**CITATION NO.:** Vellenga v. Boersma et al., 2025 ONSC 4340
**COURT FILE NO.:** CV-04-11921
**DATE:** July 23, 2025



**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Gordon Vellenga, Plaintiff

**-and-**

Peter Boersma, Adrienne Boersma, and Weijs Investment Corp., Defendants

**BEFORE:** MacNeil J.

**COUNSEL:** *Marc Munro* – Lawyer for the Plaintiff

*Blair Bowen and Teodora Obradovic* – Lawyers for the Defendants

**HEARD:** January 13 and 14, 2025

## REASONS FOR DECISION

### INTRODUCTION

[1] The dispute in this motion and cross-motion concerns the proper distribution or allocation of net proceeds from the sale of an asset of Maple Pond Farm Limited ("Maple Pond"). The net proceeds totalled approximately $2.9 million ("the Net Proceeds") and have been paid into court.

[2] The plaintiff, Gordon Vellenga ("Mr. Vellenga"), made a motion, dated March 10, 2023, seeking an order directing the disbursement of the Net Proceeds equally to Maple Pond's two shareholders, himself and the defendant, Peter Boersma ("Mr. Boersma"). The plaintiff also seeks an order striking or permanently staying the defendants' cross-motion, dated March 17, 2023.

[3] By their cross-motion, the defendants seek an order approving the distribution of the Net Proceeds after the reimbursement of numerous claims they make against Maple Pond as creditors. Those claims are set out in the affidavits of Mr. Boersma and Adrienne Boersma ("Ms. Boersma") and itemized in an "accounting and expert opinion or report" prepared by A. McCollum of Capstick McCollum & Associates, chartered professional accountants, dated September 28, 2022 ("the Expert Report"), filed in support of the defendants' claims. Alternatively, the defendants seek an order distributing half of the Net Proceeds to Mr. Boersma as the common shareholder holding 50% of the issued shares or common shares of Maple Pond.

## BACKGROUND

[4] Maple Pond operated a dairy farm from 1995 to 1999. In 1999, the corporation sold its milk quota for approximately $1.7 million. The net proceeds from the sale were approximately $1,058,000.00.

[5] Mr. Vellenga and Mr. Boersma were the directors of Maple Pond. They each own 50% of the shares of the corporation.

[6] Ms. Boersma is an officer of Maple Pond. She is also the sole owner of the defendant, Weijs Investment Corp. ("Weijs Investment").

[7] On March 17, 2004, the plaintiff commenced an application seeking, among other things, an independent audit of Maple Pond respecting its financial activities since December 30, 1994; an order requiring the repayment of monies allegedly loaned by Maple Pond to Weijs Investment in the sum of $1,058,000.00; and an order preventing Weijs Investment from dealing with lands it acquired with Maple Pond's funds, being a 2,500 acre property - referred to as the Boundary Lake Property - located in the District of Parry Sound.

[8] On May 12, 2015, the plaintiff amended the application to seek an order declaring that the Boundary Lake Property was the property of Maple Pond, and an order appointing a receiver to sell the property.

[9] On July 10, 2017, Thompson J. ordered, among other things, that Maple Pond be wound up, pursuant to s. 207 of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16, and that the application be converted to an action and proceed to trial.

[10] The trial of the action took place in September 2018. The only issue requiring determination was Mr. Vellenga's request for a declaration that the Boundary Lake Property was Maple Pond's property. On November 28, 2018, Sweeny J. rendered his reasons for judgment ("the Trial Judgment"). He held that the defendants purchased the Boundary Lake Property with corporate funds misappropriated from Maple Pond in the amount of $1,058,000.00; that the conditions for a constructive trust were met; and that an order declaring that the Boundary Lake Property is held in trust by Weijs Investment for Maple Pond was justified.

[11] Justice Sweeny further held:

(a) Mr. Boersma breached his fiduciary duty to Maple Pond, as an officer and director, by using Maple Pond's funds to purchase the Boundary Lake Property.

(b) Any expenses the defendants have incurred with respect to the Boundary Lake Property are properly accounted for in the determination of the distribution of the proceeds of the sale of the property.

(c) Any increase in value of the Boundary Lake Property, since its purchase, is properly a benefit that accrues to Maple Pond.

(d) Mr. Vellenga is a shareholder of Maple Pond and is entitled to receive a share of the value of the Boundary Lake Property asset when it is sold.

[12] On April 4, 2019, Skarica J. made an order pursuant to s. 210(1) of the OBCA appointing Scott, Pichelli & Easter ("the Liquidator") as the liquidator, without security, of all of the assets, undertakings and properties of Maple Pond ("the Liquidation Order"). Sub-paragraphs 3(h), (i) and (l) of the Liquidation Order authorized the Liquidator:

(h) to settle, extend or compromise any indebtedness owing to the Corporation save and except any disputed monies allegedly owing by the parties to the Corporation, without leave of the Court;

(i) to initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to the Corporation, the Property or the Liquidator, and to settle or compromise any such proceedings, except for these proceedings herein bearing Hamilton Superior Court File No. 04-11921. …; and,

(l) to take possession and control of the property as described in Schedule "A" hereto (the "Boundary Lake Property").

[13] Paragraph 10 of the Liquidation Order provided that "all rights and remedies against the Corporation, the Liquidator, or affecting the Property, are hereby stayed and suspended except with the written consent of the Liquidator or leave of this Court …".

[14] On August 28, 2020, the Ontario Court of Appeal dismissed the defendants' appeal of Sweeny J.'s judgment. At para. 36 of the appeal decision, the Court of Appeal rejected the defendants' argument that the imposition of a constructive trust prejudiced Weijs Investment, stating: "When the Boundary Lake Property is sold by the Corporation, Weijs Investment will receive proceeds consistent with its contribution." At para. 37, the Court of Appeal held that the trust preserves the interest on behalf of Maple Pond, and that Mr. Vellenga will be entitled to his share of the value of the Boundary Lake Property asset when it is sold.

[15] Following the dismissal of the appeal, the Liquidator entered into a listing agreement to market the Boundary Lake Property for sale. Two offers to purchase were received. The Liquidator accepted what it considered the better offer and, on June 17, 2021, MacNeil J. approved the sale transaction and granted a vesting order ("the Approval and Vesting Order").

[16] On July 14, 2021, the sale transaction was completed. The Liquidator received proceeds of $3,532,628.08 from the sale. The Liquidator then proceeded to pay taxes, interest and penalties owing by Maple Pond to Canada Revenue Agency, a creditor of Maple Pond.

[17] On February 23, 2022, before the Liquidator was discharged, Mr. Vellenga made a motion for an interim distribution of the Net Proceeds. By an order made that same date, Parayeski J. denied Mr. Vellenga's motion and held that the distribution of the Net Proceeds should be addressed at a final distribution motion.

[18] On February 27, 2023, the defendants provided the Liquidator with a copy of the Expert Report.

[19] On March 10, 2023, the plaintiff brought his motion.

[20] On March 17, 2023, the defendants brought their cross-motion.

[21] In its Second Report, dated June 8, 2023, filed after the sale of the Boundary Lake Property, the Liquidator determined that its mandate was complete. It took the position that "the only work left to do is to seek an adjustment from CRA relative to a late penalty of approximately $10,000". It then sought an order of the court approving its activities and fees and the fees of its lawyer, discharging itself, and permitting it to pay the Net Proceeds into court. In paragraph 3.15 of the Liquidator's Second Report, regarding the defendants' claims set out in the Expert Report, it states: "The Liquidator has not reviewed the claims and takes no position regarding the claims given that they are now before the court to be adjudicated upon in separate proceedings."

[22] On June 29, 2023, Harper J. issued an Approval and Discharge Order respecting the actions of the Liquidator and its fees and disbursements, approving the payment into court of the remaining proceeds available in the liquidation proceedings relating to the property and assets of Maple Pond, and discharging the Liquidator.

**POSITION OF THE PLAINTIFF**

[23] It is the position of the plaintiff that the cross-motion is a clear abuse of process. The liquidation process is now complete. The Boundary Lake Property has been sold and the taxes paid. The Boersma family ultimately purchased the property. The total net proceeds of the sale were $2,985,922.23. As equal shareholders, the Net Proceeds of the liquidation should be disbursed equally between Mr. Boersma and Mr. Vellenga.

[24] The plaintiff submits that the Boersma defendants "stole" $1,058,000.00 from Maple Pond's coffers to buy the Boundary Lake Property and now, after acquiring title in a legal manner, they seek the retroactive reimbursement of more than $3.1 million for costs incurred during their illicit use and enjoyment of the property. It is the plaintiff's position that the claims being made in the defendants' cross-motion are statute-barred and/or subject to the principles of *res judicata*. Further, the cross-motion is a nullity as the defendants failed to seek judicial leave in order to make their claims against Maple Pond.

[25] The defendants' cross-motion should be dismissed in its entirety or, in the alternative, any distribution to Mr. Boersma should be reduced in the amount of $200,000.00 for the funds misappropriated through false invoicing to Boersma Transport Inc.

**POSITION OF THE DEFENDANTS**

[26] It is the position of the defendants that they should be repaid the monies they advanced in relation to the Boundary Lake Property before any surplus is divided among Maple Pond's

shareholders. In their Notice of Cross-Motion, the defendants seek reimbursement in the amount of $3,138,360.82 for the following claims in relation to the Boundary Lake Property:

> (a) **Unnecessary Costs Claim** – Peter Boersma submitted a claim in the approximate amount of $15,000 for costs incurred unnecessarily as a result of the Liquidator's inadvertent trespass onto adjoining land and premises of the Boundary Lake Property, the changing of locks to gates and premises not belonging to Maple Pond, and the taking of possession of chattels, machinery and equipment not belonging to Maple Pond.
>
> (b) **Peter Boersma's Personal Claim** – Peter Boersma submitted a claim in the amount of $147,500 for personal funds used to purchase the Boundary Lake Property.
>
> (c) **Adrienne Boersma's Personal Claim** – Adrienne Boersma submitted a claim in the amount of $147,500 for personal funds used to purchase the Boundary Lake Property.
>
> (d) **Weijs Investment** – Weijs Investment submitted a claim in the amount of $2,828,360.82 for corporate funds of Weijs Investment (not Maple Pond) used to purchase the Boundary Lake Property and to pay operating expenses and imputed costs from 2000 to the date of the property's sale.

[27] The defendants rely on the Expert Report in support of their claims.

[28] They submit that the remedy for Mr. Boersma's breach of fiduciary duty and wrongdoing to Maple Pond, as an officer and director, was the imposition of a constructive trust, which is in line with the deterrent and remedial functions of constructive trusts. However, this has no bearing on the allocation or distribution of the Net Proceeds.

[29] The Liquidation Order did not provide a claims procedure or a claims bar date. The Liquidator did not take out a claims procedure order requiring anyone who intends to assert a claim to deliver a proof of claim before a claims bar date. In any event, all of the defendants' claims were submitted to the Liquidator during the liquidation of Maple Pond. Given the absence of a claims bar date and given that the defendants' claims were made before the Liquidator's discharge, the defendants are not barred from making a claim against the Net Proceeds at the final distribution motion. This was contemplated in the reasons of both the trial judge and the Court of Appeal. In the absence of a court-ordered claims process, including a mandated proof of claim and the required supporting documents, the defendants have made their best efforts to prove their claims.

[30] Multiple sections of the OBCA give the court jurisdiction to assess the defendants' claims and distribute the Net Proceeds accordingly. The defendants have provided particulars of their claims, supported by affidavit evidence and the Expert Report. As Maple Pond creditors, the defendants should be paid their claims in priority to payment to the company's shareholders. Further, any payment made to Mr. Vellenga should be reduced by the monies he has already received.

## ISSUES

[31] The following issues will be determined:

(a) Should the cross-motion be struck because of the defendants' failure to seek leave?

(b) Are the defendants' claims for reimbursement from Maple Pond subject to *res judicata* or issue estoppel?

(c) Are the defendants' claims for reimbursement from Maple Pond statute-barred?

(d) Should there be an accounting for monies allegedly retained by each of Mr. Boersma and Mr. Vellenga?

## THE EXPERT REPORT

[32] I give very little weight to the Expert Report for the following reasons. First, it purports to opine on the very issue that the court is called upon to determine, that is, what amounts are properly owing to the defendants by Maple Pond. Courts are frequently called upon to determine whether reimbursement for a claimed expense has been proven by the evidence before them. Given my findings below on *res judicata*, I am not convinced that expert evidence was required in order to put the claimed expenses before the court (i.e., expenses that are properly relating to the Boundary Lake Property itself) in light of their nature.

[33] Second, the "foundational documents" produced to support the particulars of the defendants' claims are not properly in evidence before the court as they have simply been attached to the Expert Report, without affidavit evidence verifying what the specific documents purport to be or the truth of their contents. The foundational documents, with the exception of the property tax bills, are vague and, in my view, of little use since there are very few proofs of payment that can be tied to a clearly relevant expense. Many are lacking in detail and do not appear on their face to be related to the Boundary Lake Property. The appendices attached to the Expert Report do not cross-reference bill/invoice numbers with bank statements or paid receipts, and there are very few descriptors provided as to what the amounts itemized relate to specifically. The Expert Report does little else than organize the claims made into the various appendices.

[34] Third, Ms. McCollum testified that she did not audit the documents for accuracy or veracity, rather she relied on the documents as produced to her by the defendants. (Ms. McCollum is the personal accountant of both the personal defendants and the company accountant for Weijs Investment. She admitted to a long-standing relationship with the defendants.) Her evidence was that she also relied upon unaudited company general ledgers prepared by Ms. Boersma. On cross-examination, Ms. McCollum testified that, in preparing the general ledgers, Ms. Boersma "has a history" of not recording entries and that "she could produce a [general ledger] that doesn't match to the financial statements that were issued".

[35] Finally, Ms. McCollum acknowledged that a number of aspects of the Expert Report are beyond the scope of her expertise, as discussed in more detail below.

## ANALYSIS

### *(a) Should the cross-motion be struck because of the defendants' failure to seek leave?*

Position of the Plaintiff

[36] The plaintiff objects to the defendants' cross-motion on the ground that they failed to seek leave to bring same, in accordance with the Liquidation Order. He argues that the Liquidator was granted authority to resolve creditor claims and, if leave was obtained, shareholder disputes. Without leave, post-judgment litigation is prohibited. Following release of the Trial Judgment, the parties negotiated the terms of the Liquidation Order, which maintained the standard requirement for judicial leave as a precondition to litigation. In order to properly advance the claims of either Adrienne Boersma or Weijs Investment, the defendants were required to bring them to the attention of the Liquidator and, if the claims were disputed or otherwise not resolved then, pursuant to the Liquidation Order, they needed to seek leave. Leave should only be granted on a claim-by-claim basis. Similarly, the shareholder claim of Mr. Boersma requires leave and he has failed to obtain it.

Position of the Defendants

[37] It is the defendants' position that the Liquidation Order did not include a claims procedure. Under the OBCA, the court has jurisdiction to determine the validity of any claims against the Net Proceeds. Creditors have priority over shareholders and the goal is to maximize the realization available to shareholders but only after liabilities are determined and paid: *Manitoba Securities Commission v. Crocus Investment Fund*, 2006 MBQB 87, at para. 15.

[38] In *Basegmez v. Akman*, 2022 ONSC 4127, at para. 149, it was confirmed that the court has "broad powers under the winding up provisions [of the OBCA] to make any order it thinks fit or considers just" in shareholder disputes and liquidation proceedings. Both the trial judge and the Court of Appeal deferred the determination, accounting and distribution of claims and proceeds until after the sale of the Boundary Lake Property.

[39] The defendants submit that, properly interpreted, the Liquidation Order does not require them to seek leave to bring a distribution motion. Section 3(h) of the Order does not apply to this dispute. The defendants' cross-motion has nothing to do with indebtedness owing by the defendants to Maple Pond. It has to do with the distribution of sale proceeds. The defendants' claims were made against the Net Proceeds before the Liquidator's discharge, and the Liquidator can no longer discharge its statutory obligation to distribute remaining property rateably among the shareholders according to their rights and interests in Maple Pond. The only way forward is a final distribution motion. While the parties dispute the allocation of the Net Proceeds, both agree that a distribution motion is needed to conclude the winding up of Maple Pond.

Discussion

[40] In my view, the defendants were not required to seek leave to bring their cross-motion since it appears to have always been the parties' intention to settle the accounting issue independent of the liquidation process.

[41] The plaintiff relies heavily on sub-paragraph 3(h) of the Liquidation Order which empowered and authorized the Liquidator "to settle, extend or compromise any indebtedness owing to the Corporation save and except any disputed monies allegedly owing by the parties to the Corporation, without leave of the Court (emphasis added)."

[42] I find that sub-paragraph 3(h) does not address the defendants' claims against Maple Pond since it refers only to purported indebtedness owing to the corporation. Not to the shareholders or other parties.

[43] Sub-paragraph 3(j) of the Liquidation Order empowered and authorized the Liquidator "to initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to the Corporation, the Property or the Liquidator, and to settle or compromise any such proceedings, except for these proceedings herein bearing Hamilton Superior Court file No. 04-11921. … (emphasis added)."

[44] I find that sub-paragraph 3(j) carved out the accounting of monies purportedly owed by Maple Pond to any of the parties so that they would be determined by the court on this final distribution motion. Both the trial judge and the Court of Appeal also understood that a final distribution motion would be the process for the accounting of any disputed monies claimed by the parties themselves as against Maple Pond with respect to the Boundary Lake Property.

[45] Maple Pond was wound up by the court pursuant to s. 207 of the OBCA. Section 217(1) of that Act provides for the discharge of a liquidator and distribution by the court. It reads:

> 217 (1) Where the realization and distribution of the property of a corporation being wound up under an order of the court has proceeded so far that in the opinion of the court it is expedient that the liquidator should be discharged and that the property of the corporation remaining in the liquidator's hands can be better realized and distributed by the court, the court may make an order discharging the liquidator and for payment, delivery and transfer into court, or to such person as the court directs, of such property, and it shall be realized and distributed by or under the direction of the court among the persons entitled thereto in the same way as nearly as may be as if the distribution were being made by the liquidator.

[46] Paragraph 12(g) of the Approval and Vesting Order declared that, among the issues that were adjourned to another hearing, was: "The Liquidator's request that after payment of any amounts as directed or authorized by the Court with respect to the aforesaid issues and after retaining sufficient reserves to satisfy any encumbrances or charges created by the appointment Order of the Honourable Justice Skarica dated April 4, 2019, the Liquidator be authorized an directed to pay the net proceeds of sale into Court to the credit of this action" (emphasis added).

[47] By paragraph 3 of the Approval and Discharge Order, which served to discharge the Liquidator, it was ordered that "after payment of the fees and disbursements herein approved and which payment is authorized, the Liquidator shall proceed to pay into Court, to the credit of the proceedings yet extant between the Plaintiff and the Defendants in the within Court file, the net sum of $2,937,935.92" (emphasis added).

[48] Based on the foregoing, I find that it was not intended that the Liquidator would finally determine the claims of the defendants. Rather, they were to be addressed by the court in a final distribution motion. Accordingly, I conclude that the defendants did not require leave from the court to bring the cross-motion.

### *(b) Are the defendants' claims for reimbursement from Maple Pond statute-barred?*

Position of the Plaintiff

[49] The plaintiff submits that, when the proceeding was converted to an action, the request for an accounting was not pursued at trial. The court therefore became *functus officio* once the Trial Judgment was issued, whether the relief sought in the underlying application was pursued at trial or not. There was no cross-application for an accounting. Therefore, pursuant to s. 4 and 5 of the *Limitations Act, 2002,* S.O. 2002, c. 24, Sched. B, the defendants' claim for an accounting is statute-barred under the basic two-year limitation period. Any claims arising out of the declaration of a constructive trust would have needed to be made prior to the second anniversary of the appeal decision, being August 28, 2022. The defendants' motion was commenced on March 17, 2023. Accordingly, they are out of time.

[50] Further, s. 15(2) of the *Limitations Act, 2002* provides that no proceeding shall be commenced in respect of any claim after the 15th anniversary of the day on which the act or omission on which the claim is based took place. Accordingly, in this case, any transaction conducted prior to March 17, 2008 is barred by this 15-year cap and cannot be judicially considered.

Position of the Defendants

[51] The defendants submit that, based on the circumstances of this case, commencing any proceeding in respect of the defendants' claims was not legally appropriate or possible after the Liquidation Order was made on April 4, 2019. To have done so would have ignored the clear language of the Order and the statutory scheme set out in ss. 216, 217 and 228 of the OBCA. Further, the elements under ss. 5(1) and (2) of the *Limitations Act, 2002*, were not discoverable until the Court of Appeal rendered its decision on August 28, 2020. It also would have ignored the judicial directions of the trial judge and the Court of Appeal who deferred the accounting of the parties' claims until after the sale of the Boundary Lake Property, which only occurred in July 2021. As a result, even after August 28, 2020, the limitation period on any of the defendants' claims could not have run until the statutory remedies available to the defendants under the Liquidation Order and the OBCA were exhausted.

Discussion

[52] I accept the submission made by the defendants that the expenses claimed relating specifically to the Boundary Lake Property itself are not statute-barred since the cross-motion is being made within the context of the proceeding that ordered the winding-up of Maple Pond pursuant to the OBCA. Many of the defendants' claims were before the trial judge and identified in the Carnegie Report. So, there has been ample notice of them.

[53] I accept the plaintiff's submission, however, that all other expenses claimed against Maple Pond, generally, dating back to 1989, are statute-barred as they fall outside the basic two-year limitation period provided for in the *Limitations Act, 2002*, the six-year limitation period that was set out in the former limitations statute and that applied in respect of claims prior to January 1, 2004, and the ultimate limitation period of 15 years provided for in s. 15(2) of the *Limitations Act, 2002* which would prevent any claim prior to March 17, 2008 from being advanced. In the event that I am wrong that any of the claims are not statute-barred, I address them more particularly below.

***(c) Are the defendants' claims for reimbursement from Maple Pond subject to res judicata or issue estoppel?***

Position of the Plaintiff

[54] The plaintiff argues that the defendants' claims for reimbursement from Maple Pond are subject to the principles of *res judicata* and/or issue estoppel and represent a collateral attack on the trial judge's decision. He submits that all of the claims being made by the defendants were raised at trial and dismissed or could have been raised at trial. Further, the alleged debts that the defendants claim the plaintiff purportedly owes Maple Pond were raised at trial in the Carnegie Report and rejected by the trial judge. Accordingly, *res judicata* applies.

Position of the Defendants

[55] The defendants' position is that *res judicata* and issue estoppel do not apply since there are significant differences between the purposes of the two proceedings. The first proceeding, the trial before Sweeny J., concerned the appropriate remedy (i.e., oppression, constructive trust) and the second proceeding, the within cross-motion, focuses on the division of the proceeds of the liquidation or on the claims either side might make to those proceeds (i.e., a distribution motion): *Basegmez v. Akman*, at paras. 31-35.

Discussion

[56] *Res judicata* precludes the re-litigation of issues that were previously before the court and determined, as well as issues that could have been placed before the court but were, for whatever reason, not advanced: *Slaton v. Alphabytes Computer Corp.*, 2005 CarswellOnt 2449, at paras. 34-36; aff'd 2006 CarswellOnt 7793.

[57] The Supreme Court of Canada confirmed the preconditions to the operation of issue estoppel in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, at para. 25, as being:

(i) that the same question has been decided;

(ii) that the judicial decision which is said to create the estoppel was final; and,

(iii) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[58] If the requisite preconditions for issue estoppel are satisfied, in exercising its discretion, the court must also ask itself if there is something in the circumstances of the case that would make the application of the issue estoppel doctrine work an injustice. However, in the context of court proceedings "such a discretion must be very limited in application": *Danyluk*, at paras. 63-67.

[59] Further, as the Ontario Court of Appeal held in *Wright v. Urbanek*, 2019 ONCA 823, at para. 8, appl'n for leave to appeal dismissed 2020 CanLII 26450 (SCC), the court also has the inherent jurisdiction to apply the doctrine of abuse of process to prevent misuse of the court's procedure in a way that would bring the administration of justice into disrepute, explaining that:

> … It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel: *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 35. One circumstance in which abuse of process has been applied is to strike out an action where the litigation before the court is in essence an attempt to relitigate a matter the court has already decided: see *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26, [2013] 2 S.C.R. 227, at paras. 39-41; *Toronto (City) v. C.U.P.E., Local 79*, at paras. 35-38.

[60] The defendants allege that the misappropriation of the approximate $1 million from Maple Pond was justified on the basis of an unpaid shareholder loan owing to Mr. Boersma. This argument was rejected by the trial judge. Before this court, the defendants acknowledge the finding the trial judge made relating to the misappropriation of company funds, but still claim that Maple Pond owes them more than $3 million. More specifically, as set out in the Expert Report, it is contended that:

(a) $1,527,860.82 is properly due and owing from Maple Pond to Weijs Investment for the original purchase of the Boundary Lake Property in 1999 and operating expenses over the years from 2000 forward;

(b) $1,300,500.00 is properly due and owing from Maple Pond to Weijs Investment for imputed costs incurred for managing the Boundary Lake Property; and,

(c) $295,000.00 is properly due and owing from Maple Pond to Mr. Boersma and Ms. Boersma for using their personal funds for the original purchase of the Boundary Lake Property in 1999.

[61] I deal with each of the defendants' respective claims below.

**Unnecessary Costs Claim of Peter Boersma in the amount of $15,000.00:**

[62] With respect to the $15,000.00 amount that Mr. Boersma claims respecting the "unnecessary costs" he incurred due to the Liquidator's inadvertent trespass onto the lands owned by Nathan Boersma adjacent to the Boundary Lake Property, I decline to order that such costs be reimbursed by Maple Pond. First, the trespass was that of the Liquidator and so any reimbursement demand is properly directed to them. Second, if there was any valid damage claim arising from the said inadvertent trespass, it would be a claim for the owner, Nathan Boersma, to make, and not Peter Boersma. This claim is dismissed.

**Peter Boersma's Personal Claim for $147,500.00 and Adrienne Boersma's Personal Claim for $147,500.00:**

[63] Mr. Boersma and Ms. Boersma each claim $147,500.00 as amounts that they purportedly contributed personally to the original purchase of the Boundary Lake Property in 1999, totalling $295,000.00. However, I do not accept that those are amounts that Maple Pond is responsible to reimburse.

[64] The record shows that an agreement of purchase and sale was entered into by 1199869 Ontario Ltd. with Lake Boundary Property Ltd. to buy property on Boundary Lake for $1,050,000.00 on September 9, 1999. That agreement was subsequently assigned by 1199869 Ontario Ltd. to Peter and Adrienne Boersma, In Trust, on November 19, 1999, for $345,000.00. As a result of that assignment, the purchase of the property to Peter and Adrienne Boersma, In Trust, was for a total of $1,395,000.00.

[65] Peter and Adrienne Boersma subsequently registered a Caution on December 8, 1999 (Instrument No. LT232392) and paid land transfer tax in the amount of $19,450.00. Then, on December 10, 1999, all parcels making up the property were transferred to Weijs Investment for $1,000,000.00, except for Parcel 9431 (Instrument No. LT232450). There was no land transfer tax paid in relation to the Weijs Investment purchase (a remark made in the Form 1 – Land Transfer Tax indicates that this was because land transfer tax had been paid in the Application to Register Caution). That same day, December 10, 1999, Parcel 9431 was transferred to Peter and Adrienne Boersma for the amount of $50,000.00 (Instrument No. LT232451).

[66] Parcel 9431 is the parcel on which the cottages and outbuildings were located. Parcel 9431 was then transferred by Peter and Adrienne Boersma to their son, Nathan Boersma, on June 14, 2002, for $200,000.00 (Instrument No. LT 246443). All other parcels remained with Weijs Investment.

[67] The constructive trust imposed by Sweeny J. did not include the cottage parcel that had been sold to Nathan Boersma. Nor did the cottage parcel form part of the Boundary Lake Property that was sold by the Liquidator. However, the defendants seek retroactive compensation for the entirety of the purchase price of the original purchase that included the cottage parcel. On cross-examination, Mr. Boersma, admitted that this was an error and suggested a reduction of the claim would be appropriate.

[68] I find that Weijs Investment only paid $1,000,000.00 to purchase the remaining parcels that constituted the Boundary Lake Property. This means that the $1,058,000.00 amount misappropriated from Maple Pond is in excess of the purchase price and no personal funds from either Mr. Boersma or Ms. Boersma were needed.

[69] Accordingly, I decline to award the $147,500.00 sum claimed by Mr. Boersma and the $147,500.00 sum claimed by Ms. Boersma as contribution towards the original purchase of all of the lands. These claims are dismissed.

**Weijs Investment's Claim in the amount of $2,828,360.82:**

[70] In the Expert Report, Ms. McCollum opines that $1,527,860.82 is owing from Maple Pond to Weijs Investment for the original purchase of the Boundary Lake Property in 1999 and operating costs over the years from 2000 forward. In this regard, the Expert Report refers to its Appendix 3 containing an itemized list of the specific expenses claimed.

*Alleged loan from Weijs Investment*

[71] The first item in Appendix 3, dated December 17, 1999, is described as "Original Purchase Price" in the amount of $1,050,000.00 paid by Weijs Investment. This represents the sum that Weijs Investment argues should be considered a "loan" from it to Maple Pond for the purchase of the Boundary Lake Property. It seeks to be reimbursed this amount from the Net Proceeds. In the Expert Report, Ms. McCollum justifies this claim by assuming that the amount of a $1,058,000.00 "loan" purportedly repaid by Weijs Investment to Maple Pond co-relates to the amount of a "shareholder loan" owed by Maple Pond to Mr. Boersma.

[72] The expert report that was before Sweeny J., prepared by Michael Carnegie and dated August 31, 2016 ("the Carnegie Report"), was filed by the defendants to support their claims that there had been cumulative investments by the Maple Pond shareholders resulting in the amount of $2,233,442 being due to Peter Boersma and the amount of $688,342 owing by Gordon Vellenga for the years 1990 – 2013.

[73] Justice Sweeny dismissed those claims in the Trial Judgment holding, at paragraphs 32-33:

> 32. The respondents called Michael Carnegie as the expert. He gave opinion evidence with respect to his accounting summary of the partner's equity and shareholders loans in the partnership and Corporation. He prepared a report that formed the basis for his evidence. His report was based on his review of the financial statements and specific input from Peter. He did not conduct an audit. In general, insofar as it purported to accurately reflect the partner's equity and shareholders loans, I found his opinion to be unsatisfactory. Insofar as his opinion is based on information he obtained from Peter and a review of the financial documents, I find it to be an unreliable statement of the partner's equity and shareholder loans. This is no reflection on Mr. Carnegie. It is a reflection on Peter's unfair and inaccurate characterization of the relationship between Peter and Gord. In purporting to assess the shareholder balances, I question the reliability of the information on which Mr. Carnegie relied, …
>
> 33. Mr. Carnegie's report and opinion are after-the-fact attempts to justify the assertion that Peter was owed in excess of the net proceeds of the milk quota sale.

[74] It is notable that many of the items identified in the Carnegie Report, to substantiate the amount allegedly owing to Mr. Boersma as a shareholder loan, are also repeated and found in the Expert Report prepared by Ms. McCollum for the purposes of the final distribution motion. Specifically, the Carnegie Report included claims for Ms. Boersma's book-keeping services; the

value of unpaid labour by the partners/shareholders; the purported shareholder loans of Mr. Boersma; unrecorded contributions made by partners and shareholders; non-cash contributions, management fees and professional fees; and other expenses. It also addressed purported amounts due to Weijs Investment. In light of the fact that the Carnegie Report was not accepted by Sweeny J., I find that any claim for those items identified therein has already been determined and cannot now be re-litigated before this court, as *res judicata* and issue estoppel apply.

[75] Sweeny J. held that Mr. Boersma had not proven the shareholder loan in the amount of approximately $1,000,000.00 that he claimed to be owed by Maple Pond. As a result, it is improper for Mr. Boersma to seek to prove the same shareholder loan before this court on the cross-motion. That issue has already been decided by the trial judge and upheld by the Court of Appeal. Paragraphs 28, 30 and 31 of the Court of Appeal's decision read, in part:

> 28. The trial judge considered and rejected these arguments. The loan was not justified, as the agreements that purportedly established the existence of a debt to Dr. Boersma had not been signed and were therefore invalid. The size of the alleged debt was also inconsistent with the financial records detailing the partners' equity at the time of the rollover. Moreover, the trial judge rejected the report and opinion of the appellants' accounting expert as "after-the-fact attempts to justify the assertion that [Dr. Boersma] was owed in excess of the net proceeds of the milk quota sale": at para. 33. As there was no basis for the loan, as well as no documentation or proper authorization, the transfer of a portion of the milk quota proceeds to Weijs Investment constituted a breach of the duty to act in the best interests of the Corporation.
>
> …
>
> 30. In this I see no error that would justify appellate intervention. …
>
> 31. The trial judge was also entitled to find that the alleged interest-free loan by the Corporation to Weijs Investment was invalid. Not only was there no legitimate basis for the loan, there was "no evidence of loan documents, a promissory note, or [Mr. Vellenga's] agreement" and "[Mr. Vellenga] did not sign the cheque": at para. 30. Even if the Corporation was operated informally, Dr. Boersma's justification for the transfer of monies to Weijs Investment was not accepted: he did not establish that he was owed in excess of $1,058,000 by the Corporation, or why, when the money was transferred, it was characterized as a loan. Both Dr. Boersma, as director, and Mrs. Boersma, as treasurer, had a fiduciary duty to the Corporation to act honestly and in good faith in the company's best interest, as well as a duty to do so with care and diligence. Their actions do not reflect a commitment to these duties. Rather, the appellants acted against the interests of the Corporation by using an asset of the Corporation to enrich themselves. The trial judge did not err in finding a breach of fiduciary duty, and thus, oppressive conduct.

[76] It is an abuse of process to attempt to relitigate accounting issues that have already been subject to judicial determination.

[77] Ms. McCollum admitted, on cross-examination, that she was not aware there had been a judicial determination that the funds used to purchase the Boundary Lake Property had been misappropriated from Maple Pond.

[78] In no manner can the $1,050,000.00 amount now be considered a "loan" to Maple Pond by Weijs Investment as it represents the amount that Mr. Boersma was found to have misappropriated from Maple Pond. I find that the issue of the $1,050,000.00 claimed by Weijs Investment is *res judicata* and constitutes a clear collateral attack on the judgment of the trial judge. There is nothing in the circumstances of this case that would make the application of the issue estoppel doctrine work an injustice. Accordingly, I deny this claim.

*Lawyers' fees*

[79] The defendants submit lawyers' invoices relating to the original purchase from 119869 Ontario Ltd. of the lands in Parry Sound and the subsequent purchase of the Boundary Lake Property by Weijs Investment.

[80] I do not award the amount paid for the legal invoice pertaining to the original purchase of the lands because that purchase did not involve Weijs Investment.

[81] I also do not award the amount paid for the legal invoice respecting the purchase of the lands by Weijs Investment since there is no evidence that the purchase was communicated to Maple Pond or that it assented to it.

*Mining and logging expenses*

[82] A number of the expenses claimed by the defendants relate to purported mining and logging activities for the Boundary Lake Property, including mining licenses of operation, mining land taxes, assessment of forestry and applications, and land surveying. There is no revenue accounted for in the analysis presented in the Expert Report. Ms. McCollum admitted in cross-examination that she was only asked to speak to "the expenses that were incurred".

[83] There are also expenses claimed in the approximate amount of $309,000.00 relating to excavating, road construction and road work. While there were some statements produced from Hall Construction relating to this road work, it was not clear in the evidence that all of the work done was for the benefit of the Boundary Lake Property and not the cottage property owned by Nathan Boersma. On her cross-examination, Ms. McCollum admitted that there was no reasonable basis to assume that Maple Pond would have incurred such an expense. She further admitted that there is no evidence that the road access increased the value of the Weijs Investment lands. Although Ms. Boersma testified that the road was constructed for the purposes of logging, not cottage access, I accept the plaintiff's argument that this makes little financial sense since the purported gross revenue from logging was allegedly only between $150,000.00 and $190,000.00. In any event, Ms. Boersma testified that Weijs Investment accrued none of the logging revenue. Instead, it was diverted to Boersma Transport Inc., a company owned by Peter Boersma. While the Expert Report maintains that these funds have been reimbursed, Ms. McCollum admitted that there is no

evidentiary support for this contention. Since the constructed road provides access to the cottage property owned by Nathan Boersma, its construction is not a waste for the Boersmas.

[84] There is no evidence the road construction was ever communicated to Maple Pond or that it assented to it. I also note that there is no evidence that Maple Pond's corporate purposes included mining or logging, and I am unable to see how it should become bound to pay for such expenditures.

[85] Accordingly, I decline to order the claimed mining, logging, excavation and road construction expenses to be reimbursed by Maple Pond.

*Property taxes*

[86] I do accept the following sums claimed by Weijs Investment for the payment of property taxes for the Boundary Lake Property since there were tax statements produced showing the amounts owing and paid, and since property taxes must be paid:

2003 - $561.13
2004 - $1,866.97
2005 - $1,932.85
2006 - $1,122.05
2007 - $1,400.83
2008 - $1,414.62
2009 - $1,136.05
2010 - $1,366.18
2011 - $1,403.72
2012 - $1,577.36
2013 - $1,753.53
2014 - $1,700.84
2017 - $1,941.46
2018 - $2,241.40
2019 - $2,577.81
2020 - $2,857.87

Total: $26,854.67

[87] Accordingly, I award the amount of $26,854.67 to Weijs Investment as reimbursement for the property taxes that it has established have been paid.

*Imputed costs for managing the Boundary Lake Property*

[88] In the Expert Report, Ms. McCollum opines that $1,300,500.00 is owing from Maple Pond to Weijs Investment for imputed costs incurred for managing the Boundary Lake Property. More particularly, the defendants claim: (i) an estimated amount of $60,000.00 for alleged bookkeeping performed by Ms. Boersma from the 1994 incorporation of Maple Pond until 2006 when the company bank account was closed; (ii) an estimated amount of $967,500.00 for land management fees for the cost of forestry and land management within the Boundary Lake Property; and (iii) an estimated amount of $273,000.00 for heavy equipment rental/usage and casual labour.

[89] There is no agreement between Maple Pond and Ms. Boersma for the provision of her bookkeeping services or the payment of same. There is also no agreement between Maple Pond and the defendants for the provision of any land management services or the payment of any such fees. On cross-examination, Ms. McCollum admitted that she had no professional expertise in valuing labour or forestry management services. She further admitted that she had no expert knowledge with respect to the cost of heavy equipment. Ms. McCollum also admitted that she was not aware that the Boersmas had any qualifications in bookkeeping or forestry management.

[90] I find that the claimed amounts totalling $1,300,500.00 are imputed only, estimated by Ms. McCollum, and have not been proven by the defendants. I am not satisfied that the few invoices and receipts produced respecting heavy equipment rental/usage and casual labour establish that they are directly related to the Boundary Lake Property. Moreover, there is no evidence that those expenses were ever communicated to Maple Pond and that it assented to them. With respect to Ms. Boersma's alleged bookkeeping claim, as noted earlier, it was also put forward in the trial as part of the Carnegie Report and rejected by the trial judge, so I find that that issue is *res judicata* and an abuse of the court's process.

*Conclusion*

[91] In the result, Weijs Investment's claim for $2,828,360.82 is denied, with the exception of the amount of property taxes it paid for the years 2003 through 2020 for the Boundary Lake Property totalling $26,854.67 which is allowed.

***(d) Should there be an accounting for monies allegedly retained by each of Mr. Boersma and Mr. Vellenga?***

[92] Both the plaintiff and the defendants asked that the court account for monies that each other has allegedly retained improperly.

[93] The defendants allege that, during the "voluntary winding up of Maple Pond before the appointment of the Liquidator", Mr. Vellenga sold assets properly belonging to Maple Pond and retained those monies, in the amount of $223,854.69, for his personal use. They further allege that Mr. Vellenga has admitted that he kept the proceeds from the sale of the corn silo, despite those funds properly belonging to Maple Pond; and that, when the Short Property (which was an asset of Maple Pond) was sold the net proceeds in the approximate amount of $160,000.00 were paid to Mr. Vellenga.

[94] For his part, the plaintiff alleges that there were amounts that Mr. Boersma took from Maple Pond and did not return. For instance, he alleges Mr. Boersma rendered "a false invoice in order to misappropriate $200,000.00 from Maple Pond" and paid it to Boersma Transport Inc., another company owned by Mr. Boersma, on or about December 31, 1999.

[95] I decline to grant either party an accounting for monies allegedly owing by the other. First, such claims would require stronger evidence than I am able to find in the record to satisfy me that they are indeed owing and not otherwise accounted for. Second, the sums alleged to have been improperly taken by each party do not relate to the Boundary Lake Property constructive

trust/distribution issue that is before me. Further, in my view, they are statute-barred under the *Limitations Act, 2002*.

**DISPOSITION**

[96] For the foregoing reasons, the plaintiff's motion is granted, in part; and the defendants' cross-motion is granted, in part.

[97] The following orders are made:

(a) The relief sought by the defendants in their cross-motion is dismissed with the exception of the claim for reimbursement of monies paid for property taxes for the Boundary Lake Property in the amount of $26,854.67, for which Weijs Investment should be credited;

(b) The Net Proceeds paid into court pursuant to the order of Justice Harper, dated June 29, 2023, plus any accrued interest, shall be forthwith transferred to Graydon Sheppard Professional Corporation, In Trust;

(c) Half of the funds held by Graydon Sheppard Professional Corporation, In Trust, pursuant to sub-paragraph (b) above is the property of the plaintiff, less the $26,854.67 property tax amount described in sub-paragraph (a) above;

(d) Half of the funds held by Graydon Sheppard Professional Corporation, In Trust, pursuant to sub-paragraph (b) above is the property of the defendants along with the $26,854.67 property tax amount described in sub-paragraph (a) above; and,

(e) The funds held in trust for the benefit of the defendants may be paid out of the trust account of Graydon Sheppard Professional Corporation in whatever manner the defendants may direct.

**COSTS**

[98] I would urge the parties to agree on costs. If they are unable to do so, then costs submissions may be made as follows and submitted to the Sopinka Judicial Assistants to my attention:

(a) By August 13, 2025, the plaintiff shall serve and file his written costs submissions, not to exceed three pages, double-spaced, together with a draft bill of costs and copies of any pertinent offers; and

(b) The defendants shall serve and file their responding costs submissions of no more than three pages, double-spaced, together with a draft bill of costs and copies of any pertinent offers, by August 27, 2025; and

(c) The plaintiff's reply submissions, if any, are to be served and filed by September 4, 2025 and are not to exceed two pages.

(d) If no submissions are received by September 4, 2025, the parties will be deemed to have resolved the issue of the costs and costs will not be determined by me.

[99] If the parties are able to settle the question of costs or if a party does not intend to deliver submissions, counsel are requested to advise the court accordingly.

**Released:** July 23, 2025 **MacNEIL J.**