IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION

Citation: *Nugent v. The Herbal Centre Ltd.*, 2024 NLSC 91
Date: June 20, 2024
Docket: 201901G2059

BETWEEN:
WILLIAM NUGENT
FIRST PLAINTIFF

AND:
WILLIAM HYNES
SECOND PLAINTIFF

AND:
THE HERBAL CENTRE LTD.
FIRST DEFENDANT

AND:
KENNETH OLIVER
SECOND DEFENDANT

Before: Justice Peter N. Browne

Place of Hearing: St. John's, Newfoundland and Labrador

Dates of Hearing: February 12-13, 16, 2024

Summary:

The Plaintiffs, Nugent and Hynes, claim the Defendant, Oliver, made an oral contract with them that provided each with a 25% share in the Defendant company The Herbal Centre Ltd. The company was formed in 2018 to operate a retail cannabis store in St. John's. Oliver and The Herbal Centre Ltd. pleaded in their Defence that there was no contract, but at the outset of trial the parties informed the Court that the existence of a contract was no longer an issue. Rather, the issues now concerned: (i) the interpretation of the terms of the contract; (ii) whether Nugent and Hynes breached those terms; and (iii) whether Oliver and The Herbal Centre Ltd. could repudiate the contract as a result of the breach.

The Court held that the parties had agreed that Nugent and Hynes would each receive a 25% interest in The Herbal Centre Ltd., but their failure to include Oliver in their British Columbia cannabis craft grow company did not constitute a breach of the contract, nor did their failure to pay Oliver their full portion of the start-up costs. The Court found Nugent and Hynes were entitled to the value of their shares and Oliver was entitled to the outstanding balance of the start-up costs owed by Nugent and Hynes.

Costs were awarded to Nugent and Hynes on a Column III basis even though the results were mixed because of Oliver's pre-trial and trial conduct.

Appearances:

J. Michael Cabot	Appearing on behalf of the Plaintiffs
Brian D. Wentzell	Appearing on behalf of the Defendants

Authorities Cited:

CASES CONSIDERED: *Donovan Homes Ltd. v. Modern Paving Ltd*., 2011 NLCA 39; *May and Butcher Limited v. The King*, [1934] 2 K.B. 17 (H.L.); *Sattva Capital Corp. v. Creston Moly Corp.*, [2014] 2 S.C.R. 633; *R.J.G. Construction Ltd. v. Marine Atlantic Inc*., 2019 NLCA 51; *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10; *Parsons v. Babb Construction Ltd.*, 2022 NLCA 16; *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10; *Guarantee Co. of North America v.*

Gordon Capital Corp., [1999] 3 S.C.R. 423; *Ali v. O-Two Medical Technologies Inc.*, 2013 ONCA 733; *House of Haynes (Restaurant) Ltd. v. Snook* (1995), 134 Nfld. & P.E.I.R. 23, 57 A.C.W.S. (3d) 818 (Nfld. C.A.); *Petten v. E.Y.E. Marine Consultants* (1998), 179 Nfld. & P.E.I.R. 94, 88 A.C.W.S. (3d) 974 (Nfld. S.C.(T.D.)); *Bixby v. B & K Carpet Warehouse Co.* (1987), 63 Nfld. & P.E.I.R. 232, 4 A.C.W.S. (3d) 1 (Nfld. S.C.(T.D.)); *Fowler v. Maritime Life Assurance Co.* (2002), 216 Nfld. & P.E.I.R. 132, 217 D.L.R. (4th) 473 (N.L.S.C.(T.D.)); *Perry v. Heywood* (1998), 175 Nfld. & P.E.I.R. 253, 82 A.C.W.S. (3d) 1013 (Nfld. C.A.); *Kings Gate Developments Inc. v. Drake* (1994), 17 O.R. (3d) 841, [1994] O.J. No. 633 (C.A.)

STATUTES CONSIDERED: *Judicature Act*, R.S.N.L. 1990, c. J-4

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

REASONS FOR JUDGMENT

BROWNE, J.:

OVERVIEW

[1] On October 17, 2018 the Government of Canada legalized marijuana leaving the provinces to decide how it would be sold. The Province of Newfoundland and Labrador opted for a privately-owned vendor model.

[2] The Plaintiffs, William Nugent and William Hynes ("Nugent and Hynes"), allege that in early 2018 an oral contract (the "Agreement") was struck with the Second Defendant, Kenneth Oliver ("Oliver"), whereby they would incorporate a company to become a licensed cannabis retailer ("LCR") and establish a retail store in St. John's. The gentlemen incorporated The Herbal Centre Ltd. ("the Company") on March 14, 2018, and Nugent and Hynes allege they agreed to a share distribution of 50% to Oliver and 25% each respectively.

[3] As part of the Agreement, Nugent and Hynes also allege they provided funding of $50,000 toward the purchase of inventory which they subsequently transferred to Oliver by bank draft on September 15, 2018. On October 29, 2018, Oliver advised Nugent and Hynes they had breached the Agreement, so he was repudiating it. The Company opened its doors on November 14, 2018, and continues to operate a retail store located at 394 Kenmount Road, St. John's, NL.

[4] Nugent and Hynes argue the Agreement was a contract formed between the parties that included a distribution of the share equity in the Company. Based on the pleadings filed Oliver argues there was no Agreement, and in the alternative if there was, then Nugent and Hynes breached their obligation to give him an equity stake in a British Columbia LCR operation; therefore, he was entitled to repudiate.

ISSUES

1. Did the parties form a contract regarding the operation of the LCR now operating as the Company?
2. What were the terms of the contract and how should they be interpreted?
3. Did Nugent and Hynes breach the contract, thereby providing Oliver a legal basis to repudiate?
4. Absent a legal and factual basis for repudiation, then what are the remedies available to the parties under the Agreement?

Relevant Jurisprudence

The Elements of a Contract

[5] At paragraphs 32 to 39 of *Donovan Homes Ltd. v. Modern Paving Ltd*., 2011 NLCA 39, our Court of Appeal set out the requirements of a valid contract as being

(a) offer; (b) acceptance; (c) consideration; (d) intention to create legal relations; and (e) certainty of terms.

[6] Regarding the last element, the Court endorsed the House of Lords decision in *May and Butcher Limited v. The King*, [1934] 2 K.B. 17 (H.L.):

> To be a good contract there must be a concluded bargain, and a concluded contract is one *which settles everything that is necessary to be settled* and leaves nothing to be settled by agreement between the parties. Of course, it may leave something which still has to be determined, but then that determination must be a determination which does not depend upon the agreement between the parties.
>
> … As a matter of the general law of contract *all the essentials* have to be settled. What are the essentials may vary according to the particular contract under consideration. We are here dealing with sale, and undoubtedly price is one of the essentials of sale, and if it is left still to be agreed between the parties, then there is no contract.

The Interpretation of a Contract

[7] The law of contract interpretation revolves around the intention of the parties at the time of the making of the contract. As stated at paragraphs 46 and 47 in *Sattva Capital Corp. v. Creston Moly Corp.*, [2014] 2 S.C.R. 633:

> "**46** The shift away from the historical approach in Canada appears to be based on two developments. The first is the adoption of an approach to contractual interpretation which directs courts to have regard for the surrounding circumstances of the contract [page657] - often referred to as the factual matrix - when interpreting a written contract (Hall, at pp. 13, 21-25 and 127; and J. D. McCamus, *The Law of Contracts* (2nd ed. 2012), at pp. 749-51). The second is the explanation of the difference between questions of law and questions of mixed fact and law provided in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 35, and *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 26 and 31-36.

> **47** Regarding the first development, the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744, at para. 27, *per* LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at paras. 64-65, *per* Cromwell J.). To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:
>
> > No contracts are made in a vacuum: there is always a setting in which they have to be placed.... In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating."

The Repudiation of a Contract

[8] The issue of repudiation of contract was discussed by the Court of Appeal of Newfoundland and Labrador in *R.J.G. Construction Ltd. v. Marine Atlantic Inc*., 2019 NLCA 51. At paragraph 25 the court stated as follows:

> **25** In *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10, [2015] 1 S.C.R. 500, Justice Cromwell considered what is required for repudiation of a contract. Not every minor or trivial breach of a contractual term will constitute repudiation. Repudiation requires the breach of an important term giving rise to significant consequences.

[9] Repudiation is a breach of contract by one party giving rise to the right of the other party to terminate the contract and pursue the available remedies for the breach. A breach is a repudiation of the contract if it is a breach of a contractual condition or of some other sufficiently important term of the contract so that there is a

substantial failure of performance (see paras. 144-145 of *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10).

POSITION OF THE PARTIES

Nugent and Hynes

[10] Nugent and Hynes take the position that the Agreement saw them receive a 25% share each in the Company in exchange for the provision of $50,000 towards inventory, and a three-way collaboration to establish an LCR in St. John's. They acknowledged their participation would be less than Oliver's as he would be in St. John's looking after matters on the ground while they helped either by travelling to St. John's to assist in person or to assist remotely.

[11] They also confirmed that the parties agreed in principle to work toward establishing an LCR in British Columbia in which Oliver would receive a 25% interest; but failing this objective, then Oliver would receive a wage for running the Company after it opened its doors.

Oliver and the Company

[12] Oliver takes the position that the Agreement saw him make application to obtain an LCR for St. John's. His role included securing an appropriate retail store location and taking all the necessary steps to commence the operation of the LCR; specifically, leasehold improvements and obtaining inventory.

[13] He was to provide Nugent and Hynes with reports about all aspects of the progress in preparing the retail space. The arrangement also contemplated that at times Nugent and Hynes may be called upon to perform certain tasks but, overall, Oliver would perform most of the work required.

[14] Oliver acknowledged that Nugent and Hynes invested $50,000 toward the inventory costs but argues that this amount was only a portion of the total cost of the enterprise, which included an obligation to pay the startup costs commensurate with shareholder percentages.

[15] Most importantly to Oliver, there was a reciprocal component of the Agreement; namely, that Nugent and Hynes were to set up a marijuana-based operation in British Columbia in which he was to have a share. This reciprocity included Nugent and Hynes performing most of the work setting up the British Columbia operation.

[16] After the Agreement was made, Oliver says that Nugent and Hynes reneged on this obligation and excluded him from their British Columbia cannabis craft grow operation. Oliver claims he inquired as to why he was excluded and never received a satisfactory answer. As a result, Oliver advised Nugent and Hynes they were no longer part of the Company.

PREFACE TO THE ANALYSIS OF THE ISSUES

[17] Prior to the outset of the trial, counsel indicated to the Court that despite the Defence pleadings, they reached an agreement that for the purpose of trial the issue of whether a contract had been formed was resolved, so the issues left for the Court to determine were:

(i) What were the terms of the contract and how should they be interpreted?

(ii) Did Nugent and Hynes breach the contract, thereby providing Oliver a legal basis to repudiate?

(iii) Absent a legal and factual basis for repudiation, then what are the remedies available to the parties under the Agreement?

[18] On the last point, counsel for Nugent and Hynes indicated that they would be seeking an Order from the Court stating that they are each entitled to a 25% shareholding in the Company. However, the parties were not prepared to introduce expert evidence on the potential share value claimed by Nugent and Hynes at this stage of the proceeding.

APPLICATION OF THE LAW TO THE FINDINGS

Issue #1: What were the terms of this contract and how should they be interpreted?

[19] In final submissions, counsel for both parties agreed that what is in issue is whether there was ever a condition in the Agreement requiring Nugent and Hynes to set up an LCR or a craft grow operation in British Columbia, with a 25% interest in either business to be given to Oliver.

[20] I find that the Agreement was formed between Oliver, Nugent, and Hynes in March 2018. The parties agreed that the original deal was as follows: (1) 50% of the Company shares went to Oliver, 25% to Nugent and 25% to Hynes; (2) Oliver would take care of most of the start-up work; (3) Oliver would receive 25% of any future British Columbia operation set up by Nugent and Hynes; and (4) Nugent and Hynes would not get paid for their efforts in getting the British Columbia operation going.

[21] The parties also agree that Oliver asked for (and Nugent and Hynes agreed to) two new conditions on September 5, 2018; namely (1) a right of first refusal to Oliver for the purchase of Nugent's and Hynes' shares, and (2) if Nugent and Hynes did not start a British Columbia cannabis operation, then he (Oliver) would get a wage for operating the Company. This was reflected in the Facebook Messenger exchanges from September 5 to 7, 2018.

Issue #2: Did Nugent and Hynes breach the contract, thereby providing Oliver a legal basis to repudiate?

Position of the Parties

Nugent and Hynes

[22] Oliver's repudiation argument cannot succeed for three (3) reasons: (i) the evidence was clear that no business was ever established by Nugent and Hynes in British Columbia; (ii) the evidence confirmed that the Agreement reached by the parties had an express provision that provided for Oliver to be paid a salary in the event that a British Columbia cannabis business did not come to fruition, so their failure to establish one did not permit Oliver to repudiate the Agreement; and (iii) the common law requirements of repudiation were not met, so therefore Oliver's position is not supported at law.

[23] In addition to the reasons cited above, Nugent and Hynes argue that the Court should consider whether Oliver's evidence lacked credibility because he was not candid or forthright during the entirety of the legal proceeding.

Oliver and the Company

[24] Oliver and the Company argue they were entitled to repudiate the contract because of two separate breaches committed by Nugent and Hynes.

[25] The first occurred on September 30, 2018, when they removed/excluded Oliver from the development of their cannabis craft grow business in British Columbia, without notice or explanation.

[26] The second occurred when the Plaintiffs failed to pay Oliver 50% of the startup costs (as distinct from the $50,000 toward initial inventory).

[27] Like Nugent and Hynes, Oliver argues (but for separate reasons) that the Court should consider whether Nugent's and Hynes' evidence lacks credibility because of the Court's admonition to both men regarding their role in the coaching of Nugent during his testimony.

[28] Before examining whether Nugent and Hynes breached the Agreement, thereby providing Oliver with the opportunity to repudiate, I will address the credibility issues as raised by both sides.

Credibility

Nugent's and Hynes' Position on Oliver's Credibility

[29] In assessing any factual basis of Oliver's repudiation arguments, legal counsel for Nugent and Hynes argues the Court should begin its analysis by assessing Oliver's credibility as it relates to his Defence. This is because the factual assertions contained in the Defence differ significantly from his *viva voce* evidence at trial.

[30] During cross-examination, Oliver was questioned on the factual assertions contained in his Defence. He conceded that his Defence was not an accurate representation of his evidence. By way of example:

- Paragraph 5 - denying that there was any contractual arrangement between Nugent, Hynes, and Oliver. Oliver acknowledged this was not correct.

- Paragraph 5(a) - was incorrect. Oliver acknowledged that Nugent and

Hynes gave him $50,000 toward start-up costs.

- Paragraph 5(b) - was incorrect. Oliver agreed the parties would set up a company to obtain a cannabis license.

- Paragraph 5(d) - denying there was an agreement for Nugent and Hynes to own 25% of the Company. Oliver acknowledged this statement was incorrect.

- Paragraph 6 - denying the parties worked collaboratively to open the Company. He conceded that this was not the case.

[31] Because Oliver placed the existence of a contract at the centre of the litigation, Nugent and Hynes argue they spent five years proving that a contract was formed. These efforts included significant document disclosure, requests for undertakings, multiple examinations for discovery of witnesses regarding the existence of an agreement, and ultimately asking the Court to place this issue before the Court as an issue in the trial.

[32] However, at the outset of trial, Oliver changed his position. He acknowledged the existence of a contract and, instead, alleged repudiation. No steps were taken by Oliver to amend his pleadings despite an invitation from the Court to file an Amended Defence at the conclusion of trial.

[33] Overall, I find Oliver did make several factual assertions in his Defence that he later disavowed at trial. Counsel for Nugent and Hynes asks the Court that should it make a finding that these factual assertions are so discordant with his testimony, then this should impact negatively on Oliver's credibility and the weight afforded to his evidence.

[34] I agree with the suggestion from counsel for Nugent and Hynes that litigants need to know the case they are to meet. This principle is enshrined in Rule 14.03 of

the *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D which provides that every pleading shall contain a statement in a summary form of the material facts on which a party relies for a defence. This rationale was discussed by our Court of Appeal in *Parsons v. Babb Construction Ltd.*, 2022 NLCA 16, at paragraphs 43 to 71.

[35] At paragraphs 70 to 71 the Court held:

> **70** A review of the pleadings, evidence, argument, and submissions on the application reveals that the issue of whether Parsons signed the assignment of debt agreement, at all or on his own behalf, was never raised. This issue was decided without the parties having been given an opportunity to address it (see *Rubens v. Sansome*, 2017 NLCA 32, 1 C.A.N.L.R. 727, at para. 106).
>
> **71** Applying the rationale of *Saadati*, *Rodaro* and *Quinlan Brothers*, discussed above, concerns regarding litigation fairness and reliability arise in this context because the judge decided the application based on an issue not pleaded, and "to which battle was never joined" (*Rodaro*, at para. 63). I conclude that this was an error and that it constitutes a denial of procedural fairness and a breach of natural justice in this circumstance.

[36] Counsel for Nugent and Hynes acknowledges that the ratio in *Parsons* concerns the principle of litigation fairness and natural justice where an issue that has not been pleaded forms part of the Court's decision. The ratio does not extend to the Court's role in assessing credibility. Nevertheless, I do accept the secondary argument that this issue should be analyzed as part of any costs' argument.

Oliver's and the Company's position on the credibility of Nugent and Hynes

[37] Oliver and the Company argue the Court should find Nugent and Hynes are not credible because they did not disclose the existence of Lifted Roots Inc., as this information would never have been known except for Oliver's discovery of its Facebook page, LinkedIn page, official website, Instagram account and Instagram postings which he filed in a Supplemental List of Documents. Because of this lack

of disclosure, the Court should draw a negative inference or, at the very least, it should question the credibility of Nugent and Hynes.

[38] Secondly, Nugent and Hynes gave differing evidence as to the timing of their involvement with Lifted Roots Inc. and how the land was purchased. Nugent testified they became involved about a year after it came into existence whereas Hynes said it was from its inception. Nugent testified that Adam Wade (Goose) purchased a $250,000 parcel of land. Later, he acknowledged that Goose never did purchase the $250,000 parcel of land and when pressed further, he testified that it was purchased by a numbered company owned by him, Hynes and Ben Wennes; whereas Hynes testified Wennes paid for the land and registered it to his plumbing business, Drips and Drains.

[39] Finally, because the Court discovered that during Nugent's evidence, Hynes, who was sitting at the back of the Courtroom, was mouthing answers to Nugent, both gentlemen were severely chastised by the Court for their behaviour. Collectively, this conduct should render both Nugent and Hynes as being incapable of belief regarding any of their evidence.

[40] Regarding this last point, while I did not personally witness Nugent's and Hynes' conduct during the cross-examination of Hynes, I do nonetheless accept the observations made by the Court Officer as being truthful. The question I must answer is what weight I should assign to Hynes' credibility and evidence because of it.

[41] Prior to pointing out the Court's concern, Hynes was being cross-examined regarding the issue of the purchase of the land by Wennes and whether it may have been purchased by Goose or a number company owned by Wennes, Nugent and Hynes. The confusion in Nugent's responses was highlighted by Oliver's legal counsel in his written submissions as noted above.

[42] From my perspective, while indeed it is very unfortunate that this conduct occurred, I do not find this aspect of Hynes' evidence to be of any significance

surrounding the issue of whether Oliver had a factual and legal basis to claim that Hynes and Nugent breached the Agreement, so I afford it no weigh.

Analysis on the credibility of the parties

[43] In reviewing the evidence in its entirety, all three gentlemen raised concerns about their credibility during their testimony.

Nugent's credibility

[44] Regarding Nugent's credibility, I reject the answer he provided to the Court during examination-in-chief, that the reason he did not place his name on the LCR application was because he was required to be up to date on his tax returns. I make this finding based on his subsequent responses to questions during cross-examination.

[45] During cross-examination, it was suggested by Oliver's counsel that the reason he did not place his name on the LCR application was because he had been previously convicted for impaired driving. Nugent denied this was the case saying that he had forgotten about this conviction and that he had a poor recollection concerning it because he had been subsequently pardoned. When pressed on the date of his pardon Nugent could not recall the date and whether it was after the LCR application. His credibility was challenged further when it was pointed out that Oliver had also not filed taxes prior to submitting his name on the LCR application.

[46] Eventually, Nugent admitted that he never spoke with an accountant, the CRA or any other knowledgeable individual to confirm that he was required to have his taxes up to date if he were to place his name on the application to the NLC.

Hynes' credibility

[47] Regarding Hynes' credibility, I do not accept his evidence on cross-examination that he did not tell Oliver on November 7th that if he (Oliver) did not put their names on a share agreement for the Company, then he (Hynes) was going to tell the NLC about what was happening between them.

[48] I find that at this point in the business relationship both Nugent and Hynes were angry and frustrated by Oliver's refusal to add their names to the shareholders' agreement.

Oliver's credibility

[49] Finally, regarding Oliver's credibility, in addition to the concerns identified above by legal counsel for Nugent and Hynes, their counsel also pointed to the following examples as a cause for concern over Oliver's credibility and reliability.

Oliver's credibility regarding evidence concerning Herbal Healing

[50] During cross-examination Oliver was shown a portion of a discovery transcript where he was questioned about his involvement with Herbal Healing. Prior to answering, Oliver confirmed he had a good recollection of being discovered.

[51] He was then shown the following exchange:

> Question: Sir, were you ever involved with an organization called Herbal Healing?
>
> Answer: No.

Question: No? Were you ever involved with any cannabis dispensaries?

Answer: No.

Question: No? Never?

Answer: No.

Question: Just to be clear, your evidence at this point is that you were never involved with any, I will call grey market dispensary that was involved with the sale of cannabis.

Answer: No.

(See Exhibit K.O. # 1)

[52] Oliver's evidence-in-chief was that he was involved with Herbal Healing, making his discovery evidence inconsistent with his trial position. I agree with the observation of Nugent's and Hynes' counsel that Oliver was not candid or truthful on this issue during his discovery.

[53] Similarly, when Oliver was asked about the existence of the Agreement at discovery, he testified it was "speculation" and refused to acknowledge its basic terms:

Question: So, were you business partners as of June 2018?

Answer: I guess you could say that.

Question: Well, I mean it is a – whether or not you guys were business partners is what this lawsuit is all about. So –

Answer: It was all speculation.

Question: -- it is not a matter of I could say. I need to know what your position is. And it sounds like you're saying -

Answer: It was all – it was all speculation. You know what I mean? There was nothing on paper. There was nothing in stone. It was all just talked about. And they helped out a little bit. And I wanted to get a

> feel for what they were – how much they were interested in it. And their level of input for how much they put into it and how it ended up going made me realize that they weren't business worthy, so I kicked them out.
>
> (See Exhibit K.O. # 2)

[54] In addition to these instances identified by counsel for Nugent and Hynes, I have my own concerns over Oliver's credibility.

Oliver's credibility regarding modification of the original Agreement

[55] During cross-examination Oliver was shown Exhibit MN#1, tab 1, page 293 (a series of text exchanges between Oliver, Nugent and Hynes). Counsel suggested to Oliver that his September 5, 2018 text to Nugent and Hynes indicated he wanted a term added to the agreement that he be included in a British Columbia cannabis operation that made money; if not, then he was to be paid a wage for managing the Company after it opened.

[56] I found Oliver to be extremely evasive during this exchange, this is despite being provided several opportunities to answer the question or to clarify his answer. He continued to reject legal counsel's suggestion even though I find it was a reasonable construction of the words in his text. I conclude that with this text Oliver was modifying the original deal because the terms of the Agreement at this point in the relationship did not include a proviso that he be paid a wage as an alternative to Nugent and Hynes not starting an LCR in British Columbia.

Oliver's credibility regarding the factual and legal basis for repudiation of the contract

[57] Also, during his examination-in-chief, Oliver conceded there was an Agreement, and he acknowledged its terms. The question left for the Court's determination was whether Nugent and Hynes repudiated the contract by not including Oliver in a British Columbia cannabis business.

[58] Oliver's defence throughout his trial testimony was that he was cut out of participating in Lifted Roots Inc. and this amounted to a breach of the Agreement by Nugent and Hynes.

[59] Nugent and Hynes, on the other hand, testified Lifted Roots Inc. was a venture into the British Columbia cannabis craft growth industry that never made a profit. It was a project that had other business partners making it impossible for Oliver to acquire a 25% stake. This was an even more unrealistic expectation on Oliver's part given he did not have the ability to invest in Lifted Roots Inc. because of his own financial circumstances at the time.

[60] Both gentlemen were challenged on their evidence regarding the viability of Lifted Roots Inc. during cross-examination, but they remained firm that Lifted Roots Inc. never advanced beyond the infancy stage into a viable business.

[61] The only direct evidence offered by Oliver regarding the existence of Lifted Roots Inc. was its social media posts and its website. The balance of the evidence regarding the Company came from *viva voce* evidence of the parties. Oliver did not provide any objective proof to contradict the evidence of Nugent and Hynes. I find that Oliver's evidence on this point was not reliable.

Analysis on the breach of the Agreement by Nugent and Hynes and the subsequent basis for repudiation by Oliver

a) Assessment of whether Nugent and Hynes breached the Agreement by not providing Oliver with a 25% interest in Lifted Roots Inc.

[62] Oliver argues that the first breach of the Agreement by Nugent and Hynes occurred when they did not provide him with a 25% interest in their craft grow company, Lifted Roots Inc.

[63] I find the evidence at trial disclosed that Lifted Roots Inc. was a completely different enterprise than the Company. Although related to the cannabis industry, Lifted Roots Inc. was attempting to enter the production side whereas the Company was attempting to enter the retail side. It was incorporated in September 2018 (well after the original Agreement) and after Oliver's knowledge about Nugent's and Hynes' entry into the cannabis craft grow business.

[64] On top of this, the start up timelines, the regulatory framework, the business plan, and the financial investment required for both enterprises were not comparable. This was best demonstrated by the *viva voce* evidence from Nugent and Hynes that one of the initial requirements for a craft growth licence required the Company to purchase agricultural land worth $1.8 million dollars. Oliver acknowledged in his evidence that he did not have the financial capacity to invest in Lifted Roots Inc. and, because of this, one of the other investors involved who had financial capital did not want him to have a share in the Company. Further, on cross-examination, Oliver admitted that the Agreement provided that if there was no British Columbia cannabis business established, he was to be paid for his time.

[65] As noted above, the Agreement was subsequently changed by Oliver during a Facebook Messenger exchange on September 5, 2018, when he requested Nugent and Hynes provide him with a right of first refusal should they decide to sell their

shares, and that if they were not able to establish a viable business in British Columbia that he be paid a wage for managing the Company.

[66] I find the subsequent modification to the Agreement requested by Oliver pertained to the start up of a parallel LCR in which Oliver would receive a 25% interest along with the requirement that most of the groundwork for this parallel LCR was to be performed by, and paid upfront for, by Nugent and Hynes. In short, the reversal of what Oliver said occurred in Newfoundland and Labrador.

[67] Based on my assessment of the totality of the evidence and the credibility of the parties, I conclude that Nugent and Hynes did not breach the Agreement with Oliver when they failed to include him as a shareholder in Lifted Roots Inc. and their pursuit of a cannabis craft grow operation licence. The original terms of the Agreement contemplated an obligation on Nugent and Hynes to establish a parallel LCR store in British Columbia, not a cannabis craft grow operation. The Agreement was later changed at Oliver's request to include a term that if Nugent and Hynes failed in this obligation, then he was to receive a wage for his efforts in running the Company.

[68] Accordingly, I find Oliver did not have a basis to repudiate the Agreement on this ground.

b) Assessment of whether Nugent and Hynes breached the Agreement by not paying their share of the leasehold improvement/start-up costs

[69] Although not pleaded as part of his Defence, Oliver claimed during his trial evidence that Nugent and Hynes had breached the Agreement based on their failure to pay their one-half share of the leasehold improvements or startup costs.

[70] The evidence showed that the location of the Company was empty retail space that required construction and electrical work along with furniture such as a stand-

alone counter, chair, display stand, etc., as well as equipment such as a freestanding safe, point-of-sale device, cash register or computer. These expenses were subject to an equal division between all three gentlemen based on their proportionate share in the business. As Oliver was the person on the ground, he was to pay these costs upfront and be reimbursed 50% of the total after they were incurred. This arrangement was confirmed by Hynes' evidence.

[71] Oliver testified that when Nugent and Hynes arrived from British Columbia in late September/early October 2018, the three gentlemen met at Oliver's home to divide up the profits from Herbal Healing. The store manager was required to provide Oliver with the entire cash sales proceeds daily. Oliver would keep the funds in a secure location in his home.

[72] Oliver could not initially remember the total amount of money that was collected and divided between the three gentlemen, but upon questioning from the Court and his counsel he settled on the figure of $150,000 each. Oliver then claimed that Nugent and Hynes were to pay him $100,000 from these funds as part of their combined share of the leasehold improvements/start-up costs, but they did not (see Transcript of Oliver's evidence, February 13, 2024, page 219, line 13; to page 222, line 10). Nugent and Hynes disagreed, testifying they paid Oliver their proportionate share from the Herbal Healing proceeds.

[73] There were no banking or accounting records for Herbal Healing introduced into evidence, nor did Oliver produce the ledger he testified he kept of the daily cash deposits he received, leaving the Court in the position of having no independent way of verifying the amount of cash each gentlemen received, or whether Oliver was paid the $100,000 he claims he was owed for his out-of-pocket costs.

[74] Despite this, counsel for Oliver drew the Court's attention to a Messenger exchange that occurred on November 15, 2018, in which the three gentlemen were discussing a buyout figure for Nugent's and Hynes' shares. During this exchange Oliver offered to pay both gentlemen $250,000 plus the amount of $72,000 which was owed to him by Nugent and Hynes:

Oliver: "250"

Oliver: "And u can keep what u owe me"

Oliver: "That's another 72"

Nugent: "We would be selling ourselves way to short at that amount. I'll see what the offers are from the other 3 parties then let you know what they come in at."

(See Exhibit WN#1, Tab 1 page 7 of 481)

[75] On redirect he explained what he meant in this text exchange:

"Q. So, what is that 250 in light of -

A. That was my offer that I was going to offer them to get rid of them.

Q. Okay. And then look at the next text message above that. "And you can keep what you owe me." What were you referring to there?

A. The money for the leasehold improvements."

[76] In support of his client's position that Nugent and Hynes breached the Agreement by not paying the startup costs, Oliver's counsel referred this Court to our Court of Appeal's decision in *R.J.G. Construction Ltd. v. Marine Atlantic Inc*., (see paras. 25-26), where it cited with approval Justice Cromwell's reasons in *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10 (see paras. 144-145), which held that the term repudiation refers to a situation in which a breach of contract by one party gives rise to the right of the other party to terminate the contract and pursue the available remedies for the breach.

[77] Repudiation requires the breach of an important term giving rise to significant consequences. If the other party "accepts" the repudiation, the contract is over. If the other party does not accept the repudiation, the contract continues (subject to various other doctrines). Should this Court find there was repudiation, then the contract is terminated *ab initio.*

[78] Counsel for Nugent and Hynes counters this analysis saying the law is clear that if one party repudiates the contract and the other party accepts, then the parties are discharged from future obligations but rights and obligations that have already matured are not extinguished (see *Guarantee Co. of North America v. Gordon Capital Corp*., [1999] 3 S.C.R. 423, at para. 40).

[79] Where one party repudiates a contract, the other party **must** elect one of two options: either accept the repudiation, at which point the contract is terminated, or treat the contract as being in full force and effect, and each party can sue for past breaches should they choose to do so.

[80] In *Ali v. O-Two Medical Technologies Inc.*, 2013 ONCA 733, the Ontario Court of Appeal outlined the innocent parties' options as:

> Once the counterparty shows its intention not to be bound by the contract, the innocent party has a choice. The innocent party may accept the breach and elect to sue immediately for damages-in which case, the innocent party must "clearly and unequivocally" accept the repudiation to terminate the contract... Alternatively, the innocent party may choose to treat the contract as subsisting, "continue to press for performance and bring the action only when the promised performance fails to materialize"; by choosing this option, however, the innocent party is also bound to accept performance if the repudiating party decides to carry out its obligations.

[81] The alleged non-payment of Oliver's share of the startup costs is a strawman fallacy. Effectively, the evidence overall points to the reason for the breakdown of the party's relationship was the alleged exclusion of Oliver from the development of the cannabis craft grow initiative, not the lack of payment for the startup costs. The latter issue only arose during trial.

[82] I agree with counsel for Nugent and Hynes; when the *Gordon Capital Corp.* analysis is applied to the present circumstances then Nugent and Hynes had shareholder status effective the time the Agreement was reached in March 2018. Consequently, it was not open to Oliver to repudiate this condition of the Agreement when he could have made a formal demand for payment, start a legal action for the

non-payment, or seek various corporate remedies to ensure payment of the remaining startup costs of $72,000.

[83] Accordingly, I find that Oliver did not have a basis to repudiate the Agreement on this ground.

Issue #3: If there was no basis for repudiation, then what are the remedies available to the parties under the Agreement?

[84] Based on my finding that Oliver and The Herbal Center Ltd. did not have grounds to repudiate the Agreement, I must now consider what remedies are available. The parties seek separate remedies for separate reasons.

[85] Nugent and Hynes seek an Order that Oliver immediately issue shares in The Herbal Center Ltd. reflecting their respective 25% ownership.

[86] Oliver seeks an Order that Nugent and Hynes each pay their respective share of the remainder of the outstanding balance on the startup costs. This is based on the text messages exchanged between the gentlemen on November 14, 2018 (see Exhibit WN#1, tab 1, page 7 of 481).

[87] Based on my reasons above, I find Nugent and Hynes are entitled to their shares and to an independent valuation of their net worth. Similarly, I find that Oliver is entitled to $72,000 for the outstanding balance owed to him on the startup costs along with prejudgment interest.

Costs

The position of Nugent and Hynes

[88] The Court should depart from its starting point of Column 3 of the Scale of Costs, and make an order for solicitor-client costs on the basis that:

a. Oliver had no defence on the merits of the case; and

b. Oliver's conduct during the litigation made the matter more time consuming and complicated than it should have been; specifically, his refusal to admit the Agreement over five years of litigation, compounded by his last-minute change of position at the start of trial. This strategy was prejudicial to the Plaintiffs' conduct of the litigation and contributed significantly to the protraction of the proceedings.

The position of Oliver and the Company

[89] In response to the pleading's argument advanced by counsel for Nugent and Hynes, counsel argues that Oliver and the Company simply denied their allegations and put them to strict proof. The fact they did not acknowledge there was an Agreement makes no difference to the outcome because when the trial was over, Oliver had admitted on the record that he did not dispute the existence of the Agreement.

[90] Oliver and the Company posit there are two situations in which solicitor-client costs are warranted, namely: where there has been "reprehensible, scandalous or outrageous conduct" either in the circumstances (i) giving rise to the cause of action, or (ii) in the proceedings.

[91] Their counsel asserts that it was Nugent and Hynes who acted in a reprehensible, scandalous, and outrageous manner both in the circumstances giving rise to the cause of action as well as in the proceedings themselves; therefore, they are entitled to solicitor-client costs.

[92] Regarding the circumstances leading to the cause of action, he points to the evidence that Nugent and Hynes agreed to include Oliver in a marijuana business in British Columbia and reassured him they were working away at developing a craft grow operation; and eleven days before they kicked Oliver out of the chat room, Lifted Roots Inc. was incorporated.

[93] Regarding the conduct of Nugent and Hynes during the trial, he refers to the point in Nugent's cross-examination where it was pointed out that Hynes was mouthing answers to Nugent, calling it collusion, and noting that it destroyed the credibility of both of the parties and rising to the height of "reprehensible, scandalous and outrageous conduct".

RELEVANT LEGISLATION/RULES AND JURISPRUDENCE

Legislation

Section 53 of the *Judicature Act*, R.S.N.L. 1990, c. J-4

> (1) Subject to the rules and the express provisions of another Act, the costs of and incident to all proceedings in the court including the administration of estates and trusts are in the discretion of the court.
>
> (2) The court may determine by whom and to what extent costs awarded under subsection (1) shall be paid.

Rules

Rules of the Supreme Court, 1986, S.N.L. 1986, c. 42, Sch. D

When costs follow the event or are determined by the rules

55.03. (1) Unless the Court otherwise orders, the costs of a proceeding or of any issue of fact or law therein shall follow the event.

(2) Unless the Court otherwise orders, the costs of and occasioned by

(c) proving the truth of any fact or the authenticity of any document, that a party unreasonably denies or refuses to admit, shall be borne as provided in rule 33.04, by that party.

Costs on refusal to admit.

33.04. Where a party unreasonably denies or refuses to admit the truth of any fact or the authenticity of any document, the Court may order the party to pay the costs of proving the truth of the facts or the authenticity of the document at a trial or hearing.

Party and party costs

55.04. (1) Unless otherwise ordered, the costs between parties shall be determined by a taxing officer according to Column 1 of the Scale of Costs in the Appendix to this Rule, were

(a) default judgment is entered in a claim for a liquidated demand only, under rule 16.01(2)(a); or

(b) an uncontested order is entered under Rule 56A.

(2) Where paragraph (1) does not apply, the costs between parties, unless otherwise ordered, shall be determined by a taxing officer according to Column 3 of the Scale of Costs in the Appendix to this Rule.

(3) The Court may award costs to be taxed in accordance with any column or combination of columns under the Scale of Costs in the Appendix to this Rule.

(4) In exercising its discretion under this Rule, the Court may consider

(a) the amounts claimed, and the amounts recovered.

(b) the importance of the issues.

(c) the complexity, difficulty, or novelty of the issues.

(d) the manner in which the proceeding was conducted, including any conduct that tended to shorten or unnecessarily lengthen the duration of the proceeding.

(e) the failure by a party to admit anything that should have been admitted.

Jurisprudence

The Principle Governing the Award of Solicitor-Client Costs

[94] In *House of Haynes (Restaurant) Ltd. v. Snook* (1995), 134 Nfld. & P.E.I.R. 23, 57 A.C.W.S. (3d) 818 (Nfld. C.A.), at paragraph 89, our Court of Appeal approved the following statement of principle:

> The principle which guides the decision to award solicitor-and-client costs in a contested matter where there is no fund in issue and where the parties have not agreed on solicitor-and-client costs in advance, is that solicitor-and-client costs should not be awarded unless there is some form of reprehensible conduct, either in the circumstances giving rise to the cause of action, or in the proceedings, which makes such costs desirable as a form of chastisement. The words "scandalous" and "outrageous" have also been used. (see *Cominco v. Westinghouse* Can. Ltd. (1980), 16 C.P.C. 19 at 22 (B.S.S.C.); Jackh v. Jackh (1981), 31 B.C.L.R. 309 at 312; Sussex Invt. Ltd. v. Leskovar (1981), 30 B.C.L.R. 372 at 378 (C.A.); and Doyle Const. Co. v. Carling O'Keefe Breweries of Can. Ltd. (1988), 27 B.C.L.R. (2d) 81(C.A.).

The Principles Governing Meritless Claims

[95] In *Petten v. E.Y.E. Marine Consultants* (1998), 179 Nfld. & P.E.I.R. 94, 88 A.C.W.S. (3d) 974 (Nfld. S.C.(T.D.)), at paragraph 156, the Court discusses the issue of meritless claims and costs, noting that there are other options to deal with meritless claims, including summary proceedings:

> 156. The control of the improper use of the court for the presentation of meritless claims can be affected by resort to other mechanisms besides the imposition of solicitor-client costs. Rule 14.24 enables frivolous and vexatious claims or ones that are an abuse of the process of the court to be dismissed or stayed on application by the affected party. The very fact that the courts are reluctant to invoke that power unless the circumstances are "plain and obvious" (per Wilson, J. in Hunt v. Carey Canada [1990] 2 S.C.R. 959 at p.

> 980) that the claim is certain to fail, is reflective of the policy of not denying a litigant access to the court to have his or her claim dealt with on the merits. Again, even where the untenability of a claim is not apparent from the pleadings, but a party nevertheless believes that on the available evidence it is impossible for liability to be imposed on a given issue or against a particular defendant, mechanisms such as applications for trial of a preliminary question of law or fact under Rule 38 or for summary trial of an issue under Rule 17A can be availed of to derail the proceeding and save the expense of a full trial.

APPLICATION OF THE LAW TO THE FINDINGS

Pre-Trial Costs

No Defence on the Merits

[96] Counsel for Nugent and Hynes refers this Court to *Bixby v. B & K Carpet Warehouse Co.* (1987), 63 Nfld. & P.E.I.R. 232, 4 A.C.W.S. (3d) 1 (Nfld. S.C.(T.D.)), where the presiding justice ordered solicitor-client costs when a party did not act in good faith by advancing a claim which had no factual basis for an improper purpose.

[97] He acknowledges that the Court in *Petten* noted that meritless claims do not necessarily attract solicitor-client costs, but the situation here was complicated by Oliver's late acknowledgement that there was a contract, combined with a new legal argument of repudiation based on Nugent and Hynes' failure to compensate him for their complete portion of the startup costs, both of which were absent in his pleadings and discovery evidence. These two grounds justify an award of solicitor-client costs, not just to compensate his clients but as a punitive measure to express rebuke over the way in which Oliver used the litigation process.

[98] Oliver's pre-trial position required Nugent and Hynes to take a broad approach to discovery to gather evidence related to the existence of the contract.

This included the discovery of Oliver and several other potential witnesses (Caitlyn Green, Meighan Green, Darrin Cromwell - none of whom were called to testify), an application by Nugent and Hynes for document production, significant document review, and other pre-trial steps leading to prolonged litigation and increased expenses.

[99] The court record confirms Oliver maintained his position that there was no contract for five years, only to abandon it at the start of trial. This included filing a Defence filled with numerous factual inaccuracies and maintaining this position through an examination for discovery. Not only did he change his legal position at the start of trial, but he also took a new legal position on the facts.

Conclusion

[100] The occurrence of these unnecessary pre-trial procedures could have been avoided by a simple admission under Rule 33.04 that there was a contract, followed by an application to amend the Defence under Rule 15.02 to plead that he had not been fully reimbursed.

[101] Consequently, I award Nugent and Hynes costs on a Column III basis pursuant to Rule 55.04(4) (d) and (e) for the following pre-trial legal services:

- Costs associated with the preparation for and attendance on the discovery of Caitlyn Green, Meighan Green, and Darrin Cromwell;
- Costs for the preparation of two applications under Rule 30 to compel document production and associated attendances;
- Costs for the filing of the Certificate of Readiness, the Pre-trial Conference Brief, and any associated attendances;
- Costs associated with any attendance on a Settlement Conference or Case Management hearing; and

- Costs associated with the preparation of the Plaintiff's Trial Brief.

Trial Costs

Oliver's Conduct in the Litigation

[102] Counsel for Nugent and Hynes refers this Court to *Fowler v. Maritime Life Assurance Co.* (2002), 216 Nfld. & P.E.I.R. 132, 217 D.L.R. (4th) 473 (N.L.S.C. (T.D.)), where the presiding justice made an award of solicitor-client costs based on the conduct of the defendant insurer in persisting in its defence up until the day of trial, noting that it took the plaintiff over 10 years with 6 years of litigation at considerable cost and emotional investment.

[103] He suggests mechanisms such as applications for trial of a preliminary question of law or fact under Rule 38, or for summary trial of an issue under Rule 17A, could have been availed of to derail the proceeding and save the expense of a full trial had Oliver not chosen his litigation strategy of denying the existence of a contract and admitting that his real defence was repudiation.

[104] I agree with counsel for Nugent and Hynes this trial was scheduled for 5 days as a consequence of Oliver's defence; had the issue been limited to whether there was a breach of contract, rather than the issue of whether there was a contract at all, this would have made for a more focused trial, allowing the evidence to be tailored on the much more narrow issues of a breach and the right to repudiation by the innocent party. This is confirmed by the fact that the trial was completed in less than three (3) days.

[105] The question I must answer is: Does this amount to reprehensible, scandalous, or outrageous conduct either (1) in the circumstances giving rise to the cause of action; or (2) in the proceedings?

[106] I have addressed Oliver's pre-trial position on his denial of the existence of a contract and awarded costs on that basis. In examining this conduct in relation to trial costs I note the Court in *Petten*, at paragraphs 79 and 80, said conduct amounting to scandalous, outrageous, or misbehaviour, can include milder forms of misconduct but ultimately a court must determine whether it is "deserving of reproof or rebuke", making the award serve both a compensatory and a punitive function.

[107] In *Perry v. Heywood* (1998), 175 Nfld. & P.E.I.R. 253, 82 A.C.W.S. (3d) 1013 (Nfld. C.A.), at paragraph 64, our Court of Appeal provided the following examples:

> *a) Taking action in bad faith by making serious but unfounded allegations of wrongdoing ... .*

[108] While the statements in Oliver's Defence that there was no contract were untrue, I find that they do not rise to the level of bad faith. The legal components of there being an intention to create legal relations with certainty of terms seemed to be a concept Oliver had trouble grasping throughout the entirety of his evidence, making his understanding that there was a contract a deficient one.

> *b) Committing a fraud on the court by deceptive conduct or perjury.*

[109] As noted above, there are aspects of Oliver's testimony I have difficulty accepting due to my concerns over his credibility. However, I cannot conclude these concerns reach the threshold of deceptive conduct or perjury.

> *c) Engaging in obstructionist tactics or consuming trial time on unnecessary or irrelevant issues to exhaust the opponent's resources.*

[110] Counsel for Nugent and Hynes refers the Court to the line of case law dealing with last minute applications to amended pleadings and how these cases often award solicitor-client costs to recognize the throw-away costs associated with pre-trial

work that has been rendered of no use, or new work that may have to be done in light of the amended pleadings (see *Kings Gate Developments Inc. v. Drake* (1994), 17 O.R. (3d) 841, [1994] O.J. No. 633 (C.A.)).

[111] In this case, the entire proceeding unfolded over 5 years based on the Defence and Oliver's discovery evidence denying the existence of the contract. I agree with counsel's submission that Oliver's pre-trial position regarding this issue led to "throw-away" costs, but I addressed this previously with the award of Column III costs for these unnecessary pre-trial procedures.

Conclusion

[112] I am not satisfied that Oliver's conduct amounts to scandalous, outrageous, or misbehaviour. My findings, especially on credibility, demonstrate that I had difficulty in accepting some aspects of the evidence of all three gentlemen but, ultimately, I found that Oliver lacked any legal basis to repudiate the Agreement and certain rights and obligations had matured namely, Nugent's and Hynes' rights to their shares and Oliver's entitlement to payment of the remainder of the startup costs.

[113] Given that the ultimate result in this matter was mixed, ordinarily the parties would bear their own costs. However, since the primary issue governing the course of the litigation including the scheduling of trial time was the existence of a contract, and not the issue of repudiation which only arose at the outset of trial, then I exercise my discretion and award Nugent and Hynes their trial costs on a Column III basis.

DISPOSITION

[114] The Plaintiffs, Nugent and Hynes, are entitled to their shares of the Company and have leave to apply to the Court for a hearing on the present value of those shares.

[115] The Defendant, Oliver, is entitled to the remaining balance owed to him for outstanding startup costs of $72,000, plus pre-judgment interest.

[116] The Plaintiffs, Nugent and Hynes, are entitled to pre-trial costs and trial costs on a Column III basis.

PETER N. BROWNE
Justice