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(Winnipeg Centre)
Indexed as: Sensible Capital Corp. v. Galton Corporation
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COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:	)	**APPEARANCES:**
	)	
SENSIBLE CAPITAL CORP.,	)	
	)	J. Michael J. Dow and
	)	Kelsey M. Yakimoski
Plaintiff,	)	for the Plaintiff
	)	
- and -	)	
	)	
GALTON CORPORATION,	)	Jacqueline G. Collins
	)	and Blaine Hancock
	)	for the Defendant
Defendant.	)	
	)	
	)	Judgment delivered:
	)	November 6, 2020

JOYAL C.J.Q.B.

I. INTRODUCTION

[1] The plaintiff, Sensible Capital Corp. (Sensible) moves for summary judgment. Sensible's underlying claim and this summary judgment motion arise as a result of various alleged breaches of a debenture agreement (Debenture) by the Defendant, Galton Corporation (Galton).

[2] Sensible is a corporation duly incorporated under the laws of the Province of Manitoba and carries on business in Winnipeg, Manitoba. Mr. David Asper (Asper) is the president of Sensible.

[3] Galton is a corporation duly incorporated under the laws of the Province of Manitoba and carries on business in Winnipeg, Manitoba. Ms. Susan Bonk (Bonk) is the president and chief executive officer of Galton.

[4] Sensible loaned Galton $500,000, pursuant to the terms of a Promissory Note (the Note) and Debenture. Pursuant to the terms of the Note and Debenture, the principal amount, together with all interest accrued, immediately becomes due and payable upon the occurrence of an "Event of Default".

[5] An Event of Default occurs under the Debenture if Galton or Precision Weather Solutions Inc. ("PWS") (a company owned by Galton) is in "default in the observance or performance of any material covenant or condition to which it was subject pursuant to the Debenture" and if it fails to remedy the default within a period of 30 business days from the date of the notification.

[6] Sensible says that Galton breached (and did not remedy within 30 business days) the following "material" covenants under the Debenture:

i. Galton did not carry on and conduct business in a proper and efficient manner;

ii. Galton failed to provide Sensible with consolidated financial statements prepared on a review engagement basis and in accordance with generally accepted accounting principles, within 120 days (April 30) of the end of Galton's fiscal year (December 31); and

iii. Galton failed to convene a meeting of Sensible and the other Debenture holders at least twice annually.

[7] Galton rejects any claim by Sensible that it did not carry on or conduct business in a proper and efficient manner. Although Galton does not dispute the allegations that it failed to provide the consolidated financial statements as identified above and that it failed to convene a meeting of Sensible (and the other Debenture holders at least twice annually), Galton maintains that the two covenants respecting the consolidated financial statements and the annual meetings are not "material" as that term is intended in the Debenture.

[8] In addition, Galton relies upon the equitable defence of estoppel as set out under paragraph 7 of its statement of defence. Galton says that Sensible, through Asper, was aware, during the relevant period, that Galton had been struggling financially and that its focus had by necessity turned to an ongoing legal proceeding in which it was involved in respect of a previous dominant client. In this context, Galton says that Sensible, through Asper, had full knowledge of and had approved that Galton did not have the consolidated financial statements for 2016 and 2017, and that it could not convene a meeting of the board of directors (Board), the CEO, Sensible and the other Debenture holders without the financial statements, as otherwise required. It is Galton's position that Sensible, through Asper, also had knowledge of and had approved that Galton was, at the relevant time, pursuing and prioritizing the completion of Scientific Research and Experimental Development (SRED) credits (by and through Galton's accounting firm) rather than proceeding with the preparation of the financial statements. Galton contends that Asper

knew that the receipt of these tax credits, the obtaining of further financing and the achievement of some finality with respect to the ongoing litigation would be critical to Galton's future well-being. Galton submits that, as a result of Asper's alleged knowledge of Galton's financial difficulties and his approval of Galton's attempts to prioritize the completion of the SRED credits, it (Galton) delayed in the preparation of the financial statements and the convening of the meetings. Accordingly, it is the position of Galton that, given Asper's knowledge and conduct, Sensible is estopped from relying upon the "Event of Default" provisions.

II. ISSUES

[9] Based on the positions taken by the parties leading up to and during the oral submissions on this motion, the issues requiring the Court's attention reduce to the following questions:

1. Is this an appropriate case for summary judgment?

2. If this is an appropriate case for summary judgment, should the Court order that oral evidence be presented by one or more parties?

3. If this case can be decided on summary judgment, has Sensible established on the evidence that Galton breached one or more of the three covenants under the Debenture and that one or more of the three covenants are "material"?

4. Even if Galton breached one or more of the three covenants in question and that any of the breached covenants are found to be "material", is Galton nonetheless entitled to rely upon the defence of estoppel?

[10] The parties agree that were this matter to proceed to trial, the questions as set out above would be the issues requiring adjudication. In other words, if this matter can properly proceed through the summary judgment process and if Question 3 can be answered in the affirmative and Question 4 in the negative, there would remain no genuine issues requiring a trial and Sensible would be entitled to summary judgment.

[11] For the reasons that follow, I answer Questions 1 – 3 in the affirmative, and Question 4 in the negative. With those answers, I have determined that there remains no genuine issue requiring a trial. Accordingly, summary judgment is granted in favour of Sensible.

III. EVIDENCE ADDUCED AND AVAILABLE ON THIS MOTION

[12] Given some of the issues that need be determined on this motion, not the least of which is the foundational question as to whether this is an appropriate case for summary judgment, it is important to understand the evidence adduced and available on this motion.

[13] The evidence adduced on this motion provides in part a basis for deciding not only the question as to whether this case can be decided by summary judgment, but also a basis for the other essential determinations used to decide this motion's actual outcome.

[14] The following constitutes the evidence adduced and available on this motion:

1. The pleadings filed herein;
2. Affidavit of David Asper affirmed September 17, 2019;
3. Affidavit of Susan Bonk affirmed October 30, 2019;
4. Reply Affidavit of David Asper affirmed November 14, 2019;

5. Cross-examination transcript of David Asper dated December 5, 2019;

6. Cross-examination transcript of Susan Bonk dated December 6, 2019;

7. Answers to Undertakings from the cross-examination of Susan Bonk dated January 16, 2020; and

8. Answers to Undertakings from the cross-examination of David Asper dated February 13, 2020.

IV. FACTUAL BACKGROUND

[15] On the basis of the evidence adduced on this motion (as set out above), the following is the factual backdrop against which my later determinations are made in respect of the earlier-identified issues set out at paragraph 9.

[16] Unless there is a suggestion of uncertainty or evidence to the contrary, it should be understood that what is set out below in this section represents either uncontested narrative fact or, alternatively, facts which – for the purposes of this summary judgment motion – I have found to be fact, based upon the available evidence adduced on this motion. Additional and more-specific consideration of the facts may be set out later in other parts of this judgment where, in addressing the earlier-identified issues for my determination (see paragraph 9), I discuss the application of the governing law to the facts as I have found them.

Asper's Investment

[17] In November 2016, the president of Sensible, Asper, was presented with an opportunity to invest in Galton. He was advised that Galton owned PWS, a company that

was continuing to develop a weather forecast and analytics system designed for a broad range of potential customers. Bonk was the sole officer and director of PWS. To consider the investment, Asper was provided with a Galton Term Sheet, a Winnipeg Free Press Article about PWS and a Corporate Summary of PWS.

[18] Enclosed in the Corporate Summary were the 2015 unaudited financial statements of PWS, which indicated that PWS was prospering with $2.5 million in sales and had net income in excess of $600,000.

[19] The Corporate Summary also indicated that PWS was involved in litigation with Farmers Edge Inc. (Farmers Edge). Until November 2015, Farmers Edge was the dominant client of PWS. By that time, Farmers Edge was allegedly in breach of the agreements between the parties as the0y were in arrears with PWS on many accounts. Rather than rectifying the matter, Farmers Edge terminated the agreements, claiming a material breach of contract by PWS. Farmers Edge commenced an action against PWS in December 2015. PWS filed a defence and counterclaim in response, addressing Farmers Edge's non-payment of overdue invoices and attempts to infringe on PWS's intellectual property rights.

[20] To consider and evaluate the investment, Asper retained the services of Harold Heide. After reviewing the materials, they set up a meting with H. Sanford Riley, William Watchorn (who were the other investors in Galton) and Bonk. The meeting took place on or about December 14, 2016. Following the meeting, they all agreed that Bonk "might be on to something good", but that she would require close operational oversight to implement her plan. They further agreed that the Board's representation provided for in

the proposed Debenture, as well as the reporting and meeting requirements to non-Director Debenture holders, would suffice in keeping proper and sufficient oversight over Bonk.

[21] Asper set up a meeting with Bonk in the first week of January 2017, in order to further discuss Galton and PWS, the plan regarding her oversight, reporting requirements and her overall plan moving forward. At the meeting, Bonk discussed the general overview of what was happening in the business, the customer development she intended to pursue and the status of the litigation as between PWS and Farmers Edge.

The Loan: The Promissory Note, the Debenture and the Subscription Agreement

[22] After considering all of the above, Asper decided to proceed with the investment and Sensible loaned Galton the principal sum of $500,000 (the Principal Amount) pursuant to the terms of the Note dated January 20, 2017, and a $500,000 convertible subordinated Debenture also dated January 20, 2017.

[23] The terms of the Note provided, amongst other things, that:

1. Galton would repay Sensible the Principal Amount, together with all interest accrued thereon, in accordance with the terms and conditions of the Note (in the preamble);

2. the Principal Amount was to be repaid together with interest calculated and compounded semi-annually on the Principal Amount at a rate of eight per cent per annum on January 20, 2021 (the Maturity Date) (Article 1);

3. notwithstanding the Maturity Date, the Principal Amount together with all Interest accrued thereunder, would become immediately due and payable without

notice, on the occurrence of any Event of Default where not remedied in accordance with the terms of the Debenture (Article 2.01); and

4. if an Event of Default not remedied in accordance with the terms of the Debenture, Galton would also pay all costs incurred by Sensible in enforcing and collecting upon the Note, including legal costs on a solicitor-client basis (Article 2.01).

[24] The terms of the Debenture provided, amongst other things, that:

1. Galton covenanted and agreed that it would:

   i. carry on and conduct business in a proper and efficient manner (Article 5.01(b));

   ii. provide to Sensible consolidated financial statements, prepared on a review engagement basis and in accordance with generally accepted accounting principles, within 120 days of the end of each of their fiscal year during the terms of the Note and Debenture (Article 5.01(e));

   iii. convene a meeting of Debenture holders at least twice annually to permit the CEO of Galton and Galton's Board of Directors to report on the business and finances of Galton, PWS and any other subsidiary (Article 5.01(o));

2. the Principal Amount and Interest thereon would immediately become due and payable, upon the occurrence of an Event of Default (Article 7.01);

3. an Event of Default was said to have occurred if Galton or PWS made default in the observance or performance of any material covenant or condition to which it was subject pursuant to the Debenture or any other agreement with Sensible and if it failed to remedy the default within a period of thirty (30) business days from the date of notification of such default (Article 7.01(a));

4. if an Event of Default occurred, then upon demand of Sensible, without need for any other notice, Galton would forthwith pay to Sensible the Principal Amount that would become due and payable together with all Interest thereon (Article 7.02(a)); and

5. in the event Galton failed to forthwith pay the Principal Amount and Interest upon such demand, Sensible in its own name would be entitled and empowered to institute any action or proceedings at law or in equity for the collection of the sums so due and unpaid, and may prosecute any such action or proceedings to judgment or final decree, and may enforce any such judgment or final decree against Galton with respect to the monies adjudged or decreed to be payable (Article 7.02(b)).

[25] Under the Debenture, there is no ability for the Debenture holders to have any control with regard to the operation or direction of Galton or PWS. If the individual Debenture holders had objection to some aspect of the financial statements, they did not have an ability to require further financial information or take any further steps.

[26] In addition to the Debenture, Asper signed a Subscription Agreement. The Subscription Agreement is a required document under securities legislation pursuant to

National Instrument 45-106 *Prospectus Exemptions* (NI45-106). The Subscription Agreement was required to be entered into by each investor (Subscriber) with Galton.

[27] Asper acknowledges that if there was anything objectionable to him in the Subscription Agreement, that he would have decided not to go ahead with the Debenture and the Subscription.

[28] The Subscription Agreement includes representations and warranties of the Subscriber, including that the Subscriber is not relying upon any other information, representation or warranty made by Galton.

[29] In addition, the Subscription Agreement also sets out further representations and warranties and a number of risk factors. In order to invest in this company, the Subscriber was required to qualify for a prospectus exemption category under applicable securities laws, meaning the securities laws of Manitoba. Risk factors included that the Corporation would continue to require additional capital to conduct existing and planned activities, and that a failure to establish an adequate level of market acceptance or superior competitive technology would threaten the continued viability of the Corporation. Asper acknowledged that these were risk factors he was aware of.

[30] In addition, the Subscription Agreement also provided terms that the Subscriber had knowledge and experience in financial and business matters so as to be capable of evaluating the merits and risks of an investment in the Debenture, including the possible loss of the Subscriber's entire investment in the Debenture; that the Subscriber had consulted, to the extent deemed appropriate by the Subscriber, their own adviser with regard to the investment; that the Debenture was not qualified by a prospectus under

securities laws; the proceeds of the offering would be used for general corporate purposes in the sole discretion of the Corporation; the Subscriber was aware of litigation between the Corporation and Farmers Edge and that no representations were made as to the state or outcome of the litigation.

[31] The covenants of the Corporation expressly referenced in the Subscription Agreement are the requirement to pay the Principal Amount of the Debenture and Interest thereon, in accordance with the terms of the Debenture and the Note, and "certain other positive and negative covenants in relation to the conduct of the Corporation's business as more particular[ly] described in the Debenture."

[32] In addition, pursuant to the Schedules of the Subscription Agreement, Schedule "B" provided a number of additional risk acknowledgements, including that the investment was risky; there was a risk of loss of the entire investment; the Subscriber may receive little or no information about their investment; and that they met certain accredited investor status. Asper understood these risk factors at the time of making the investment and he met the accredited investment criteria.

[33] In addition to his acknowledgement and understanding of the risk factors identified above, the evidence also suggests that Asper's consideration and evaluation of the possible investment was also informed by his understanding and expectation that there would be the establishment of a board, reporting and meeting requirements and the obligation to provide financial statements. These mechanisms all appear to have been material to Sensible's investment in that they were perceived as a way of providing oversight in respect of Bonk and the business. As Asper intended on making a passive

investment, the evidence suggests that he never would have considered or made this investment without these basic accountability provisions upon which he could rely so as to enable him to monitor his investment.

[34] A Board was established for Galton in the summer of 2017. The Debenture holders held four seats consisting of H. Sanford Riley (Chairman of the Board), Robert Silver, Charles Loewen and William Watchorn. Bonk was also on the Board and, as the majority shareholder, was entitled to appoint three seats. However, Bonk only appointed one seat, that being Thomas Staples.

[35] Galton's fiscal year end is December 31. Pursuant to the terms of the Debenture, financial statements were to be provided to Sensible 120 days after that date, being on or before April 30 of each following year. As the Effective Date of the Debenture was January 20, 2017, Galton was required to provide the 2016 financial statements by April 30, 2017, the 2017 financial statements by April 30, 2018 and the 2018 financial statements by April 30, 2019.

Asper's Various and Ongoing Inquiries and Requests

[36] At various times from the making of the investment, Asper asked Galton, through requests to Bonk, to provide financial reporting and to meet with Debenture holders pursuant to the terms of the Debenture. However, Galton did neither. Asper also made ongoing inquiries of other investors and Board members as to what was happening in the operation of Galton, but it appeared no one had or was able to share any information.

[37] Throughout 2017 and 2018, Asper was aware of the status of the Farmers Edge litigation. In February 2018, he expressed an interest in helping in this litigation and he

became peripherally involved in efforts through his connections to facilitate a resolution of the litigation. He was provided with a large volume of Farmers Edge documents by Ms. Bonk. He was aware that the Judicially Assisted Dispute Resolution process had been pursued and that this had not been successful.

[38] Asper was also provided with the last written offer that Galton had provided to Farmers Edge. He had discussions about specific numbers with Ms. Wortzman, Corporate Secretary and President of Farmers Edge. Although Bonk and Mr. Loewen, a Debenture holder Board member, met with Farmers Edge representatives to attempt settlement, no resolution was concluded. Asper was invited to attend or call into Board meetings in March and May 2018 and he chose not to attend or participate.

Galton's Financial Difficulties

[39] By late spring, early June of 2018, Galton maintains that Asper became aware from Bonk that Galton and PWS were in serious financial trouble and that they were not going to make payroll. Galton also insists Bonk would have communicated to Asper, Galton's ongoing and needed attempts to obtain the SRED credits.

[40] I will pause here to note that, despite what parts of Galton's submissions would suggest, one of the sole factual questions about which there is a dispute, relates to what counsel for Sensible called the "grey area" surrounding whether and/or what Bonk would have communicated to Asper in early June of 2018. In that connection, there remains a question as to whether, as Galton contends, Galton, through Bonk, communicated to Asper in early June 2018 that Galton could not meet payroll and that Galton would be applying for the SRED credits.

[41] Despite the apparent dispute respecting that conversation and what was communicated to Asper in late spring, early June of 2018, it seems clear that the alleged conversation in question is relevant in this case, principally in relation to the issue of estoppel. In that regard, the governing legal test that would enable a successful estoppel argument is clear. The focus of that test in respect of estoppel is rigorous and it represents a "very high bar". Given the applicable legal test, and given my comments to counsel made at the time of their submissions respecting whether oral evidence would be required on this summary judgment motion, I will, for the purposes of my analysis later in this judgment, assume without deciding, that despite his lack of recollection, by early June 2018, Asper was made aware by Bonk of the serious financial trouble facing Galton and PWS and that he (Asper) was advised of the ongoing attempts to obtain the SRED credits. With that fact assumed, it will still be necessary when I confront the estoppel issue, to address the real and determinative question: whether, during or following the conversation in which Asper is assumed to have learned about Galton's financial difficulties and the alleged attempts to obtain the SRED credits, Asper did anything through words or conduct that suggest it was his ambiguous and unequivocal intention to alter Sensible's legal relationship with Galton?

[42] Irrespective of the "grey area" respecting the communication between Bonk and Asper in the spring of 2018, at some point, Asper was informed that the entire Board had resigned. Nonetheless, he received no formal communication of this, nor any information as to whether a new Board would be appointed.

[43] In early June 2018, Bonk convened a meeting with Asper, William Watchorn and Kerry Green. Bonk had advised that Kerry Green was interested in making an investment in Galton/PWS. Bonk then provided a draft term sheet, which could have seriously eroded the value of Asper's and other Debenture holders' investments.

[44] At the behest of H. Sanford Riley, an informal meeting of several Debenture holders was convened via teleconference as they all were prepared to consider any new financing that might assist the company. However, all participants agreed that they could not make any decisions about future financing of the company because no one knew quite what was going on respecting the company's status. It was conveyed to Bonk that they would not look at any proposal until she provided full disclosure as to the status of the company. That disclosure was never provided.

[45] Despite the June 2018 meeting where Bonk had mentioned the possible investment of Kerry Green, Galton had not scheduled regular meetings as it was required to do under the Debenture and it is suggested that as a consequence, prior to the spring of 2018, the extent of Galton's financial difficulties was unknown to Asper.

Sensible's Notice to Galton of its Events of Default

[46] Irrespective of what I have already indicated I will assume was in fact communicated to Asper by Bonk in early June 2018 about the difficulties in meeting payroll and the ongoing pursuit of SRED credits, Sensible had come to the view that Galton had defaulted under the terms of the Debenture. As a consequence, Sensible would specifically allege that:

1. Galton did not carry on and conduct business in a proper and efficient manner;

2. Galton failed to provide Sensible with consolidated financial statements, prepared on a review engagement basis and in accordance with generally accepted accounting principles, within 120 days of the end of Galton's fiscal year; and

3. Galton failed to convene a meeting of Sensible and the other Debenture holders at least twice annually.

[47] Sensible's position with respect to Galton's alleged default is evidenced by the fact that on June 11, 2018, only a few days after the alleged conversation/communication between Bonk and Asper, Sensible provided notice to Galton of its Events of Default under the Debenture and demanded that Galton remedy the Events of Default within 30 business days.

[48] Galton did not remedy the above Events of Default within the 30-business-day time frame. As a result, on September 13, 2018, Sensible issued its statement of claim against Galton for the Principal Amount and accrued Interest thereon under the Note and Debenture.

[49] On October 24, 2018, Galton filed a statement of defence. In its defence, Galton says that the Debenture provisions set out above are not material, and that, as a result, they do not trigger the default provisions under the Debenture. In addition, Galton says that Asper knew that the financial statements were not being prepared as they were pursuing SRED credits and that Galton was unable to convene a meeting of Galton and other Debenture holders without the financial statements.

The Eventual Provision of the Non-Consolidated, Unaudited and/or Non-Review Engagement Financial Statements

[50] On December 7, 2018, and only after the issuance of the statement of claim, Galton's counsel provided to Sensible's counsel Galton's 2016 consolidated financial statements, some 20 months after they were required to be provided under the terms of the Debenture. The 2016 financial statements were not prepared on a review engagement basis as required by Article 5.01(e) of the Debenture.

[51] On February 2, 2019, Galton's counsel provided to Sensible's counsel Galton's 2017 non-consolidated financial statements and PWS's 2017 unaudited financial statements, some 10 months after they were required to be provided under the terms of the Debenture. While the 2017 financial statements were prepared on a review engagement basis, they were not consolidated as required by Article 5.01(e) of the Debenture.

[52] Galton's 2017 non-consolidated financial statement indicates on page six that in 2017, Galton lost $356,000 as opposed to $15,000 in 2016 from operating activities (which was also a significant decrease from the net income in excess of $600,000 reported for 2015 as set out in the PWS Corporate Summary). It further indicated in note one on page seven that, as a result of those losses, there was material uncertainty that may cast significant doubt upon Galton's ability to continue as a going concern.

[53] With respect to PWS, the 2017 unaudited financial statement states at the Basis for Qualified Conclusion paragraph at page two that:

> The company has reported deferred revenue of $Nil on the December 31, 2016 balance sheet. We were unable to obtain access to relevant financial information to determine if this balance, and the resulting impact on net loss for the December 31, 2016 and 2017 years then ended, is appropriate. Consequently, we were unable to perform the procedures we considered necessary.

[54] In addition, the 2017 unaudited financial statement indicates in the Balance Sheet that retained earnings went from $709,693 in 2016 to a deficit of $3,428,531 in 2017, primarily because of losses in each of 2016 and 2017 of $2,000,000. It further indicates that a material uncertainty exists that may cast significant doubt upon PWS's ability to continue as a going concern primarily because of the net losses for the years ending in 2016 and 2017. The Statement of Operations on page six indicates significant amounts for product development, professional fees and salaries and benefits were spent in 2017 compared to 2016.

[55] For example, the:

1. professional fees were $452,180 in 2016, compared to $600,531 in 2017; and

2. salaries and benefits were $383,466 in 2016, compared to $755,115 in 2017.

[56] Bonk was questioned at her cross-examination as to why the professional fees and salaries and benefits were doubled in 2017 compared to 2016, but refused to answer the question, claiming the information is not relevant. Sensible contends that the marked increase in these expenses is relevant as to Sensible's allegation that Galton failed to carry on and conduct business in a proper and efficient manner. Sensible further contends that all of this exemplifies Galton's and Bonk's ongoing conduct of refusing to provide relevant financial information to Sensible.

[57] On December 2, 2019, Galton's counsel provided Sensible's counsel with Galton's 2018 non-consolidated financial statements and PWS's 2018 non-consolidated financial

statements, some eight months after they were required to be provided under the terms of the Debenture. While the 2018 financial statements were prepared on a review engagement basis, they were not consolidated as required by Article 5.01(e) of the Debenture.

[58] Galton's 2018 non-consolidated financial statement indicates on page four that in 2018, Galton lost $295,382 in 2018 from operating activities. It further indicates on note one on page seven that, as a result of the operating losses during the years ended December 31, 2018 and 2017, there is material uncertainty that may cast significant doubt upon Galton's ability to continue as a going concern.

[59] Lastly, it indicates on note four on page 10 that:

> The convertible debenture agreement includes a covenant whereby financial statements have to be provided to the debenture holders within 120 days of the end of each fiscal year. As at the issue date of the 2018 financial statements, the company was in violation of this covenant. As a result, the credit agreement was classified as a currently liability.

[60] Based on the above, it would appear that Galton's own accountants were of the view that the failure to provide the financial statements within the allotted time period was a material breach of the Debenture, thereby changing the state of the Debenture liability to a current liability.

[61] PWS's 2018 non-consolidated financial statement indicates on page five in the Statement of Operations that in 2018, PWS had a net loss of $556,452. It further indicates at note one on page seven that PWS had incurred operating losses during the years ended December 31, 2018 and 2017, and has a working capital deficiency and as a result, there is material uncertainty that may cast significant doubt as to whether the company will have the ability to continue as a going concern.

[62] In addition, that non-consolidated 2018 financial statement indicates on page 11 note four, that included in the accounts payable, is government remittances payable of $94,013 (2017 - $1,384 receivables) relating to federal and provincial sales taxes and source deductions. Apparently, as of January 16, 2020, this has been paid.

[63] As of December 4, 2019, both Galton and PWS were in default with the Manitoba Companies Office for failing to file annual returns.

[64] To date, Sensible has not received any payments towards the Principal Amount or accrued Interest thereon under the Note and Debenture.

[65] On the motion for summary judgment, Sensible is seeking judgment in the sum of $500,000, plus interest at a rate of eight per cent per annum calculated and compounded semi-annually pursuant to the Note and Debenture.

V. ANALYSIS

Is this an Appropriate Case for Summary Judgment?

[66] Galton argues that this is not an appropriate case for summary judgment as a summary judgment motion cannot achieve a fair and just determination of the issues in this action.

[67] In light of what Galton characterizes as significant factual disputes between the evidence of Sensible and Galton, it is Galton's position that it is not possible to make a determination respecting the "live" factual or legal issues in this case without hearing oral evidence of the principals of Sensible and Galton. Indeed it is Galton's position that the necessary determinations of all of the live issues are best served and informed by oral evidence coming not just from the parties, but also other potential witnesses. All of

which, says Galton, makes a trial the most proportionate and expeditious means of achieving a just result.

[68] When arguing the inappropriateness of summary judgment in this case, Galton submits, amongst other things, that the question of the "materiality" of the covenants can only be determined by taking into account not only the circumstances surrounding "the entering into" of the relevant agreements, but also, the intentions of the parties at the time the relevant agreements were entered into. Galton points out that Sensible was not the main party involved in the negotiation of the agreements. Accordingly, Galton argues that it may be that evidence of some of the parties involved in negotiating the agreements will need to be called in order to assist on the question of whether or not the covenants were material. In short, Galton asserts that all of that evidence is best adduced at trial and that the determination of what is a "material" term cannot best be decided on a summary judgment motion.

[69] As it relates to its estoppel argument, Galton submits that it must be recognized that, in the circumstances of this case, the estoppel issue represents what they describe as a question of "mixed fact and law". Accordingly, says Galton, the Court will require evidence from the parties. In this connection, Galton asserts that, insofar as there is any discrepancy in the positions of Galton and Sensible respecting what Bonk told Asper in early June of 2018 and what Asper knew and approved of concerning Galton's prioritized pursuit of the SRED credits over the preparation of the financial statements, an assessment based on oral evidence will be required. Galton suggests that along with all

the other evidence, the oral evidence adduced at a trial can show that Asper did demonstrate an intention to change the legal relationship between Sensible and Galton.

[70] Having carefully considered Galton's position as to whether it is appropriate to permit Sensible to pursue its motion for summary judgment, I have determined that Sensible's motion should be permitted to proceed. In other words, I have determined that the summary judgment motion in the circumstances of this case will provide a process that can achieve a fair and just adjudication of the issues in this action.

[71] The recent amendments to the Court of Queen's Bench Rules concerning summary judgment provide as follows:

> **When summary judgment motion may proceed**
> 50.04(5.2) The pre-trial judge must allow a proposed motion for summary judgment to proceed if he or she is satisfied that the summary judgment motion can achieve a fair and just adjudication of the issues in the action by providing a process that
>
> (a) allows the judge to make the necessary findings of fact;
>
> (b) allows the judge to apply the law to the facts; and
>
> (c) is a proportionate, more expeditious and less expensive means to achieve a just result than going to trial.
>
> **Orders and directions**
> 50.04(5.3) If the pre-trial judge determines that a motion for summary judgment may proceed, he or she may make any order or give any direction that he or she considers necessary or appropriate respecting the conduct of the motion, including an order or direction respecting the evidence in the motion and timelines for the completion of any step relating to the motion.
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> **Oral evidence**
> 50.04(5.4) Without limiting the generality of subrule (5.3), the pre-trial judge may order that oral evidence be presented by one or more parties, with or without time limits on its presentation, if the judge considers it necessary to make a determination on a motion for summary judgment.

[72] In ***Dakota Ojibway Child and Family Services et al. v. MBH***, 2019 MBCA 91 (CanLII) (***Dakota***), the Manitoba Court of Appeal had occasion to review and comment upon the new summary judgment Rules. In so doing, it also had occasion to review the Supreme Court of Canada's decision in ***Hryniak v. Mauldin***, 2014 SCC 7 (***Hryniak***), and the test for summary judgment in Manitoba. In commenting upon the "screening function" to be performed at the summary judgment conference (now performed at the pre-trial conference), the Court in ***Dakota*** noted as follows (at paras. 92-95):

> [92] At the conference, the judge will make a preliminary decision as to whether the motion will proceed (see r 20.03(4)). Rules 20.03(5) and 70.18.1(2) (which applies in family proceedings) provide that the judge must allow the motion to proceed if he or she is satisfied that the motion can achieve a fair and just adjudication of the issues in the action by providing a process that:
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> a) allows the judge to make the necessary findings of fact;
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> b) allows the judge to apply the law to the facts; and
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> c) is a proportionate, more expeditious and less expensive means to achieve a just result than going to trial.
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> These rules specifically incorporate the principles articulated in para 49 of *Hryniak*.
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> [93] Rules 20.03(5) and 70.18.1(2) describe the "threshold test" or "initial hurdle" that must be met by the moving party. If the judge is not satisfied that the process will meet the three requirements in those rules, the judge will direct that the motion not proceed (see r 20.03(4)). If this initial hurdle is met by the moving party, the judge hearing the motion must still decide, on the basis of the complete record, whether it is possible to make the necessary findings of fact and to apply the law to the facts to achieve a just result.
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> [94] It bears emphasis that if any one of the requirements in rr 20.03(5) or 70.18.1(2) is absent, the summary judgment process is not available in a child protection proceeding or in any other proceeding. These principles are interconnected and all speak to whether summary judgment will provide a fair and just adjudication (see *Hryniak* at para 50).
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> [95] As stated in *Hryniak*, "What is fair and just turns on the nature of the issues, the nature and strength of the evidence and what is the proportional procedure" (at para 59).

[73] The only issues to be decided in the present case are whether Galton breached one or more of the three covenants under the Debenture, whether each of those covenants is material and, with respect to the estoppel argument, whether Asper demonstrated an unambiguous and unequivocal intention to change the legal relationship between Sensible and Galton.

[74] In hearing the summary judgment motion in the present case, the Court will be in a position to make the necessary findings of fact on the evidentiary record before it. The Court will also be in a position to apply the governing law to those facts. When I examine the issues and the evidentiary record already before the Court and when I note, as earlier indicated, what it is that the Court is prepared to assume (as fact) in respect of the estoppel argument, I have concluded that if this claim were to proceed to trial, there are no further necessary or relevant facts that can only be established at trial. Indeed, the evidence that has been adduced on this motion more than allows this Court to make the necessary findings of fact to decide the issues that have been placed before the Court. Whether that evidentiary foundation and the connected findings of fact (or any assumed facts) are – upon the application of the governing law and the related legal tests – sufficiently persuasive to satisfy the Court that there still exists (or not) a genuine issue or issues requiring a trial is quite obviously a separate and distinct question. That separate question ought not to be conflated with the issue of whether the summary judgment motion in this case provides an adequate enough process to allow the judge to make the necessary findings of fact and apply the governing law to those facts for the purpose of achieving a fair and just adjudication of the issues on this motion. When

addressing that separate question and considering the adequacy of the summary judgment process in a given case, it should not be forgotten that under the new Rules, on a summary judgment motion, the Court may weigh evidence, evaluate credibility and draw reasonable inferences from the evidence, whether that evidence is provided in written or oral form.

[75] In the present case, I reject Galton's submission that in order for the Court to be able to determine whether any of the covenants alleged to have been breached are "material", the Court will require oral evidence and/or a trial. As I will repeat when I address the next question in this Analysis section (respecting the necessity of oral evidence on this summary judgment), I am of the view that based on the governing law, the Court has before it on the evidence already adduced, that which is required and relevant for a determination as to whether the covenants in question are material.

[76] The covenants in question have been clearly set out in the evidence. Their existence is not in dispute. The presence of those covenants in the Debenture and their contextual significance and relationship to the Note and Subscription Agreement can be examined and, where necessary, interpreted. Whether the issue is described as a question of law or a question of mixed fact and law or otherwise, the determination of whether a covenant is material can, in most cases, be determined by a court on summary judgment. That is no less the case as it relates to the question of whether the purported "material" covenant has been breached, particularly when the necessary foundational facts upon which the law will be applied, are, to a great extent, not in dispute. The Manitoba jurisprudence clearly suggests that issues of contractual interpretation are not

exempt from, and indeed can be addressed on, summary judgment. See, for example, ***Her Majesty the Queen v. Intact Insurance Company***, 2019 MBQB 190 at para. 20.

[77] In the present case, there is no dispute that Galton failed to convene any Debenture holder meetings and it also failed to provide any financial statements within the times prescribed in the Debenture. Both parties have filed affidavits. Cross-examinations have occurred on the affidavits. To the extent that such evidence includes potentially relevant evidence necessary to determine whether Galton breached a material covenant, that evidence is available for my examination and assessment. The determination of whether the covenants are material, principally involves the interpretation of the Debenture, the Note and the Subscription Agreement. On that question (the issue of materiality), some of those agreements may have little or no relevance. Whatever the relative and respective emphasis is to be placed on the agreements, individually or collectively, as will be apparent later in this judgment, I do not accept that in the circumstances of this case, the issue of "whether the covenants are material" can only be determined by, and require a consideration of, the oral testimony of those who drafted the relevant agreement or agreements (see the related jurisprudence and discussion at paras. 116-21 of this judgment). Accordingly, any such oral evidence, whether it would be addressed at a trial or even on this summary judgment motion, is not required for a fair and just determination of the issues in this action.

[78] As to Galton's estoppel argument, I similarly have determined that the summary judgment motion and its process will permit me to make the necessary findings of fact and apply the governing law to those facts. Indeed, as with the question concerning the

materiality of the covenants, not only will the summary judgment process on the estoppel argument achieve a fair and just adjudication of the issues, it also presents a more proportionate, more expeditious and less expensive means to achieve that just result.

[79] Insofar as Galton's estoppel argument asserts that in early June of 2018, Bonk communicated to Asper that Galton could not meet payroll and that Galton would be applying for SRED credits and prioritizing the pursuit of those credits rather than the preparation of the requisite financial statements, I have already indicated that I will assume for the purposes of this motion, that such a conversation and communication did take place. I do so recognizing that Asper has no recollection of such a conversation. Having assumed the fact of that conversation and the communication connected to that conversation, and given that both parties have filed affidavits and the transcripts from the respective cross-examinations on those affidavits, there is before the Court the requisite factual foundation upon which the governing law can be applied. In that connection, the present evidentiary foundation will allow the Court to determine whether Asper did anything through words or conduct that suggest it was his unambiguous and unequivocal intention to alter Sensible's legal relationship with Galton.

[80] For the foregoing reasons, Sensible's motion for summary judgment is permitted to proceed.

Given that this is an appropriate case for summary judgment, should the Court order that oral evidence be presented by one or more parties?

[81] My analysis and determinations in respect of the previous question have determinative application on this second question. In disposing of this second question,

I do not intend to repeat my related analysis and reasons as set out in the previous question, where I address the appropriateness of proceeding by way of summary judgment. It will suffice to note that I have concluded that oral evidence on this summary judgment is not necessary to clarify or complete the already-significant and existing evidentiary foundation before the Court in relation to those matters I must decide. Put simply, oral evidence on this summary judgment motion is not required to enable me to make the factual findings I must make and upon which I will apply the governing law to achieve a fair and just result.

Is Sensible entitled to summary judgment against Galton?

[82] The Court of Queen's Bench Rules which have application on a motion for summary judgment, are as follows:

> **Granting summary judgment**
> 20.03(1) The judge must grant summary judgment if he or she is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence.
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> **Powers of judge**
> 20.03(2) When making a determination under subrule (1), the judge must consider the evidence submitted by the parties and he or she may exercise any of the following powers in order to determine if there is a genuine issue requiring a trial:
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> (a) weighing the evidence;
> (b) evaluating the credibility of a deponent;
> (c) drawing any reasonable inference from the evidence;
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> unless it is in the interests of justice for these powers to be exercised only at trial.

[83] In the previously-noted Manitoba Court of Appeal judgment in ***Dakota***, the Court explained the test to be applied on summary judgment (at paras. 107-11):

> [107] The test for summary judgment may be briefly summarised as follows.

> [108] At the hearing of the motion, the moving party must first satisfy the motion judge that there can be a fair and just determination on the merits (i.e., that the process will permit him or her to find the necessary facts and to apply the relevant legal principles so as to resolve the dispute, and that proceeding to trial would generally not be proportionate, timely or cost-effective). In so doing, the moving party bears the evidential burden of establishing that there is no genuine issue requiring a trial.
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> [109] If those requirements are met, the responding party must meet its evidential burden of establishing "that the record, the facts, or the law preclude a fair disposition" (*Weir-Jones* at para 32; and *Stankovic* v *1536679 Alberta Ltd*, 2019 ABCA 187 at para 22; see also *Stankovic* at para 29) or that there is a genuine issue requiring a trial (e.g., by raising a defence). In other words, the responding party must establish why a trial is required (see *Hryniak* at para 56). If the responding party fails to do so, summary judgment will be granted.
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> [110] The analysis contemplated by Karakatsanis J in *Hryniak* is itself a two-step analysis (see para 66). First, the motion judge must determine if there is a genuine issue requiring a trial based only on the evidence, without using any additional fact-finding powers. If there is such an issue, the second step requires the motion judge to determine if the need for a trial can be avoided by weighing the evidence, evaluating credibility, drawing inferences and/or calling oral evidence (see r 20.07(2)).
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> [111] There is no shifting onus; the standard of proof is proof on a balance of probabilities; and the persuasive burden of proof remains at all times with the moving party to establish that a fair and just adjudication is possible on a summary basis and that there is no genuine issue requiring a trial.

[84] Mindful of the principles set out in ***Hryniak*** and ***Dakota***, I have already determined that there can be a fair and just determination on the merits of this case through the summary judgment process and that such a process represents a means of proceeding that is, in the circumstances of this case, proportionate, expeditious and less expensive.

[85] My analysis now turns to the evidential burden that the moving party (Sensible) bears in establishing that there is no genuine issue requiring a trial. If that requirement is met, I will then address whether the responding party (Galton) has established that

there is a genuine issue requiring a trial such that a summary disposition of this action should be pre-empted.

[86] As set out earlier at paragraph 9 when identifying the issues on this motion, in order to determine whether Sensible is entitled to summary judgment against Galton, the Court must address what are the two issues that would require adjudication if this matter were to proceed to a trial. If those two issues or questions can be properly determined and answered on this motion in favour of Sensible, then there are no remaining genuine issues requiring a trial and Sensible is entitled to summary judgment.

[87] For convenience, I again set out the two issues that require the Court's attention:

a. Can and has Sensible established on the evidence that Galton breached one or more of the three covenants under the Debenture and that one or more of the three covenants are "material"? and

b. Even if Galton breached one or more of the three covenants in question, and that any of the breached covenants are found to be "material", is Galton nonetheless entitled to rely upon the defence of estoppel?

[88] The following analysis explains why both questions can be answered in favour of Sensible and as a consequence, why I have concluded that there remains no genuine issue requiring a trial.

Can and has Sensible established on the evidence that Galton breached one or more of the three covenants under the Debenture and that one or more of the three covenants are "material"?

[89] The evidence before the Court clearly indicates that Sensible loaned Galton $500,000 pursuant to the terms of the Debenture.

[90] Pursuant to the terms of the Note and the Debenture, the Principal Amount together with all Interest accrued becomes immediately due and payable upon the occurrence of an Event of Default. An Event of Default is said to have occurred under the Debenture if Galton or PWS "made default in the observance or performance of any material covenant or condition to which it was subject pursuant to the Debenture" and it failed to remedy the default within a period of 30 days from the date of notification of such default.

[91] It is the position of Sensible that Galton breached (and did not remedy within 30 days) the following material covenants under the Debenture:

a. to carry on and conduct business in a proper and efficient manner;

b. to provide to Sensible consolidated financial statements, prepared on a review engagement basis and in accordance with generally-accepted accounting principals, within 120 days (April 30) of the end of each fiscal year (December 31) during the terms of the Note and Debenture; and

c. to convene a meeting of Debenture holders at least twice annually to permit the CEO of Galton (Bonk) and Galton's Board of Directors to report on the business and finances of Galton, PWS and any other subsidiary.

[92] I will briefly address each of these covenants in respect of Sensible's allegation that they were breached. If and where such a breach has occurred, I will then turn to the question of whether the breaches in question involve covenants that were "material".

Failure to Carry on Business in a Proper and Efficient Manner

[93] Sensible submits that the following evidence clearly establishes that Galton has failed to carry on business in a proper and efficient manner:

a. The financial statements of Galton show that:

   i. Galton lost $356,000 as opposed to $15,000 in 2016 from operating activities;

   ii. Galton lost $295,382 in 2018 from operating activities;

   iii. there is material uncertainty that may cast significant doubt upon Galton's ability to continue as a going concern as a result of the operating losses during the years ended December 31, 2017 and 2018;

b. The financial statements of PWS show that:

   iv. PWS's retained earnings went from $709,693 in 2016 to a deficit of $3,428,531 in 2017, primarily because of losses in each of 2016 and 2017 of $2,000,000 each;

   v. in 2018, PWS had a net loss of $556,452;

   vi. PWS has incurred operating losses during the years ended December 31, 2017 and 2018, and has a working capital deficiency, and, as a result, there is a material uncertainty that

may case significant doubt as to whether the company will have the ability to continue as a going concern;

vii. in 2018, PWS had unpaid government remittances of $94,013 (2017 - $1,384 receivables) relating to general and provincial sales taxes and source deductions;

c. As of spring or early summer 2018, Galton and PWS were in serious financial trouble and there was a concern that they weren't going to make payroll;

d. All of the Board members (besides Bonk) resigned in June 2018;

e. Galton breached the material covenants under the Debenture to provide financial statements to Debenture holders and to convene Debenture holder meetings twice annually; and

f. Galton and PWS are in default with the Manitoba Companies Office for failing to file annual returns.

[94] I have examined the evidence with respect to what Sensible alleges is Galton's failure to carry on business in a proper and efficient manner. Separate and apart from the question of whether or not this covenant is material, I am not satisfied that I am in a position on this summary judgment motion and on the basis of the evidence before me, to conclude on an "all things considered" basis that the facts invoked by Sensible point inexorably to the sort of managerial or operational dereliction and failure of stewardship suggestive of a failure to carry on business in a proper and efficient manner.

[95] There are no doubt questions and possible criticisms that can be raised against the leadership of Galton respecting some of its decisions and practices that may have led

to what quickly developed into some serious financial difficulties. As will become clear later in this judgment, I have in fact determined that some of what Galton omitted to do (respecting the financial statements and the Debenture meetings), constitutes significant and, indeed, material breaches of the stipulated covenants. That said, while Galton can be properly impugned for its material breaches in relation to the failure to provide the requisite financial statements and in its failure to convene the requisite meeting of Debenture holders, those failures, along with the other facts that Sensible points to in the evidentiary foundation respecting the lamentable state of Galton's corporate health, are still not sufficient so as to cause me in the circumstances of this summary judgment process to conclude that Galton failed to carry on and conduct business in a proper and efficient manner. Despite the legitimate and serious questions that can be asked in relation to how Galton found itself in the financial trouble it did, the type of assessment, evaluation and "judgment" that Sensible seeks in respect of the propriety and efficiency of Galton's stewardship and managerial conduct remains elusive, given the nature of the evidence before me. Accordingly, I have concluded that the paper evidence before me is not sufficiently clear so as to persuade me that, in respect of this particular covenant, Sensible has discharged its evidential burden.

[96] In concluding as I have in the circumstances of this case, my determination informed as it is by the paper evidence, should not be seen as pre-empting, on a summary judgment motion, the possibility of another court in the unique and particular circumstances of a different case, finding (on the basis of paper evidence) such a breach in a similarly-worded covenant.

[97] Given my finding, there is no necessity of considering the materiality of this covenant.

[98] As will be apparent in the reasons that follow, my determination that Sensible has not established that Galton failed to carry on business in a proper and efficient manner will not be determinative on this motion as it will not prevent Sensible from obtaining the dispositive result it seeks.

The Financial Statements

[99] It is clear from the evidence that Galton's fiscal year end is December 31. It is similarly clear that Galton is in breach of this covenant as there is no dispute that it did not provide Sensible with Galton's or PWS's 2016, 2017, 2018 financial statements within 120 days (April 30) of the end of each fiscal year. Although some of the financial statements were later prepared on a review engagement basis, and in accordance with generally-accepted accounting principles and some were consolidated, none of them were prepared on a review engagement basis and consolidated.

[100] Accordingly, I find that Galton breached the covenant requiring it to provide the financial statements when and as stipulated.

Debenture Holder Meetings

[101] As with the covenant discussed above (the Financial Statements), little time need be spent on Sensible's justified allegation that Galton failed to convene the necessary Debenture holder meetings.

[102] The evidence clearly reveals that Galton breached this covenant as there is no dispute that Galton did not convene a meeting of Debenture holders at least twice

annually, that would have, amongst other things, permitted Bonk and the Board to report on the business and finances of Galton, PWS and any other subsidiary. In the context of what would have been those Debenture holder meetings, that reporting would have been directly to the Debenture holders, including Sensible. The evidence is clear that Galton did not schedule even one such meeting in the three years since the Debenture was given. I note from the evidence that, throughout the period of Asper's own investment, he continuously requested, through Bonk, to have Galton hold a meeting of the Debenture holders.

The Materiality of the Covenants

[103] It is the position of Galton that none of the covenants identified by Sensible are material, such that any breaches cause the default provisions to come into effect.

[104] Based on what it says is the applicable law and the nature and limitations of the evidence adduced by Sensible on this summary judgment motion, Galton argues that Sensible cannot and has not demonstrated the requisite "materiality" of the covenants so as to be able to obtain the dispositive relief it seeks.

[105] It is Galton's position that Sensible's claim requires an interpretation and consideration of both the Debenture and Subscription Agreements. Galton contends that Sensible's position and its evidence fails to do so, just as it also fails to adequately consider the factual matrix of the actual agreements and by extension, the objective intention of the parties.

[106] Galton submits that where an agreement involves the execution of multiple contracts, the interpretation of one agreement must be considered in light of the terms

of all agreements. Part of one agreement may be part of a larger whole which may assist in helping to define the contours of the exact bargain between the parties. See ***Orwinski et al. v. Hi-Rise Capital***, 2019 ONSC 3975 (CanLII) at paras. 32-34. Galton asserts that Sensible's position and evidence on this summary judgment motion, especially on the issue of materiality, disregards and de-emphasizes parts of the Subscription Agreement just as it disregards and de-emphasizes the entirety of the actual surrounding circumstances of all the drafted agreements. According to Galton, Sensible inappropriately focuses solely on what it (Galton) says is the evidence of one party—Asper, a party who did not draft the agreements. The consequence of this approach, says Galton, is to focus entirely on the irrelevant intention of only one party.

[107] Galton invokes various cases which, in Galton's view, provide the necessary direction in respect of how the relevant contractual interpretation ought to be performed in cases like the present. In performing such contractual interpretation, Galton correctly argues that the goal of any court must be to determine the objective intention of the parties. This, says Galton, is a fact-specific goal conducted in tandem with the application of legal principles governing the interpretation of agreements. In this sense, the determination of an objective intent is a question of mixed fact and law. See ***Sattva Capital Corp. v. Creston Moly Corp.***, 2014 SCC 53 (CanLII) (***Sattva***) at paras. 49-50 (for a more full discussion of how questions on a review ought to be characterized – including questions of contractual interpretation – see ***Teal Cedar Products Ltd. v. British Columbia***, 2017 SCC 32, wherein the Court also confirms some of the applicable principles discussed later in this judgment). It is Galton's submission that, where, what

it says is an issue of mixed fact and law and, where the specific issue of interpretation involves the determination of the objective intention of the parties, the comparatively limited evidence (such as has been advanced by Sensible) usually adduced on a summary judgment motion, will seldom be appropriate for a dispositive determination by a court.

[108] According to Galton, part of Sensible's inadequate evidentiary foundation relates to its failure to confront and address the significant and substantive differences between the terms of the Subscription Agreement and the Debenture Agreement. In this regard, Galton argues that under the Subscription Agreement, there are significant risk factors that are set out which Galton maintains Sensible has failed to acknowledge in its evidence. In particular, the Subscription Agreement provides for express acknowledgment of the subscribers' awareness of the litigation between the corporation and Farmers Edge. Under the Subscription Agreement, the subscriber acknowledges that it is capable of evaluating the merits and risks of an investment in the Debenture (including the possible loss of the subscribers' entire investment in the Debenture). Galton insists that these acknowledgements must be taken into account when interpreting the Debenture Agreement and whether the plaintiff has met the persuasive burden to establish materiality.

[109] As noted, part of what Galton identifies as the inadequacy of Sensible's position and evidence relates to the exclusive emphasis on Asper's subjective understanding and intention. This approach, says Galton, fails to address the need for objective evidence and the provision of a relevant factual matrix from which the objective intention of the parties might be discerned. Galton submits that Sensible's evidence consists of the

opinion and evidence of but one party who did not draft the documents in question. This, says Galton, does not constitute the factual matrix needed to make the necessary analysis. In that regard, Galton suggests that the appropriate objective evidence as to the intent of the Debenture holders may have been provided, for example, by Mr. Riley or Mr. Finkbeiner, the lawyer who drafted these documents. Galton underscores that currently, there is no objective evidence to suggest that taking into account both the Debenture and the Subscription Agreements, it was the parties' intention that the Debenture holders would be able to sue on the Debenture if Galton did not provide financial statements in a timely manner, or did not hold Debenture holder meetings. Without such evidence, Galton contends that the Court cannot conclude that Sensible has established objectively, that the clauses are material.

[110] Galton submits that, without the evidence to establish the relevant factual matrix that would demonstrate the requisite objective intention of the parties, the Court is left with limited evidence as represented by the agreements themselves. In that connection, Galton suggests that the covenants cannot be considered material where it can be said (as Galton does) that even had Galton provided the requisite financial statements in a timely manner, and even had they convened the necessary Debenture holder meetings, the Debenture holders had no ability to act or react. Given what Galton submits is the absence of any rights on the part of Debenture holders that would flow from the provision of the financial statements or the convening of a meeting at which the corporation and Board members were permitted to present information as to the status of the corporation, the covenants in question cannot be interpreted as material. With that in mind, Galton

argues that the Debenture should be seen for what is, a loan, under which Galton has undertaken to pay back to the Debenture holder its initial investment and interest by 2021, or alternatively, to convert its interest into an equity interest. The Debenture holder is not a shareholder and is not, according to Galton, accorded the rights of a shareholder. For Galton, the main obligation of repayment under the Debenture remains intact and it is that which "goes to the root of" the contract and it is only that which is "material".

[111] I have considered carefully all aspects of Galton's argument in respect of materiality. Having done so, I am nonetheless persuaded by the position of Sensible that the covenants in question are in fact, and law, material.

[112] While the Debenture does not define what constitutes "a material covenant", there is on the evidentiary record before the Court, an ample basis for concluding that the covenants in question are material and that the issue of materiality no longer remains a genuine issue requiring trial.

[113] Much of the argument advanced by Galton on materiality revisits directly or indirectly the foundational position Galton advanced throughout this motion, which is that this case cannot and should not properly be decided on summary judgment or on the basis of the existing evidentiary foundation before this Court. I have already made a determination on the more general issue of the appropriateness of the summary judgment process in this case and I do not intend to repeat my analysis in that regard. To the extent that this argument of Galton is more specifically pitched to the issue of materiality, I will address and confirm yet again in that context, what I have already determined is, in my view, the Court's capacity in this case to make both the necessary

factual findings and, as well, proceed with the appropriate application of the relevant law for the purposes of coming to a fair and just adjudication.

[114] In contending that the question of materiality cannot be determined on summary judgment because of the need to take into account all of the evidence touching upon the surrounding circumstances and intention of the parties who entered into the agreement or agreements, Galton relies upon the judgment in ***Graywood Developments Ltd. et al. v. Campeau Corporation***, 1985 CarswellOnt 663 (Ont. S.C.). While I acknowledge the relevance and potential use of surrounding circumstances and the importance of identifying the intention of the parties, the application of ***Graywood***, however, is of limited use to the present case, in that ***Graywood*** did not involve a summary judgment motion and, moreover, it involved a motion for an order discharging the certificate of pending litigation issued against certain lands. I also note that the motion in ***Graywood*** was brought to a master and not to judge. Yet even if ***Graywood*** is distinguishable, I underscore in any event (as I have throughout this judgment by invoking Queen's Bench Rule 50.04(5.2) and by pointing to the reasons in ***Hryniak*** and ***Dakota***) that as long as the evidence before a given court allows a presiding judge to find the necessary facts and apply the relevant legal principles to those facts in order to resolve the dispute, and assuming that the process is proportionate, and a more expeditious and a less expensive means to achieve a just result than going to trial, then the summary judgment process is available and appropriate.

[115] As I will explain, the evidentiary foundation on this summary judgment motion on the issue of "materiality" more than permits me to find the necessary facts and apply the

governing law insofar as that evidence includes discernable objective evidence of the surrounding circumstances of the Agreement (as noted and explained below at paras. 117-18) from which facts can be found respecting the objective intention of the parties. When I consider that discernible objective intention combined with the discernible reasonable expectations of the parties (which I find in the agreements themselves) and when I interpret the agreement in a manner that accords with sound commercial principles and good business sense, I can and do conclude that the covenants in question are material.

[116] In ***Elias et al. v. Western Financial Group Inc.***, 2017 MBCA 110 (***Elias***), the Manitoba Court of Appeal thoroughly reviewed the principles of contractual interpretation. Needless to say, these principles have as much application on a motion (including a summary judgment motion) as they do at trial. In that judgment, Pfuetzner JA noted as follows (at paras. 68-71, 76):

> [68] It is well settled in Canada that the goal of contractual interpretation is to give effect "to the intention of the parties, to be gathered from the words they have used" (*Consolidated-Bathurst v Mutual Boiler*, 1979 CanLII 10 (SCC), [1980] 1 SCR 888 at 899). In *Sattva*, Rothstein J described the process of determining the intention of the parties when he wrote (at paras 47-48):
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> > 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.
> >
> > **The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement.**
>
> [69] Courts are required to consider the surrounding circumstances in interpreting a contract regardless of whether the contract may be ambiguous

(see *King* at paras 69-70; *Sattva* at para 46; *Fontaine et al v Canada (Attorney General) et al*, 2014 MBCA 93 at para 43; *Directcash Management Inc v Seven Oaks Inn Partnership*, 2014 SKCA 106 at para 13; *Shewchuk v Blackmont Capital Inc*, 2016 ONCA 912 at para 39; and *IFP Technologies (Canada) Inc v EnCana Midstream and Marketing*, 2017 ABCA 157 at para 82).

[70] The type of evidence that can be considered as part of the surrounding circumstances was described in *Sattva* (at para 58):

> The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract (*King*, at paras. 66 and 70), that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting.
>
> [emphasis added]

[71] However, **the surrounding circumstances cannot be used to overwhelm the words of the contract**. In *Sattva*, Rothstein J wrote (at para 57):

> The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract ([Geoff R] Hall, [*Canadian Contractual Interpretation Law*, 3rd ed (Toronto: LexisNexis, 2016)] at pp. 15 and 30-32). **While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement** (*Glaswegian Enterprises Inc. v B.C. Tel Mobility Cellular Inc.* (1997), 1997 CanLII 4085 (BC CA), 101 B.C.A.C. 62).
>
> . . . .

[76] **Contracts should not be construed in a manner so as to defeat the reasonable expectations of the parties. In my view, this principle is particularly important in the context of commercial contracts**, such as the ones at issue in this appeal, which were the subject of extensive negotiations between sophisticated parties. **Parties to such a contract have legitimate expectations that the contract will be enforced and construed in accordance with their reasonable expectations.** Indeed, the parties often will have entered into other arrangements with third parties based on an assumption that their reasonable expectations will be fulfilled. As noted in *IFP Technologies* (at para 192):

> **Whether expectations are reasonable can be informed by the commercial context of a contract**: ***Mesa*** [*Operating Ltd Partnership v Amoco Canada Resources Ltd*, 1994 CarswellAlta 89 (CA)], *supra* at

> para 20. **Reasonable expectations of contracting parties are to be found in the contract itself** rather that the court's abstract perception of what is "fair". **[T]he reasonable expectations of the parties operate so as to imply a term limiting one party's ability to perform a contract in a manner which undermines the interests of the other party.**
>
> [emphasis added]
>
> [**emphasis mine**]

[117] Insofar as Galton's position concerning materiality erroneously laments the absence of evidence respecting the objective intention of the parties, it need be stated that, while the relevant factual matrix (properly understood) and "the surrounding circumstances" need involve that which was or ought to have been within the knowledge of the parties at the time of the contract, they can also include evidence from which other objective background facts can be discerned: the commercial purpose of the contract, its aim and objectives, the nature of the relationship created by the contract and the nature or custom of the market or industry in which the contract was executed. See ***King v. Operating Engineers Training***, 2011 MBCA 80 at para. 72; and ***Geoffrey L. Moore Realty Inc. v. The Manitoba Motor League***, 2003 MBCA 71 at para. 15. Given the objectively discernible nature of some of the above reference points, which may make up the surrounding circumstances, it does not follow that in the pursuit of the objective intention of the parties, parol evidence (as discussed at paras. 119-21) is necessary in each and every case in order to identify or understand these reference points or the surrounding circumstances. With that in mind, contrary to Galton's categorical assertions, most of the surrounding circumstances and the information known to both parties is discernible on the evidence on this motion. In addition to noting the discernible surrounding circumstances in the present case, the interpretation of this, like all contracts,

also requires a court to remain mindful that it should interpret a contract in a manner that accords with sound commercial principles and good business sense and in a manner that avoids any commercial absurdity. See ***Albo v. The Winnipeg Free Press et al.***, 2019 MBQB 34 at para. 112.

[118] I am in agreement with Sensible that it has in fact provided objective evidence to support its position that the covenants in question are material. When one looks at the terms of the Debenture and at the Note and the information that was known or ought to have been known by both parties when the Debenture was signed, one can discern the following "surrounding circumstances":

1. The purpose of the agreement was to provide Galton, the holding company of PWS, with additional financing so that PWS could expand its general operations and infrastructure to support deals with new clients along with new product development;

2. At the time of the investment, Galton appeared to be prospering with $2.5 million in sales and had net income in excess of $600,000;

3. The Debenture holders (unless nominated to be on the Board of Directors of Galton) were making passive investments in Galton; and

4. In order for passive investors to be able to protect and monitor their investments and to keep Galton accountable, the Debenture contained certain covenants such as the obligation of Galton to be run in a proper and efficient manner, to provide financial statements and to hold Debenture holder meetings.

[119] The above surrounding circumstances can be easily discerned from the evidence before the Court. See ***Sattva*** at para. 58; and ***Elias*** at paras. 68 and 70. Again, I agree with Sensible when it says that it would not be appropriate in the circumstances of this case to receive evidence from the lawyer, Mr. Finkbeiner, who drafted the Debenture and the Subscription Agreement. While I will address the relevance of the Subscription Agreement below, it will suffice to note that any justification for such parol evidence from Mr. Finkbeiner in order to establish the surrounding circumstances of the Agreement, does not exist in the present case, given that those surrounding circumstances can already be identified and examined on the existing evidentiary record that has been put before me. If Galton took issue with what Sensible maintains is the relevant and surrounding circumstances of the Agreement as represented by Sensible, Galton itself could have attempted to adduce evidence from Mr. Finkbeiner, which might have further clarified or contextualized the surrounding circumstances that Galton seems to contend have been de-emphasized or ignored by Sensible. No such attempts were made by Galton. In any event, insofar as there is, as noted, evidence already available in respect of both the surrounding circumstances of the Agreement and obviously, of the Agreement itself, objective evidence of intention of the parties is available and discernible on the issue of materiality. Given the availability of that evidence, any supplemental or extrinsic evidence from the drafting lawyer would be, more likely than not, impermissibly addressing, amongst other things, the subjective intention of the parties.

[120] In respect of parol evidence, Rothstein J. noted the following in ***Sattva*** at

paras. 59-60:

> It is necessary to say a word about consideration of the surrounding circumstances and the parol evidence rule. The parol evidence rule precludes admission of evidence outside the words of the written contract that would add to, subtract from, vary, or contradict a contract that has been wholly reduced to writing (*King*, at para. 35; and Hall, at p. 53). To this end, the rule precludes, among other things, evidence of the subjective intentions of the parties (Hall, at pp. 64-65; and *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129, at paras. 54-59, *per* Iacobucci J.). The purpose of the parol evidence rule is primarily to achieve finality and certainty in contractual obligations, and secondarily to hamper a party's ability to use fabricated or unreliable evidence to attack a written contract (*United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316, at pp. 341-42, *per* Sopinka J.).
>
> The parol evidence rule does not apply to preclude evidence of the surrounding circumstances. Such evidence is consistent with the objectives of finality and certainty because it is used as an interpretive aid for determining the meaning of the written words chosen by the parties, not to change or overrule the meaning of those words. The surrounding circumstances are facts known or facts that reasonably ought to have been known to both parties at or before the date of contracting; therefore, the concern of unreliability does not arise.

[121] I acknowledge, as did Rothstein J. in ***Sattva*** at para. 61, that the parol evidence rule has, given the increased emphasis on surrounding circumstances, become somewhat of an anachronism, or, at the very least, of limited application in view of the many applicable exceptions. That said, in the present case, parol evidence from Mr. Finkbeiner and/or others is unnecessary, given the already-identifiable surrounding circumstances available on the record that both parties had a hand in creating.

[122] Although Galton impugns the evidence of Asper as constituting only evidence of subjective intention, such criticism fails to appreciate the purpose of parts of Asper's evidence, just as it fails to appreciate that there is also separate substantiating evidence before the Court that addresses the objective intention of the parties on the issue of materiality. As it relates to Galton's criticism of Asper's evidence, that criticism, in my view, fails to distinguish between the alleged evidence of Asper's subjective intention and

his evidence as a passive investor, which evidence addresses, amongst other things, what he reasonably and legitimately expected would be protections that would come from the safeguards that form part of the written commercial agreement and whose words speak for themselves. While anything Asper might say respecting his intention (in signing the Agreement) cannot and will not be determinative on the issue of materiality, his evidence as a party and as a passive investor can legitimately be taken as confirming his reasonable expectations, which reasonable expectations are, importantly, otherwise discernible and objectively found in, and congruent with, the words of the contract itself and the surrounding circumstances of its creation.

[123] To the extent that the surrounding circumstances consist of background facts objectively knowable to both parties, they can in the present case, be discerned and they can be properly taken into account based on the current evidentiary record. As with any case, however, those surrounding circumstances should nonetheless not be used to overwhelm the words of the Debenture and Note, which linguistically and contextually have clear meaning. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract. In other words, the terms of an agreement should not be construed in a manner so as to defeat the reasonable expectations of the parties, which is a matter of particular importance in the context of commercial contracts where the "reasonable expectations" of contracting parties are often found in the contract itself. Indeed, when I examine the available surrounding circumstances in the present case, they can in my view be used to substantiate and

confirm the intention and reasonable expectation of the contracting parties to make the covenants in question material.

[124] When I examine the Debenture and Note, I conclude that the reasonable expectations of the parties can be determined such so as to suggest that the covenants in question are material. The covenants were clearly intended to engage the default provisions as they were the only way that the Debenture holders (who in this case are passive investors who have invested substantial sums of money) could expect to protect and monitor their investments and to some extent, hold Galton accountable. As Sensible has suggested, had Sensible received the financial statements within the times prescribed by the Debenture, Sensible could have perceived that PWS was in fact losing money contrary to the 2015 financial statements which were provided to Sensible when Galton was soliciting Sensible for its investment. Additionally, had Galton convened Debenture holder meetings twice per year, Sensible could have had more timely information as to the financial stability of Galton and PWS and Sensible could have had input as to possible solutions. Instead, such information came only when Asper was advised that Galton and/or PWS may not be able to make payroll.

[125] As it relates to Galton's argument concerning the relevance of the Subscription Agreement, I can only say that I am far from convinced that it forms a determinative part in the interpretation of the Debenture or, more specifically, that it need be considered in determining whether the covenants under the Debenture are material. It would seem obvious that the Debenture is what governs the relationship and obligations between the parties with respect to the Debenture. It is the Subscription Agreement which governs

the terms of the acquisition of the Debenture. I am in agreement with Sensible when it argues that it would be odd indeed were the terms of the Subscription Agreement able to negate the positive obligations under the Debenture which Galton assumed.

[126] While I accept that Sensible clearly entered into the Subscription Agreement, and in doing so it acknowledged that the investment was risky, there is nonetheless nothing in the Subscription Agreement provisions which are relevant to the determination of whether or not the covenants in question are material. The evidence before the Court suggests that despite the provisions of the Subscription Agreement, Sensible entered into the investment on the basis that it could rely upon the covenants of the Debenture to monitor and protect its investment. These safeguards can and should be seen as existing irrespective and perhaps because of the acknowledged accompanying risks. Such expectations are reasonable and discernible when a court examines and interprets the relevant provisions, particularly where they arise in the context of a commercial contract.

[127] Insofar as it is Galton's position that the only covenant that is material in the Debenture is the covenant to repay the loan on maturity (with interest at the prescribed rate), I say only that such an interpretation represents a commercial absurdity. As mentioned earlier, the Court has an obligation not only to avoid such an absurdity, but also and instead, to interpret a contract in a fashion that accords with sound commercial principles and good business sense.

[128] When I consider the terms of the Note and the Debenture, and when I consider Galton's position that the only covenant that is material in the Debenture is the covenant to repay the loan on maturity, it becomes clear that Galton's argument makes no sense.

[129] The Note provides as follows:

a. The principal amount was to be paid together with interest calculated and compounded semi-annually on the principal amount at a rate of 8.00 per cent per annum (the "interest" on January 20, 2021 (the "Maturity Date") (Article 1)); and

b. Notwithstanding the Maturity Date, the principal amount together with all interest accrued thereunder, would become immediately due and payable without notice on the occurrence of any Event of Default (as determined as was defined in the Debenture) unless such Event of Default was remedied in accordance with the terms of the Debenture (Article 2.01).

[130] The Debenture provides as follows:

a. Galton covenanted and agreed that it would:

i. pay principal, interest and other monies pursuant to the terms of the Debenture and Note (Article 5.01(a));

b. The Principal Amount and Interest thereon would immediately become due and payable, upon the occurrence of an Event of Default (Article 7.01); and

c. An Event of Default was said to have occurred if Galton or PWS made default in the observance or performance of any material covenant or condition to which it was subject pursuant to the Debenture or any agreement with the Debenture holders and it failed to remedy the default within a period of thirty (30) Business Days from the date of notification of such default (Article 7.01(a)).

[emphasis added]

[131] It should be obvious that Article 7.01 of the Debenture is an acceleration clause which would permit Sensible to accelerate Galton's obligation to repay the loan prior to the Maturity Date upon an Event of Default which in turn requires the default of the material covenant. If Galton's argument is valid, then there could never be an Event of Default as the only material covenant is the obligation to repay the loan at the Maturity Date. In other words, there would never be a case where Sensible could accelerate the loan. The consequence of Galton's argument is that Article 7.01 is rendered meaningless, which is as Sensible identifies, a result that would contravene the basic principles of governing contractual interpretation. Accordingly, for Article 7.01 to have meaning, there must be some other covenants in the Debenture that are material that would permit the acceleration of the loan. When I consider the language in the Debenture and the objective intention of the parties as can be gleaned by the language of the Debenture and the surrounding circumstances of that same Debenture, I have no difficulty concluding that the three covenants in question do represent material covenants whose breach could accelerate the loan as contemplated. Such an interpretation in the present case accords with sound commercial principles, good business sense and it is also consistent with the reasonable expectations of the parties which I find are present and found in the agreement itself.

[132] In addition to my consideration of the surrounding circumstances, the language of the Debenture, the connected objective intention of the parties and the reasonable expectations as found in the agreement, I note as well that the "materiality" of a term or a covenant can be discerned by its "importance", its "essential" nature and "relevance",

when considered in the context of an agreement and when considered in relation to what those terms were intended to do and regulate. Respecting Galton's significant obligation to provide timely financial statements and to schedule Debenture holder meetings twice a year, and as it relates to the adjectives and descriptors that can characterize that obligation, Sensible invokes the judgment in ***Stone Graphic Publications v. Stone Graphics Inc.***, 1995 CanLII 685 (BC SC) (***Stone Graphics***) where the British Columbia Supreme Court considered whether certain terms of a partnership agreement were material. In that case, the plaintiffs, who were all limited partners in the partnership, passed a special resolution removing the defendant (Stone Graphics Inc.) as the general partner. The limited partnership agreement allowed for the removal of the general partner by the limited partners in the event of a breach by the general partner of a "material term" of the partnership agreement. Having brought an action for, amongst other things, a declaration that the special resolution was valid, the British Columbia Supreme Court noted (at para. 22):

> The special resolution passed on July 27, 1994 says that Stone Graphics Inc. breached certain material financial terms of the partnership agreement including: Article 6.3(c) - failure to prepare and present an annual budget; Article 10.4 - failure to provide financial statements of the partnership within 90 days after the end of the fiscal year; Article 10.3 - failure to retain an accountant to review and report upon the financial statements; Article 6.3(d) - failure to take in and account for income from the partnership business by materially overstating the income; and Article 6.12 - co-mingling the funds of the Partnership with the funds of the general partner and others.
>
> [emphasis added]

[133] In finding that the defendant had indeed breached the terms of the partnership agreement and that the above articles were material terms of the Partnership Agreement,

the Court also noted the following (at paras. 48-49):

> [48] "Material" is defined in the Concise Oxford Dictionary, 8th Edition, as "...important, essential, relevant...". The plaintiffs say that the terms of the partnership agreement breached by the general partner are material in the sense that they are relevant, important and essential. The defendants do not plead that the terms are not material. I conclude that these Articles do contain "material terms" of the partnership agreement. Because as limited partners the plaintiffs are prohibited from participation in the business of the Partnership, the obligation on the general partner to account for the income and assets of the Partnership; to prepare and present proper financial statements; to retain an accountant to review and report on the financial statements; and to report annually concerning the status of the Partnership are fundamental to the protection of Partnership assets and the investment of the limited partners, see *337965 B.C. Ltd. and others v. Tackama Forest Products Ltd. and others*, unreported, B.C.C.A., Vancouver Registry CA014177, May 11, 1992; and *King and others v. On-Stream Natural Gas Management Inc. and others*, Shaw, J., B.C.S.C., Vancouver Registry, C904711, June 19, 1993.
>
> [49] The inventory of art work in the possession and control of the general partner is the only security the limited partners have for their investment. A failure to properly account for the inventory places the limited partners' investment at risk. As well, the partners are obliged to report to Revenue Canada in order to take advantage of tax-deductible losses or to remit tax on partnership profits. The failure by the general partner to provide accurate financial information in a timely fashion, especially concerning income, also materially affects the limited partners.
>
> [emphasis added]

[134] In the present case, as set out by Asper in his Affidavit, this was a passive investment by Sensible. Sensible did not have a seat on the Board of Galton. Accordingly, Sensible was entirely reliant on the Debenture provisions regarding financial statements and Debenture holder meetings to be able to assess and monitor its investment in a timely fashion. No such Debenture holder meetings were held and Sensible received financial statements only months after their respective due dates and only after the action in the present case was brought. Sensible is accurate when it draws this Court's attention to the similarities as between its situation and that of the plaintiff limited partners in ***Stone Graphics***.

[135] I accept the submission of Sensible that the covenants in question under the Debenture are in the present case material as they are "important, essential and relevant" to the Debenture and the agreement as a whole as between the parties. The covenants in question created duties on the part of the corporation that were fundamental to the protection of the investments of the Debenture holders who were passive investors. While not determinative in this case, I do note that the evidence of Asper is that the establishment of a Board as well as the reporting and meeting requirements and the obligation to provide financial statements, were all material to his investment insofar as they provided a means of oversight with respect to Bonk and the business. Asper's evidence and his reasonable expectation in this regard are consistent with the objective intention of the contracting parties and the important, relevant and essential nature of the covenants as discernible from the surrounding circumstances and the words of the Debenture.

[136] In coming to the conclusion I have respecting the materiality of the identified covenants, I question the starkness of Galton's position when it insists that for a covenant to be "material", it must go to "the root of the contract", almost on the order of a "fundamental breach". While the breach of material term or covenant may sometimes or often represent a "fundamental breach" which goes to the "root of a contract", materiality should not be unconsciously conflated with or dependent on those terms. Sensible is correct to maintain that the right to terminate for fundamental breach is independent of the rights to terminate under a debenture and vice versa. See ***Pioneer Hi-Bred***

International, Inc. v. Richardson International Limited, 2010 MBQB 161 (CanLII) at paras. 114-16.

[137] When examining the appropriate manner by which to determine the level of gravity (or materiality) attaching to the breach of any of the covenants, it is instructive to note as I did earlier in this judgment at paras. 59 and 60 that, based on note four on page 10 of the 2018 non-consolidated financial statement, it would appear that Galton's own accountants had concluded that the breaches in question were material in that they changed the state of the Debenture liability to a current liability.

[138] Finally, I wish to note as well, that in observing as I do that the covenants did create duties on the part of the corporation that were fundamental, those duties, despite their connection in part to the provision of financial statements and obligatory Board meetings, are obligations of the corporation. In other words, even if the Board had indirectly endorsed or specifically decided to concentrate on the pursuit of SRED credits, that does not change the obligations of the corporation to the covenants and it certainly does not dilute the materiality of the covenants.

Even if Galton breached one or more of the three covenants in question, and that any of the breached covenants are found to be "material", is Galton nonetheless entitled to rely upon the defence of estoppel?

[139] It is Galton's position that Sensible, because of the knowledge and conduct of Asper, is estopped from relying upon the provisions in the Debenture that require Galton to provide timely financial statements and convene Debenture holder meetings, just as it is similarly estopped from relying upon the acceleration clause contained in Article 7.01. Bonk alleges on behalf of Galton that Asper knew that Galton was pursuing the SRED

credits and knew of its impact upon Galton's ability to produce its financial statements and its ability to convene Debenture holder meetings. Galton suggests that, as a result of Asper's knowledge and conduct, Bonk/Galton delayed the preparation of the financial statements and the holding of Debenture holder meetings.

[140] As I have already explained, I will, for the purposes of this summary judgment motion, assume—despite Asper's lack of recollection of the conversation—that Bonk communicated with Asper in early June of 2018 as she alleges with respect to the SRED credits and its impact upon Galton's ability to produce financial statements and to convene Debenture holder meetings. Yet even with that assumed fact, the Court must address, in order to determine this final question, whether Asper made a clear, unequivocal and/or unambiguous representation (or did anything by way of conduct) such so as to suggest that Sensible did not intend to enforce its strict legal rights against Galton and did thereby alter the legal relations between the parties.

[141] After having given careful thought to Galton's arguments and the evidence before the Court on this summary judgment motion, I have determined that neither through his words or conduct, did Asper do or say anything that suggests Sensible's intention to not enforce its strict legal rights against Galton and therefore alter the legal relations between the parties.

[142] In ***North American Trust Co. v. 56358 Manitoba Ltd.***, 1995 CarswellMan 176 (***North American Trust***), Krindle J. had occasion to comment upon the defence of estoppel. The following was set out at para. 8:

> In *Prudential Assurance Co. (Trustee of) v. 90 Eglinton Ltd. Partnership* (1994), 25 C.B.R. (3d) 139 (Ont. Gen. Div. [Commercial List]), at p. 147, Farley J. of the

> Ontario Court of Justice adopted the principle of promissory estoppel set out in the 13th edition of *Hanbury and Maudsley: Modern Equity* (London: Stevens & Sons, 1989):
>
> > Where, by words or conduct, a person makes an unambiguous representation as to his future conduct, intending the representation to be relied on, and to affect the legal relations between the parties, and the representee alters his position in reliance on it, the representor will be unable to act inconsistently with the representation if by so doing the representee would be prejudiced.
>
> [emphasis added]

[143] The plaintiff trust company in ***North American Trust*** had lent $13 million to the defendant numbered company secured by demand debenture. The parties made an agreement that only the interest on the loan and property taxes were to be paid. Four years later, the plaintiff gave notice to the defendant that it was no longer prepared to continue the payment arrangement, and the loan was to be paid in full within 60 days. In that case, the defendant argued that by continuing negotiations for the potential negotiation of the loan, the plaintiff was estopped from relying upon the legal effect of its notice under the debenture. The Court found that despite ongoing negotiations for the potential renegotiation of the loan, there was no evidence to show that the plaintiff had intended to alter the legal relationship. On that point, the Court noted as follows (at paras. 7 and 9):

> [7] Even if it were possible that the defendants believed, because they wanted to believe, that the ongoing discussions meant that **North American Trust** would not enforce its rights, there is absolutely no evidence from which it can be inferred that **North AmericanTrust** intended that the legal relations created by the giving of notice would be altered as a result of the fact of the discussions.
>
> . . . .
>
> [9] In the facts of this case, the only unambiguous representation which has been proved is the representation by **North AmericanTrust** that it intended to realize on its security. I am not satisfied on a balance of probabilities

> that **North American Trust** ever represented, by act or deed, that it would not do so. The most I am prepared to find is that the defendants, based more upon wishful thinking than anything else, may have convinced themselves that so long as they kept talking and paying the interest and taxes, the problem would go away.

[144] In ***Sales Promotion Services Inc. v. Ultramar Canada Inc.***, 1998 CanLII 5995 (ON CA) (***Sales***), the Court summarized what is required for unambiguous representation. The Court noted as follows at para. 4:

> …In order to ground an estoppel, there must be a promise or a representation in the nature of a promise; the promise must be intended by the promisor to affect the legal relationship between the parties; and, by the promise, the promisor must indicate that it will not insist on its strict legal rights arising from its relationship with the promisee. Even assuming that such a promise or representation may be made by silence, the promise must be an unequivocal representation that the promisor does not intend to enforce his strict legal rights against the promisee. To bring the legal doctrine into operation, the promise or representation must be "clear" or "unequivocal" or "precise and unambiguous".

[145] The parties in ***Sales*** had reached an oral agreement and agreed to set it down in writing. Despite repeated attempts by the plaintiff to have the defendant sign a written agreement to give effect to the terms pursuant to the Ontario *Sale of Goods Act*, R.S.O. 1990, c. S.1, the defendant refused to do so, and never responded to the plaintiff's attempts to communicate. As a result, the plaintiff brought an action against the defendant after the defendant alerted them that the project that was the subject of the contract had to be put on hold. The trial judge found that the defendant was estopped from denying the existence of the oil contract. The Court of Appeal however, held that the silence was not an unequivocal representation that intended to alter the legal rights of the parties (at para. 5):

> In this case, there was no such promise or representation made by the appellant. Its silence cannot be said to have conveyed a clear or unequivocal or unambiguous promise either to waive its legal rights under s. 5(1) of the Sale of Goods Act or to undertake to sign a document in writing that would meet the terms of that section. While we share the trial judge's displeasure with the conduct of Mr. Favro in failing

> to respond to repeated requests which Mr. Sharp made to him, both orally and in writing, we do not share the trial judge's conclusion regarding the legal effect of Mr. Favro's inaction. The deafening silence from the appellant, at its highest, did not clearly or unequivocally or unambiguously communicate to the respondent that the appellant had given up its legal right to insist on a contract in writing. Indeed, the very fact that Mr. Sharp felt obligated to make repeated requests for written confirmation supports the view that the respondent was not entitled to draw, and did not draw, an inference of waiver or estoppel from the appellant's silence.

[146] It is clear from the jurisprudence, what it is that must be discernible from either the words or conduct of Asper such so as to permit Galton to argue that Sensible should be estopped from relying upon the Debenture covenants and triggering the acceleration clause. In that connection, I am of the view that Bonk has not provided evidence, other than the making of mere allegations that Asper was aware of and approved of Galton not preparing financial statements or convening Debenture holder meetings as Galton was pursuing the SRED credits as a priority. In my view, that is not sufficient so as to show the unequivocal and unambiguous intention on the part of Sensible to not enforce its strict legal rights.

[147] When I examine the evidence on the summary judgment motion, I am mindful of the fact that in responding to the affidavit material or other evidence supporting the motion, a responding party cannot rest on the mere allegations or denials in the pleadings, but must indeed set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue requiring a trial.

[148] I agree with Sensible that in the present case, there is absolutely no evidence before the Court that Asper made a clear, unequivocal, precise and/or unambiguous representation that Sensible did not intend to enforce its strict legal rights against Galton

and therefore alter the legal relations between the parties. In fact, the evidence would seem to establish the following:

1. Asper consistently made various verbal requests of Bonk for Galton to provide the financial statements and to convene Debenture holder meetings up until the date he provided written notice of the Events of Default (to Galton) on June 11, 2018, only days after the alleged conversation as between Bonk and Asper. The proximity of that notice of the Events of Default to the conversation in question hardly suggests an intention to not enforce Sensible's strict legal rights and/or alter the legal relations between the parties;

2. Asper was only first provided with written materials indicating that Galton was pursuing SRED credits on June 6, 2018, when Bonk provided him with the draft term sheet; and

3. Galton did not ask Debenture holders for an extension of time to provide the financial statements pursuant to the terms of the Debenture.

[149] In light of the above evidence and given the fact that the responding party (Galton) has not on this summary judgment motion provided evidence establishing that Sensible acted in a way so as to represent that it did not intend to enforce its strict legal rights against Galton and thereby, alter the legal relations between the parties, the defence of estoppel is unavailable to Galton. Accordingly, the issue of estoppel no longer remains a genuine issue requiring a trial.

VI. CONCLUSION

For the foregoing reasons, given my determinations respecting the questions and issues set out at paragraph 9 of this judgment, there now remains in this action no genuine issues requiring a trial. Accordingly, Sensible is awarded summary judgment in the sum of $500,000, plus interest at a rate of eight per cent per annum calculated and compounded semi-annually pursuant to the Note and the Debenture. If the issue of costs is disputed, the parties can address that issue with the Court.

_____ C.J.Q.B.