specific issue in question was New York law. In itself, that is an apt confirmation that conflicts law must be approached with a special care.

[116] Lord Justice Staughton stated:

1. In any case which involves a foreign element it may prove necessary to decide what system of law is to be applied, either to the case as a whole or to a particular issue or issues. Mr Oliver, for Macmillan Inc., has referred to that as the proper law; but I would reserve that expression for other purposes, such as the proper law of a contract, or of an obligation. Conflict lawyers speak of the *lex causae* when referring to the system of law to be applied. For those who spurn Latin in favour of English, one could call it the law applicable to the suit (or issue) or, simply the applicable law.

2. **In finding the *lex causae* there are three stages. First**, it is necessary to characterize the issue that is before the court. Is it for example about the formal validity of a marriage? Or intestate succession to movable property? Or interpretation of a contract?

3. The **second** stage is to select the rule of Conflict of Laws which lays down a connecting factor for the issue in question. Thus the formal validity of a marriage is to be determined, for the most part, by the law of the place where it is celebrated; intestate succession to movables, by the law of the place where the deceased was domiciled when he died; and the interpretation of a contract, by what is described as its proper law.

4. **Thirdly**, it is necessary to identify the system of law which is tied by the connecting factor found in stage 2 to the issue characterised in stage 1. Sometimes this will present little difficulty, though I suppose that even a marriage may now be celebrated on an international video link. The choice of the proper law of a contract, on the other hand, may be controversial.

5. In an ideal world the answers obtained in these three stages would be the same, in whatever country they were determined. But unfortunately, the Conflict rules are by no means the same in all systems of law. In those circumstances a choice of Conflict rule may have to be made. *It is clear that, in general, the second and third stages are to be determined by the law of the place where the trial takes place (lex fori). That law must tell one what the connecting factor is for the issue before the court, and what system of law it points to*. But the first stage, characterisation of the issue, presents more of a problem.

6. In *Dicey and Morris on The Conflict of Laws* (12th edn) p.35 there is this passage:

"The problem of characterisation has given rise to a voluminous literature, much of it highly theoretical. The consequence is that there are almost as many theories as writers and the theories are for the most part so abstract that, when applied to a given case, they can produce almost any result."

Fortunately, the next sentence reads:

> "They appear to have had almost no influence on the practice of the courts in England."

The authors conclude (p.44):

> "The way the court should proceed is to consider the rationale of the English conflict rule and the purpose of the rule of substantive law to be characterised. On this basis, it can decide whether the conflict rule should be regarded as covering the rule of substantive law. In some cases the court might conclude that the rule of substantive law should not be regarded as falling within either of the two potentially applicable conflict rules. In this situation a new conflict rule should be created."

Later (p.47):

> "... the way lies open for the courts to seek common-sense solutions based on practical considerations."

7. Before leaving these preliminary matters, I would add that, if at all possible, the rules of Conflict should be simple and easy to apply. One might say that all rules of law should be of that character; but we have less control over rules of domestic law. The litigant who is told by his advisers that his case may or may not involve the application of a foreign system of law, and that he must be armed with expensive expert evidence which may, in the event, prove unnecessary, deserves our sympathy. For many years even cases of tort/delict involved uncertainty and the analysis of five different speeches

> in the House of Lords. Academic writers of distinction concern themselves with Conflict, not surprisingly since it is a subject of great intellectual interest. We must do our best to arrive at a sensible and practical result.
>
> …
>
> 13. There are in essence three issues before us, corresponding to the three stages in a Conflict case which I have mentioned. They are:
>
> **(A) How does one characterize the question in this action?**
>
> **(B) What connecting factor does our Conflict rule provide for questions of that character?**
>
> **(C) What system of law does that connecting factor require to be applied?"**
>
> [My emphasis added]

[117] I will now apply that methodology to the case at Bar.

1. How is the question in the proposed derivative action (as opposed to the nominal legal claim made *per se*) best characterized, according to the *lex fori* (ie Nova Scotia law in this case)? I say it is whether the officers and directors of Link Canada are individually liable to Link Canada for decisions they made in those capacities?

[118] In the Overview to his initial brief, Jay stated:

> In 2016, Link Canada was decimated following several years of alleged corporate misappropriation by the Respondents. The Applicant alleges that **this was the result of a breach of fiduciary duty on the part of the directors and officers of Link Canada**, namely: John Link, Troy Link and John Hermeier (collectively the Individual Respondents). In particular, the Applicant asserts that the Individual Respondents acted in circumstances of unlawful corporate conflict as the simultaneous directors and officers of both:
>
> a) Link Canada; and
>
> b) **the ultimate beneficiary of the misconduct** – the corporate Respondent Link Snacks Inc. ("Link Snacks").

[119] He went on to state at paragraph 24:

> … the essence of the Applicant's complaint is contained at paragraphs 18 to 21 of his Notice of Application in Chambers, as follows:
>
> *Corporate Misappropriation*
>
> At all material times, the officers and directors of Link Canada were obliged to act in the best interests of Link Canada. Because the Individual Respondents were officers and directors of both Link Canada and Link Snacks, they had conflicted loyalties with respect to any and all business affairs between the two companies.
>
> The Individual Respondents took no steps to resolve these conflicts, such as appointing independent management teams to handle any business affairs between Link Snacks and Link Canada. Instead, and as outlined above, the Individual Respondents acted in violation of their legal and fiduciary duties to Link Canada.
>
> As the operating minds of both Link Canada and Link Snacks, the Individual Respondents authorized and directed an entire asset transaction in conflict (the "Corporate Misappropriation"). This ultimately decimated Link Canada and the value of its shareholdings up the corporate ladder.
>
> Link Snacks was the primary beneficiary of this Corporate Misappropriation by the Individual Respondents. Link Snacks received all the operating assets of a highly developed Canadian distribution company for no consideration whatsoever.

[120] The Respondent's brief summarized their position at para. 6:

> For all of its length, missing from the Applicant's brief is any explanation of why Wisconsin or U.S. law would apply to a claim for breach of fiduciary duty by: (1) directors of a Nova Scotia company; (2) for the alleged misappropriation of the Nova Scotia company's assets, located in Canada; (3) that supposedly destroyed such company's distribution network in Canada; and (4) injured it in Nova Scotia. There is no reasonable dispute that the laws of Nova Scotia apply to claims for breach of fiduciary duty by directors of a Nova Scotia company and the Application should be denied because the Applicant knowingly chose to wait nearly four years after he discovered the Corporate Misappropriation Claims to try to assert them on behalf of the injured party – Link Canada.

[121] Jay's core claim is that the Individual Respondents are responsible for the economic injury he asserts on behalf of Link Canada. Link Snacks was "the ultimate beneficiary of the misconduct". He characterizes this as primarily a case of "unjust enrichment", which allows him to claim reliance upon *Dicey's Rule* 230 (c) - "… if it arises in any other circumstances, its proper law is the law of the country where the enrichment occurs." Jay says that the unjust enrichment alleged occurred in Wisconsin, USA- hence Wisconsin law should apply. I disagree. The question at issue, writ large, is whether the officers and directors of Link Canada are individually liable to Link Canada for decisions they made while in those capacities.

2. What connecting factor does our conflict rule provide for questions of that character? I say it is the domicile of the proposed plaintiff corporation (which leads next to the law of the place of incorporation that governs issues regarding the internal affairs of a corporation).

[122] Link Canada was incorporated and is domiciled at law, in Nova Scotia. The Individual Respondents were in a position to cause this asserted economic injury solely because they were directors and officers of Link Canada. Their legal responsibility will depend on an assessment of whether they breached their fiduciary duties to Link Canada. This assessment requires reference to the common law of Nova Scotia, which defines those duties. That law is substantive law. The crux of the case involves the internal affairs of Link Canada.

[123] There are two claims here under the heading “Corporate Misappropriation”:

1. the “transfer pricing claims” between 2009 and 2016; and

2. the “theft of Link Canada claim” in 2015 - 16.

[124] I conclude that it is inappropriate to rely on the present *Dicey’*s Rule 257(3), previously Rule 230 (c), which is relevant to cases of “unjust enrichment”. After characterizing the core issue in dispute here, it is not a matter of “unjust enrichment”. The asserted source for the basis Jay’s claims is the breach of fiduciary duty by the Individual Respondents in their roles as officers and directors of Link Canada. The proposed question in dispute is best characterized as: have the Individual Respondents breached their fiduciary duties to Link Canada? The determination thereof requires the analysis be based on the source of their fiduciary duty, which is the substantive law of Nova Scotia.

[125] Moreover, it appears to me, on the evidence presented, that there is a real chance on a trial of the merits that an assertion of unjust enrichment in relation to the Transfer Pricing claims will fail; thus, the related breach of fiduciary duty claims will take on legal prominence instead. If the “Theft of Link Canada claims” (i.e. sale of its assets at undervalued amounts to Link Snacks) are considered to be claims of “unjust enrichment”, then a determinative issue may well be whether the

benefit to Link Snacks occurred without a juristic reason. “To put it simply, this means that there is no reason in law or justice for the defendant’s retention of the benefit conferred by the plaintiff making its retention ‘unjust’ in the circumstances of the case.” - Per Cromwell J., for the court, in *Kerr v. Baranow*, 2011 SCC 10, at para. 40. Notably, Justice Cromwell went on to state:

> 41 …However, just as the Court has resisted a purely categorical approach to unjust enrichment claims, it has also refused to limit juristic reasons to a closed list. This third stage of the unjust enrichment analysis provides for due consideration of the autonomy of the parties, including factors such as "the legitimate expectation of the parties, the right of parties to order their affairs by contract (*Peel*, at p. 803)…
>
> 44 Thus, *at the juristic reason stage of the analysis, if the case falls outside the existing categories, the court may take into account the legitimate expectations of the parties* (*Pettkus*, at p. 849) and moral and policy-based arguments about whether particular enrichments are unjust (*Peter*, at p. 990). Overall, *the test for juristic reason is flexible, and the relevant factors to consider will depend on the situation before the court* (Peter, at p. 990).
>
> 45 *Policy arguments concerning individual autonomy may arise under the second branch of the juristic reason analysis*. In the context of claims for unjust enrichment, this has led to *questions regarding how (and when) factors relating to the manner in which the parties organized their relationship should be taken into account*. It has been argued, for example, that the legislative decision to exclude unmarried couples from property division legislation indicates the court should not use the equitable doctrine of unjust enrichment to address their property and asset disputes. However, the court in *Peter* rejected this argument, noting that it misapprehended the role of equity. As McLachlin J. put it at p. 994, "It is precisely where an injustice arises without a legal remedy that equity finds a role." (See also *Nova Scotia (Attorney General) v. Walsh*, 2002 SCC 83, [2002] 4 S.C.R. 325, at para. 61.)[45]
>
> [My italicization added]

[45] Cited with approval in other contexts: *Moore v. Sweet*, 2018 SCC 52, at para.116 , which itself was cited with approval by Justice Brown in *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 at para. 47.

[126] To the extent that *Dicey's Rule* 230(c) is relied upon by Jay, and it presents Wisconsin as the place where the enrichment occurred, the two claims, breach of fiduciary duty and unjust enrichment, could generate different choice of law answers – i.e. Nova Scotia and Wisconsin. That is an undesirable result. Only one system of substantive of law should apply to any one set of facts asserted to be actionable.

[127] The characterization and connecting factor inquiry leads me to conclude that the choice of law rule for matters relating to the internal affairs of Link Canada, including the conduct of its officers and directors, should be based on the domicile of the proposed plaintiff corporation which leads to reliance on the law of the place of incorporation. I shall elaborate below.

3. Which system of law (Wisconsin or Nova Scotia) is tied by the connecting factor (domicile of Link Canada) to the "issue that is before the court", identified at stage 1?

[128] In *Canadian Business Corporations Law*, Third Edition Volume 1 (Toronto: Lexis-Nexis Canada, 2017) at paragraph 4.75, the author Kevin P McGuinnes states, and I agree, that:

> The internal affairs doctrine is an American conflict of laws principle which likely applies to Canada as well. It recognizes that only one jurisdiction should have the authority to regulate a corporation's internal affairs… *Few, if any, claims are more central to a corporation's internal affairs than those relating to alleged breaches of fiduciary duties by*

> *a corporation's directors and officers. Accordingly, the law of the jurisdiction of incorporation governs potential liability for breach of fiduciary duty claims*.
>
> [My italicization added]

[129] I am satisfied that Nova Scotia is the proper jurisdiction in which to adjudicate the matter (regarding jurisdiction *simpliciter* and *forum non conveniens* considerations); I conclude that Nova Scotia law is the correct overall choice of law (*lex causae*) in relation to the proposed derivative action, including as to the specific issue of which limitation period applies (Nova Scotia or Wisconsin). However, let me briefly examine the latter conclusion.

[130] In Canada, per *Tolofson*, a limitation period defence is considered substantive law. But is it the substantive Wisconsin law or Nova Scotia law that should be applied in this case?

[131] I have the affidavit evidence of Andrew W. Erlandson, who is qualified as an expert to give evidence regarding the law of Wisconsin. In his June 1, 2020, sworn affidavit he states:

> I offer no opinion on the application of Nova Scotia law, particularly the rules governing statutes of limitation under Nova Scotia law, in the above-captioned matter.
>
> …
>
> In my opinion, it is unlikely that a statute of limitations defence could successfully bar the Corporate Misappropriation claims under Wisconsin law. Jay pursued these causes of action in Wisconsin courts from December 2010 through November 2019. That entire time, the causes of action were pending before a Wisconsin court (either the Circuit Court or Court of

> Appeals). Jay's litigation activity tolled any applicable statutes of limitations under Wisconsin Statute 893.13 (2).
>
> I am also familiar with Wisconsin case law concerning equitable tolling of statutes of limitation… In my opinion, a court applying Wisconsin law would not, after all that time and expense, apply a statute of limitations to bar litigation of the substantive merits of the claims.… In my opinion, it is unlikely that a Wisconsin Circuit Court would consider applying the statute of limitations defence in this matter, until the case proceeded to the merits stage.

[132] Although *Dicey, Morris and Collins* on the Conflict of Laws, 15th edition, concerns an increasingly distinct legal regime from that of Canada, there is still value in consulting it:

> The rationale of the English conflict Rule that matters of procedure are governed by the law of the forum is one of practicality and convenience.… It does not apply to statutes of limitation: it is no more impractical or inconvenient to apply a foreign limitation Rule that extinguishes only the remedy than it is to apply one that extinguishes the right as well. Besides being wrong in principle, the traditional approach produced unfortunate results… *Fortunately, the false turn taken by the English courts was corrected* by the *Foreign Limitation Periods Act 1984* and the *Contracts (Applicable Law) Act 1990,* and Rome I Regulation, *the effect of which is that the foreign periods of limitation will be applied when the lex causae is the foreign law and the English periods when the lex causae is the English law*. It makes no difference whether the law extinguishes both the right and the remedy or the remedy alone.
>
> [My italicization added]

[133] *Dicey, Morris and Collins on The Conflict of Laws* confirm that English common law still considers statutes of limitation as procedural, in contrast to courts in Canada. On the other hand, England now has legislation in place that makes English statutes of limitation applicable where the *lex causae* is English law. In my view, after having concluded that Nova Scotia law is the *lex causae*,

there is no appropriate juridical reason to not rely on Nova Scotia substantive law in a wholesale fashion – including its legislation regarding limitation periods.

[134] Jay says that the substantive law of Wisconsin should apply if the derivative action is permitted to proceed in Nova Scotia.[46]

[135] If Wisconsin law applies, and specifically applies *vis-à-vis* the applicable limitation periods, then one must ask: what is the limitation period for such matters in Wisconsin law?[47]

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[46] He argued that Wisconsin law should be the substantive law governing the cause, if the matter is heard in Nova Scotia. He did not provide, which one might have expected, a more nuanced choice of law analysis with authorities in support of his position. He alternatively requested that this court come to the conclusion that it is appropriate, and effect such a result by fashioning a legally binding manner in which the entire proceeding would be heard by a Wisconsin court governed by Wisconsin law. I reject outright that latter suggestion.

[47] By email September 30, 2020, I asked Counsel: "what [do] you both say is the limitation period on Jay's claim in Wisconsin law and cite the Wisconsin statutory authority setting out the limitation period (and where tolling appears in the Wisconsin statutory law)." An October 6 reply from the Applicant urged the court to "disregard Mr. Kirtley's [purported expert] opinions [contained within the Respondent's October 2 letter] about Wisconsin law". I will respect that urging. I received replies to that question from both the Applicant and Respondents on October 2, 2020. Jay refers to Wisconsin Statute Chapter 893, "Limitations", which states that unjust enrichment claims are subject to a six-year limitation period [893.43], and breach of fiduciary duty claims are subject to a three-year limitation period [893.57]. He also notes that limitation periods in Wisconsin may be tolled or suspended by statute [Chapter 893.13(2)] and principles of equity (paragraphs 15 – 16, Erlandson affidavit). As noted, I will disregard Mr. Kirtley's "opinion" evidence, but for completeness I set out the Respondents' position. The Respondents say that because according to Wisconsin law Jay must proceed with a derivative claim in Nova Scotia, as the place of incorporation of Link Canada, therefore the claims Jay seeks to assert on behalf of Link Canada do not exist under Wisconsin law and therefore the Wisconsin statute of limitations is irrelevant. Furthermore, they cite the Wisconsin "Limitations" Statute section 893.07 which reads: "1) if an action is brought in Wisconsin on a foreign cause of action and the foreign period of limitation which applies has expired, no action may be maintained in [Wisconsin]; 2) if an action is brought in [Wisconsin] on a foreign cause of action and the foreign period of limitation which applies to that action has not expired, but the applicable Wisconsin period of limitation has expired, no action may be maintained in [Wisconsin]." The Respondents go on to state: 'The result of Wisconsin Statutes' section 893.07 is that the applicable Nova Scotia limitation period would apply to any claims brought on behalf of Link Canada in Wisconsin courts." They argue that to the extent that there is a "unjust enrichment" claim, that claim in Wisconsin "was wholly premised on the finding that the Respondents breached their fiduciary duties… because a finding of fiduciary duty breach by the Respondents under Nova Scotia law is necessary for a finding of unjust enrichment

[136] The opinion of expert witness, Andrew Erlandson, is that under Wisconsin law, "it is unlikely that a Wisconsin Circuit Court would consider applying the statute of limitations defence in this matter *until the case proceeded to the merits stage*." [My italicization added]

[137] If the Nova Scotia *Limitation of Actions Act* is applied to the facts of this case, the Respondents say that Jay is clearly out of time, as there is no legal basis for him to claim a suspension of the running of the limitation period. Thus, Jay's right to proceed with the derivative action would be statute-barred.

[138] The essence of the claim here is breach of fiduciary duty by the officers and directors of a Nova Scotia company. The alleged breaches are in relation to Link Canada, which has been incorporated and operated exclusively in Nova Scotia from 2002 to 2016. The domicile of Link Canada is Nova Scotia. The implicated fiduciary duties are defined according to Nova Scotia law, and are owed to that company. In

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against Link Snacks, there is no statute of limitations under Wisconsin law applicable to Jay's unjust enrichment claim, which must be brought under Nova Scotia law." Regarding tolling in Wisconsin, they note that contrary to the Erlandson opinion which claimed section 893.13(2) would not apply in the circumstances - "under Wisconsin law the filing of a deficient claim does not toll the statute of limitations, rather it must be the commencement of an action to enforce the cause of action actually at issue which leads to tolling. Here that cause of action belongs to Link Canada alone and has not been commenced previously." The period of limitation that relates to "the cause of action to which the period of limitation applies" is the Link Canada claim for which no commencement of such an action has taken place, therefore there is no trigger to cause tolling according to Wisconsin law. They did not make a submission regarding the tolling of the limitation period in accordance with the Wisconsin principles of equity.

my view, those fiduciary duties are therefore also to be considered as breached in Nova Scotia.

[139] The general rule is that the law of the place of incorporation should be applied to matters that involve the internal management of the corporation. I agree, as indicated by McGuinness, in *Canadian Business Corporation Law*, the law of Nova Scotia governs potential liability for breach of fiduciary duty.

[140] In summary, I conclude that Nova Scotia law is the proper choice of law. The Nova Scotia *Limitation of Actions Act* should apply, absent compelling reasons to the contrary. I see none in this case. Moreover, I conclude that it is likely the proposed limitations defence to the proposed derivative action is "bound to be accepted by a trial judge" (*Budd* at para. 38).

Conclusion

[141] Jay has not satisfied me, more likely than not, that permitting the derivative action to proceed "appears to be in the interests of the company."

[142] Jay knew the material facts underlying claims by December 2010 and May 2016. To the extent that he may wish to rely on improvident legal advice or assert that he was unaware of the relevant law, this has no bearing on the limitation period

issue - *Milbury v Nova Scotia (Atty. Gen.),* 2007 NSCA 52, at paragraph 27; *Central Trust Co. v. Rafuse,* [1986] 2 S.C.R. 147.

[143] Furthermore, according to Nova Scotia law, there is no basis to claim any suspension of the running of the limitation period.[48]

[144] Pursuant to section 23 of our *Limitation Act*, the limitation period in relation to Jay's proposed claims discovered before September 1, 2015 (the effective date), i.e., the "Transfer Pricing Claims", is the earlier of September 1, 2017, or under the previous *Limitation of Actions Act*, RSNS 1989, c. 258, sometime in December 2016 - therefore at the latest by **December 2016**; and for claims discovered after September 1, 2015, (the "Theft of Link Canada Claims"), pursuant to s. 8 of the Act, the limitation period is two years from the day on which the claim is discovered (May 2016 at the latest), therefore at the latest by **May 2018**.

[145] The Application for leave to proceed with the derivative action was filed March 12, 2020.

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[48] As Justice Bryson stated in *Canadian Elevator Industry Education Program v. Nova Scotia (Elevators and Lifts)*, 2016 NSCA 80, at paras 72-74: "…it is equally important that valuable judicial resources not be squandered on unmeritorious claims…[in cases where] the essential facts are known and not in dispute…it is neither unfair nor premature to decide [such determinative issues]."

[146] Jay has not satisfied the Court, more likely than not, that he is "acting in good faith", or that the proposed derivative action is "in the interests of the company."[49]

[147] I deny him leave to proceed with the derivative action on behalf of Link Canada in Nova Scotia.[50]

Rosinski, J.

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[49] I am mindful of the reservation stated in *L+ B Electric Ltd. v Oickle*, 2006 NSCA 41 by Justice Hamilton: "I will deal first with their argument relating to good faith. The judge found that the "onus" on Mr. Oickle to prove that he was acting in good faith was to satisfy the court by a preponderance of evidence, not some higher burden… The appellants have not argued that the judge erred in applying the ordinary burden. Accordingly, *for the purposes of this appeal I have assumed, without deciding, that this is the correct burden."*

[50] Although it was not directly addressed by counsel, I should add for completeness sake, that while a *nunc pro tunc* order (having retroactive effect, such as the filing of the leave for derivative action herein) is within the jurisdiction of this court, *Coates v. Capital District Health Authority*, 2011 NSCA 4, *Nord Invest Ltd. v. Maple Leaf Foods*, [2008] N.J. No. 45 ((CA), and *1186708 Ontario Inc. v. Gerstein*, 2017 ONSC 1217 (Div. Ct.), it is a discretionary order, and I find it not to be in the interests of justice to issue such an order, given my findings of fact and conclusions herein.