

IN THE COURT OF QUEEN'S BENCH OF ALBERTA  
JUDICIAL DISTRICT OF CALGARY

BETWEEN:

KEITH WARREN and FRANCES COCHRAN

Plaintiffs

- and -

ABC WILDERNESS ADVENTURES LTD.,  
PLACES LESS TRAVELLED LTD.,  
PAUL LEESON, ANN SUTTON and JAMES BILDNER

Defendants

BROUGHT UNDER THE CLASS PROCEEDINGS ACT  
S.A. 2003, c. C-16.5

**AMENDED STATEMENT OF CLAIM**

AMENDED this 27<sup>th</sup> day of July, 2007. Pursuant to  
Rule 130 dated the 27<sup>th</sup> day of July, 2007



The Parties

1. The Representative Plaintiff Keith Warren is an individual resident in Drayton Valley, Alberta.
2. The Representative Plaintiff Frances Cochran is an individual resident in Comox, British Columbia.
3. The Defendant ABC Wilderness Adventures Ltd. ("ABC") is a federally incorporated company with offices in British Columbia.
4. The Defendant Places Less Travelled Ltd. is a federally incorporated company. At all material times, Places Less Travelled Ltd. was a wholly owned subsidiary of ABC and was operated indistinguishably from and as an alter ego of ABC. Other than with respect to shareholdings, references to ABC herein shall incorporate and include Places Less Travelled Ltd.

5. The Defendants Paul Leeson ("Leeson") and Ann Sutton ("Sutton") are individuals resident in British Columbia. Leeson and Sutton are common law spouses and, as such, acted jointly and with a common intent in respect of all matters set out below.

6. The Defendant James Bildner ("Bildner") is an individual resident in the State of Massachusetts, U.S.A.

7. This Action is brought by Ms. Cochran and Mr. Warren pursuant to the *Class Proceedings Act*, S.A. 2003, c. C-16.5 on their own behalf and on behalf of all of ABC's Class A shareholders, Class B shareholders and Class C shareholders (as hereinafter defined), regardless of their place of residence, with the exception of the Defendants Leeson, Sutton and Bildner (the "Class"). All issues raised and relief sought herein are raised and sought on behalf of all members of the Class equally and/or in accordance with the rights and quantities of their respective shareholdings in ABC. References to the Plaintiffs herein shall be deemed to include the Class. The Plaintiffs seek an Order of this Court certifying these proceedings pursuant to the *Class Proceedings Act*.

#### ABC and the Lodge

8. ABC owns and operates a guest hotel, the Purcell Mountain Lodge, in the Purcell Mountain area of South-Eastern British Columbia (the "Lodge"). The Lodge is a fully self-sufficient structure, with its own power and water sources.

9. ABC's capital structure consists of three classes of shares: Class A Common Shares, Class B Common Shares and Class C Preferred Shares. Pursuant to ABC's Articles of Incorporation, in the ordinary course:

- (a) Each Class A Common Share provided its holder (a "Class A shareholder") with the right to vote at any meeting of shareholders and further provided that holder with 3.4 votes per share;
- (b) Each Class B Common Share also provided its holder (a "Class B shareholder") with the right to vote at any meeting of shareholders but provided such holders with one vote per share; and

- (c) Each Class C Preferred Share did not provide its holder (a "Class C shareholder") with any right to vote any at any meeting of shareholders.

10. The Articles of Incorporation further provide rights to the Class A shareholders and Class B shareholders to participate in the distribution and receipt of ABC's property upon dissolution.

11. The Articles of Incorporation further provide that, in the event of any offer to purchase, any solicitation of an offer to sell or any invitation to make an offer to sell a certain number of Class A Common Shares (an "Offer") the holders of Class B Common Shares are to receive certain rights of conversion that would see their Class B Common Shares converted to or treated as Class A Common Shares with respect to and for the purpose of the Offer (the "Conversion Right"). The purpose of the Conversion Right was to protect the Class B shareholders from having the Class A shareholders liquidate their Class A Common Shares ahead of, to the prejudice of and against the wishes of the Class B shareholders and further to provide the Class B shareholders with a means of retaining control of ABC in the event of a sale of Class A Common Shares that affected control of ABC. At all material times, it was known and understood by each of the Defendants that the reasonable expectation of the Class B shareholders was that the Conversion Right existed for the benefit and protection of the Class B shareholders.

12. In addition, with the knowledge, agreement and consent of the Class A shareholders, the Class B shareholders have also been provided by ABC with certain rights to stay at the Lodge and use its facilities, exercisable for a set number of days each year based on the number of Class B Common Shares owned (the "Use Right"). The existence of the Use Right was a key factor and consideration in the decision of the Plaintiffs to become shareholders in ABC.

13. As of May 2005:

- (a) Leeson and Sutton were the sole officers and directors of ABC, and as such owed ABC and ABC's shareholders fiduciary duties and duties of care, in part as set out in the *Canada Business Corporations Act*, R.S.C. 1985, c-44 (as am.) (the "CBCA");

- (b) Leeson was the registered owner of 132,670 Class A Common Shares, representing 77.6% of the issued and outstanding Class A Common Shares ("Leeson's Class A Shares");
- (c) Leeson was the registered owner of 5,500 Class B Common Shares, representing 3.1% of the issued and outstanding Class B Common Shares;
- (d) Sutton was the registered owner of 2,000 Class B Common Shares, representing 1.1% of the issued and outstanding Class B Common Shares
- (e) Mr. Warren was the registered owner of 7,000 Class B Common Shares, representing 3.9% of the issued and outstanding Class B Common Shares; and
- (f) Ms. Cochran was the registered owner of 3,500 Class B Common Shares, representing 1.97% of the issued and outstanding Class B Common Shares.

14. The remaining 159,250 Class B Common Shares, 33,907 Class A Common Shares and all 430 of the Class C Preferred Shares are held by the Class.

15. For some time prior to May 2005, Leeson and Sutton, in their capacity as directors and officers of ABC, had reported to the shareholders, including the Plaintiffs, that ABC was in a somewhat precarious financial state. Among other things, Leeson and Sutton reported that the number of guest bookings at the Lodge were falling.

16. Further, Leeson and Sutton represented to the Plaintiffs that ABC had few assets. In particular, Leeson and Sutton advised that the Lodge was on land leased from the British Columbia Crown pursuant to an agreement (the "Crown Lease"). Accordingly, other than owning some chattels associated with operating the Lodge, ABC's only real value was as a going concern. If the business were to fail, ABC's value would essentially be nil.

#### The Rights Offering

17. On May 13, 2005, ABC, under the sole direction of Leeson and Sutton, issued a Rights Offering to the Class A and Class B shareholders. The stated purpose of the Rights Offering was to raise up to \$300,000 to:

- (a) retire up to \$50,000 of the working capital portion of the debt owed by ABC to the Business Development Bank of Canada (the "BDC Debt");
- (b) pay \$60,000 as "expenses of the Rights Offering"; and
- (c) use the balance of the funds for "general working capital".

18. Pursuant to the Rights Offering:

- (a) each Class A and Class B shareholder was given one right per Class A Common share or Class B Common share held (a "Right");
- (b) each 0.573 of a Right entitled the holder of such Right to purchase \$0.50 of convertible secured debentures (the "Debentures");
- (c) the Debentures were secured by, among other things, a charge on all of ABC's assets (with second in place priority, behind only an existing security held in respect of the BDC Debt) and a pledge of ABC's shares in Places Less Travelled Ltd.;
- (d) each \$0.50 of principal amount of Debenture was convertible into one Class B Common Share at cost of \$0.50 per share;
- (e) the maximum amount of the Debentures offered was \$300,000;
- (f) as such, for a total cost of \$1.00 per share, the holders of Rights could purchase up to 600,000 Class B Common Shares, representing 338.5% of the existing issued and outstanding Class B Common Shares;
- (g) stated another way, if all of the Debentures were purchased and converted to Class B common shares, those shares would cost \$600,000 to acquire and represent 77.2% of the issued and outstanding Class B Common Shares; and
- (h) the Rights were available for exercise until 4:00 p.m. (MST) June 10, 2005.

19. The Rights Offering further provided that:

- (a) in the event that the existing Class A and Class B shareholders did not purchase the Debentures by the time the Rights expired, ABC had arranged for Bildner to purchase up to the full amount of Debentures offered at a cost of \$0.50 per Debenture (the "Standby Commitment");
- (b) by agreeing to the Standby Commitment, Bildner received:
  - (i) the right to convert the Debentures to 600,000 Class B Common Shares; and
  - (ii) an agreement from Leeson that Leeson would vote Leeson's Class A Common Shares as directed by Bildner; (the "Voting Agreement").

20. The Rights Offering further provided that Leeson was providing to Bildner a Put Option, pursuant to which Leeson, at his sole discretion, could compel Bildner to purchase Leeson's Class A Shares at a price of \$3.65 per share, subject to certain restrictions and conditions as to cost and timing (the "Put Option").

21. Taking the Rights Offering as a whole, in the event that the other Class A and Class B shareholders were dissuaded from exercising or otherwise did not exercise their Rights by purchasing Debentures Bildner would:

- (a) At a cost of \$300,000, be entitled to a charge against all of ABC's assets;
- (b) Have voting control over Leeson's Class A Shares, which carried 3.4 votes per share and represented 452,778 votes out of a possible 743,611.8 votes in ABC, or 60.9% of the existing votes; and
- (c) Have the right, for a further \$300,000, to convert his Debentures and receive 600,000 Class B Common Shares, which would be 77.2% of the then-issued Class B Common Shares or, together with control or ownership of Leeson's Class A Shares, 78.2% of the total votes in ABC.

Further, as a result of the Rights Offering, Leeson gained the ability to force the sale of Leeson's Class A Shares for a payment of \$486,070.50.

22. Moreover, the third-party costs of Bildner and Leeson creating these rights and opportunities for themselves were to be paid for by the proceeds of the Rights Offering, funds that were being raised for, and were thus supposed to be for the benefit of, ABC.

23. As set out below, due to their belief that ABC had little value, none of the Plaintiffs participated in the Rights Offering. Rather, Bildner purchased the maximum amount of Debentures available under the Rights Offering. Sometime subsequent to the close of the Rights Offering, Bildner became a director and officer of ABC.

### The Misrepresentations

24. Contrary to the representations of Leeson and Sutton, however, at the time of the Rights Offering, ABC had a much greater value than was disclosed to the Plaintiffs. In particular, in the fall of 2004, a dispute arose between the British Columbia Crown and ABC over the existence and terms of the Crown Lease. Leeson and Sutton represented to the Plaintiffs that the dispute with the Crown over the Crown Lease was resolved by way of a "Crown Lease Amendment Agreement". Leeson and Sutton expressed or implied to the Plaintiffs that the Crown Lease Amendment Agreement simply provided for greater clarity and certainty over the terms of the Crown Lease. At no time prior to the close of the Rights Offering did the Defendants ever advise the Plaintiffs that the Crown Lease Amendment Agreement provided any rights to acquire the lands under the Lodge in fee simple (the "Lease Representations").

25. The Lease Representations were specifically repeated in writing in the circular setting out the Rights Offering.

26. The Lease Representations were untrue, inaccurate and misleading. In fact, contrary to such Representations, what was termed the "Crown Lease Amendment Agreement" gave ABC the right to purchase fee simple title to the lands under the Lodge for a relatively nominal amount. The right to purchase fee simple title to the lands dramatically affects the value of ABC. It changes the company from one with no real assets and, as a failing business, little value to one that will own a substantial and valuable asset, namely the land under the Lodge.

27. Leeson and Sutton made the Lease Representations knowing they were untrue, inaccurate and misleading. Leeson and Sutton made the Lease Representations with the intention that the

Plaintiffs would rely upon the Lease Representations when considering the Rights Offering and, in such reliance, decide not to exercise the Rights provided to them in the mistaken belief that they were simply putting money into a failing business that had no assets and no prospect of returning their investment. Alternatively, Leeson and Sutton were reckless, willfully blind or careless as to the untrue, inaccurate and misleading nature of the Lease Representations when making them to the Plaintiffs.

28. The Plaintiffs relied upon the Lease Representations and, in such reliance, determined that they would not exercise any Rights under the Rights Offering. Had the Plaintiffs known the truth about the Lease Representations, the Plaintiffs would have exercised their Rights and purchased Debentures.

#### Oppressive Conduct

29. In structuring the Rights Offering as they did, Leeson, Sutton, Bildner and, at the instance of Leeson and Sutton, ABC have:

- (a) transferred control of ABC to Bildner;
- (b) given Bildner the right to purchase a supermajority of all equity and voting rights in ABC;
- (c) enriched Leeson and Sutton by providing them with a means to sell their interest in ABC at their sole discretion;
- (d) taken funds raised for ABC, and thus intended for its benefit, and used them to pay for the above actions which were, in fact, primarily done with the intention and result of benefiting Leeson, Sutton and Bildner; and
- (e) done so by, *inter alia*, providing misleading and untruthful disclosure to the Plaintiffs about ABC including, without limitation, by making the Lease Representations.

30. Further, the Put Option constitutes an "Offer" under ABC's Articles of Incorporation; accordingly, the Rights Offering should have contained provisions to give effect to the

Conversion Right. Specifically, the Plaintiffs and other Class B shareholders should have had an offer to purchase their Class B Common Shares at the same value as Leeson's Class A Shares or, alternatively, had their Class B Common Shares converted to Class A Common Shares, an act that would have given the Class B Shareholders more votes than Bildner and thus kept control of the company with the Plaintiffs and other Class B shareholders and away from Leeson, Sutton and Bildner.

31. By virtue of their conduct and the results of such conduct as set forth and summarized above, along with such other particulars as may be presented before or during the Trial of this Action, the Defendants have acted in a manner that is oppressive or unfairly prejudicial or that unfairly disregards the rights of the Plaintiffs. The Plaintiffs expressly plead and rely upon s. 241 of the CBCA in this regard.

Breaches of Duty

32. As the sole directors and officers of ABC at the time of the Rights Offering, Leeson and Sutton owed the Plaintiffs fiduciary duties and duties of care, including but not limited to those duties set out in s. 122 of the CBCA, to among other things:

- (a) act in the best interests of ABC;
- (b) act in a manner that placed the interests of ABC and the shareholders above and ahead of those of Leeson and Sutton; and
- (c) provide full and truthful disclosure to the shareholders of ABC about transactions involving ABC including, without limitation, the Rights Offering and the Crown Lease Amendment Agreement.

33. By issuing the Rights Offering and entering into the associated agreements, Leeson and Sutton have, among other things:

- (a) acted to their own benefit ahead of the Plaintiffs by creating the Put Option with favourable terms and rates under which they can sell Leeson's Class A Shares without providing for a similar right to the Plaintiffs;

- (b) acted to their own benefit ahead of ABC by using ABC's funds, and in particular the proceeds of the Rights Offering, to pay for the creation of the Rights Offering;
- (c) given misleading and untrue disclosure to the Plaintiffs by failing to disclose the true facts surrounding the Crown Lease Amendment Agreement;
- (d) surrendered effective control of ABC to Bildner, an outsider to the company with no equity position in the company or, alternatively, an insufficient equity position for the amount of control provided to him; and
- (e) such further and other particulars as may be proven at Trial.

#### Breach of the Use Right

34. Since acquiring control of ABC pursuant to the Rights Offering, ABC, under Bildner's direction, has purported to claim that the Plaintiffs and other Class B shareholders are not entitled to the Use Right. The Plaintiffs state that such claims are inconsistent with the terms of their subscriptions and investments in ABC. The Plaintiffs seek declaratory relief and, as necessary, rectification of ABC's Articles and By-laws in this regard.

#### Breach of Articles

35. By disregarding the Conversion Right in making the Rights Offering, the Defendants have conducted ABC's business in a manner inconsistent with ABC's Articles of Incorporation. Such actions are prohibited by the CBCA (s. 16(2)) and constitute further breaches of Leeson and Sutton's duties as officers and directors (s. 122 CBCA).

#### Conspiracy

36. The Plaintiffs state and the fact is that in creating the Rights Offering and engaging in the conduct set out above, the Defendants acted by combination and in an unlawful manner with the common intent or purpose of benefiting themselves at the expense and detriment of the Plaintiffs. As a result of the Defendants' wrongful actions in this regard, the Plaintiffs have suffered loss or damage as set out below. The Defendants knew or ought to have known that the Plaintiffs would suffer injury as a result of the Defendants' unlawful actions.

Damages

37. As a result of all of the foregoing breaches and misconduct, the Defendants have caused the Plaintiffs to suffer loss and damages including, but not limited to:

- (a) loss of the Conversion Right;
- (b) loss or threatened loss of the Use Right;
- (c) loss of value of their Class B Common Shares;
- (d) loss of opportunity; and
- (e) such further particulars as may be adduced at Trial.

38. The amount of such loss and damage is unknown at present but is believed to exceed \$100,000.

Remedies

39. Pursuant to the Court's inherent powers and jurisdiction, as well as pursuant to s. 241(3) of the CBCA, for all of the foregoing misconduct and breaches, the Plaintiffs seek the following relief:

- (a) interim and permanent orders to restrain any further implementation of the Rights Offering;
- (b) an immediate order to account for:
  - (i) the number of shares owned by Bildner; and
  - (ii) the use of proceeds from the Rights Offering;
- (c) interim orders directing the Defendants to allow the Plaintiffs to review the books, records and accounts of ABC;

- (d) an order directing the removal of Leeson, Sutton and Bildner from any positions as officers or directors they may have with ABC;
- (e) an order removing, on a temporary or permanent basis, any voting rights associated with any shares in ABC owned or controlled by the Defendants;
- (f) interim and permanent orders appointing a receiver-manager of ABC to be paid for at the expense of Leeson, Sutton and Bildner;
- (g) an order directing that any assets of ABC, including the lands under the Lodge, be transferred to the possession and control of the receiver-manager;
- (h) an order directing ABC to issue to the Plaintiffs Class A Common Shares in exchange for their Class B Common Shares;
- (i) a declaration that the Plaintiffs are entitled, for so long as they remain shareholders, to the Use Right;
- (j) an order compelling the Defendants to surrender their shares in ABC or, alternatively, compelling ABC to cancel such shares;
- (k) further or alternatively, orders to give effect to the Conversion Right in the face of the Offering Memorandum and Put Option;
- (l) further or alternatively, an order directing the Defendants to purchase the Plaintiffs' shares at a price to be determined at Trial;
- (m) further or alternatively, an order directing the Defendants to pay compensation to the Plaintiffs for the loss and damages suffered by the Plaintiffs as set out herein;
- (n) further or alternatively, damages in an amount to be determined at Trial;
- (o) orders directing that the books and records of ABC be amended and rectified to give effect to any order this Court may make as to ABC's shareholders, directors, officers, Articles of Incorporation or By-laws; and

- (p) such further and other relief as may be sought at Trial and as this Court may allow.

Derivative Action

40. As necessary, the Plaintiffs will seek the leave of this Court to continue all or any part of the claims herein as a derivative action on behalf of ABC under s. 239 of the CBCA.

Other Relief and Matters

41. The Plaintiffs further state that the Defendants' conduct in creating the Rights Offering was so callous and high-handed and represents such a reprehensible and marked departure from the ordinary standards of conduct that punitive damages are warranted.

42. The Plaintiffs further state that the Defendants should pay costs of this Action on a solicitor-client basis.

43. The Plaintiffs propose that the trial of this action take place at the Court House in Calgary, Alberta and states that in its opinion the within trial will not exceed 25 days.

WHEREFORE THE PLAINTIFFS CLAIM:

- (a) An Order certifying these proceedings pursuant to the *Class Proceedings Act*, S.A. 2003, c. C-16.5;
- (b) Interim and permanent orders to restrain any further implementation of the Rights Offering;
- (c) An order directing the Defendants to account for:
- (i) the number of shares owned by Bildner; and
  - (ii) the use of proceeds from the Rights Offering;
- (d) Orders directing the Defendants to provide the Plaintiffs with rights of inspection of the books and records of ABC;

- (e) An order directing the removal of Leeson, Sutton and Bildner from any positions as officers or directors they may have with ABC;
- (f) An Order removing, on a temporary or permanent basis, any voting rights associated with any shares in ABC owned or controlled by the Defendants;
- (g) Interim and permanent orders appointing a receiver-manager of ABC to be paid for at the expense of Leeson, Sutton and Bildner;
- (h) An order directing that any assets of ABC, including the lands under the Lodge, be transferred to the possession and control of the receiver-manager;
- (i) An order directing ABC to issue to the Plaintiffs, Class A Common Shares in exchange for their Class B Common Shares;
- (j) A declaration that the Plaintiffs are entitled, for so long as they remain shareholders, to the Use Right;
- (k) An order compelling the Defendants to surrender their shares in ABC or, alternatively, compelling ABC to cancel such shares;
- (l) Further or alternatively, orders to give effect to the Conversion Right in the face of the Offering Memorandum and Put Option;
- (m) Further or alternatively, an order directing the Defendants to purchase the Plaintiffs' shares at a price to be determined at Trial;
- (n) Further or alternatively, an order directing the Defendants to pay compensation to the Plaintiffs for the loss and damages suffered by the Plaintiffs as set out herein;
- (o) Further or alternatively, damages in an amount to be determined at Trial but presently estimated to be not less than \$100,000;
- (p) As necessary, orders directing that the books and records of ABC be amended and rectified to give effect to any order this Court may make as to shareholders, directors, officers or the Articles of Incorporation;

- (q) Punitive damages of not less than \$50,000;
- (r) Interest pursuant to the *Judgment Interest Act*, R.S.A. 2000, c. J-1;
- (s) Costs on a solicitor-client basis; and
- (t) Such further and other relief as this Honourable Court deems just.

**DATED** at the City of Calgary, in the Province of Alberta, this 8<sup>th</sup> day of June, 2007  
**AND DELIVERED** by BENNETT JONES LLP, Barristers and Solicitors, Solicitors for the  
Plaintiffs whose address for service is in care of the said Solicitors at 4500 Bankers Hall East,  
855 - 2nd Street S.W., Calgary, Alberta, T2P 4K7.

**ISSUED** out of the Office of the Clerk of the Court of Queen's Bench of Alberta,  
Judicial District of Calgary, this 8<sup>th</sup> day of June, 2007.

   
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CLERK OF THE COURT

**NOTICE**

ACTION NO. 0701-05986

**TO: The Defendants**

You have been sued. You are the Defendants. You have only 15 days to file and serve a Statement of Defence or Demand of Notice. You or your lawyer must file your Statement of Defence or Demand of Notice in the office of the Clerk of the Court of Queen's Bench in Calgary, Alberta. You or your lawyer must also leave a copy of your Statement of Defence or Demand of Notice at the address for service for the Plaintiffs named in this Statement of Claim.

**WARNING:** If you do not do both things within 15 days, you may automatically lose the lawsuit. The Plaintiffs may get a Court Judgment against you if you do not file, or do not give a copy to the Plaintiffs, or do either thing late.

This Statement of Claim is issued by

**BENNETT JONES LLP**  
Michael D. Mysak  
File No. 55704-1  
Telephone No. (403) 298-8143  
Fax No. (403) 265-7219

Solicitors for the Plaintiff whose address for service is in care of the said solicitors.

The Plaintiffs reside and carry on business in Drayton Valley, Alberta and Comox, British Columbia.

The Defendants (so far as known to the Plaintiffs) reside or carry on business in British Columbia and Massachusetts, U.S.A.

IN THE COURT OF QUEEN'S BENCH  
OF ALBERTA  
JUDICIAL DISTRICT OF CALGARY

BETWEEN

KEITH WARREN and FRANCES COCHRAN  
Plaintiffs

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BROUGHT UNDER THE CLASS  
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