IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Blue Line Hockey Acquisition Co., Inc. v. Orca Bay Hockey Limited Partnership,*** 2008 BCSC 27

Date: 20080110
Docket: S050342
Registry: Vancouver

Between:

Blue Line Hockey Acquisition Co., Inc., Northland Properties Corporation, Kery Ventures Limited Partnership, R. Thomas Gaglardi, Ryan K. Beedie, True North Hockey Limited Partnership and True North Arena Limited Partnership

Plaintiffs

And

Orca Bay Hockey Limited Partnership, Orca Bay Hockey Inc., Orca Bay Arena Limited Partnership, Orca Bay Arena Corp., John E. McCaw, Jr., Sportco Investments, Inc., Sportco Investments II, Inc., Francesco Aquilini, Aquilini Investment Group, Inc., Vancouver Hockey Limited Partnership, Vancouver Hockey General Partner Inc., Vancouver Arena Limited Partnership, Vancouver Arena General Partner Inc., Aquilini Investment Group Limited Partnership and Tri Power Developments Limited Partnership

Defendants

Before: The Honourable Madam Justice Wedge

Reasons for Judgment

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I. Introduction

Overview

[1] In November 2003, three experienced and prominent Vancouver businessmen -- Tom Gaglardi ("Gaglardi"), Ryan Beedie ("Beedie") and Francesco Aquilini ("Aquilini") -- agreed to work together to acquire an ownership interest in the Vancouver Canucks hockey team (the "Canucks"). The Orca Bay group of companies, controlled by John McCaw Jr. ("McCaw"), owned the Canucks at the time. Aquilini eventually left the group. Some months later, he entered into negotiations with Orca Bay and acquired the Canucks on his own behalf.

[2] Gaglardi and Beedie alleged that the agreement to work together created a partnership or joint venture and that Aquilini, as their former partner or joint venturer, owed them a duty not to acquire the Canucks on his own behalf. They also alleged that Orca Bay, by entering into negotiations with Aquilini, knowingly assisted Aquilini in his breach of duty. Gaglardi and Beedie argued that they were the rightful owners of the Canucks, and sought as a remedy an order that Aquilini holds the Canucks on a constructive trust for them.

Issue

[3] The narrow issue in this case is whether the agreement among the three men created a relationship giving rise to fiduciary obligations, and, if so, whether those obligations continued to bind Aquilini after his departure from the group.

[4] The law does not discourage the pursuit of self-interest in most commercial dealings. Whether an individual owes a duty of loyalty or good faith to another depends on the nature of the particular relationship in issue. That concept was best described by La Forest J. in a leading case on fiduciary duty:

> …Commercial interactions between parties at arm's length normally derive their social utility from the pursuit of self-interest, and the courts are rightly circumspect when asked to enforce a duty (i.e., the fiduciary duty) that vindicates the very antithesis of self-interest….
>
> ….
>
> [Put another way], the law does not object to one party's taking advantage of another *per se*, so long as the particular form of advantage taking is not otherwise objectionable.
>
> (***Hodgkinson v. Simms***, [1994] 3 S.C.R. 377 at 380, 117 D.L.R. (4th) 161)

Conclusions

[5] I have concluded that the relationship among Gaglardi, Beedie and Aquilini was not one of partnership or joint venture. The three pursued the acquisition of the Canucks without an agreement as to their respective rights and obligations during the pursuit or the terms of a deal they were ultimately prepared to accept. Each was free to leave the group and pursue the opportunity on his own account without regard to the others.

[6] Even assuming the relationship constituted a partnership or joint venture, it ended when Aquilini gave notice of his departure. Any fiduciary obligations arising from the relationship ended at the same time.

[7] It follows that Orca Bay did not knowingly assist in any breach of fiduciary duty.

II. Credibility Issues

[8] Credibility was a matter of much debate among the parties and took up a significant amount of time at trial. Gaglardi and Beedie mounted extensive challenges to the credibility of Aquilini, McCaw and most other central witnesses who testified on behalf of the defendants. Aquilini and Orca Bay challenged the credibility of Gaglardi in many areas of his evidence.

[9] However, very few of the findings of fact on which the outcome of the case rests required an assessment of credibility. In the few instances in which a particular finding of fact required resolution of a credibility issue, I have indicated whose evidence I preferred and why. With respect to most key facts, findings of credibility were simply unnecessary.

[10] The challenges brought by Gaglardi and Beedie to the credibility of the various witnesses related primarily to the timing and content of the discussions between Aquilini and Orca Bay representatives concerning Aquilini's interest in acquiring the Canucks after he left the group. As will become apparent in these reasons, I have concluded that inquiry was for the most part irrelevant to the outcome of the dispute.

[11] Most of the key facts were undisputed. A summary of those facts follows.

III. Summary of Key Facts

[12] In 2003, limited partnerships doing business as Orca Bay Sports and Entertainment ("Orca Bay") owned the Canucks and General Motors Place (the "Arena") where the team plays its home games. Orca Bay is controlled by McCaw.

[13] When Gaglardi, Beedie and Aquilini first met in November 2003, they agreed to put together an expression of interest for the purchase of a 50% interest in the Canucks. The three men discussed some of the business terms they wished to include in their proposal. They did not come to any agreement as to the terms by which all were prepared ultimately to be bound.

[14] The three men did not discuss the terms, if any, that would govern their relationship with one another or reduce to writing their agreement to pursue the opportunity as a group. They understood, however, that no member of the group could bind the others to any agreement during the negotiations with Orca Bay.

[15] Between November 2003 and February 2004, Gaglardi, Beedie and Aquilini presented a series of non-binding proposals to Orca Bay for the purchase of a 50% interest in the Canucks and various options to acquire an interest in the Arena. None of the proposals was of interest to Orca Bay.

[16] In early March 2004, Aquilini decided he no longer wished to pursue the joint acquisition. He left the group without objection from the other two. Aquilini told Gaglardi and Beedie he remained interested in acquiring a share in the Canucks in the

future should the opportunity arise. Gaglardi and Beedie did not commit to including him as part of the group again. No promises were exchanged and no conditions were imposed by or on any member of the group at the time of Aquilini's departure.

[17] Gaglardi and Beedie decided to table a proposal based on a different ownership structure than that proposed before Aquilini's departure, one that involved the purchase of a 75% interest in both the Canucks and the Arena (collectively the "Enterprise").

[18] Negotiations based on the new proposal ensued, but were challenging. Gaglardi and Beedie were not convinced the Enterprise was worth the $250 million asking price, particularly with an NHL lockout looming.

[19] The negotiations did not progress significantly until August 2004 when Gaglardi and Beedie offered to purchase 100% of the Enterprise. On the basis of that offer, the parties signed a non-binding framework document (the "Term Sheet") outlining the principal business terms upon which a binding agreement would be based. The Term Sheet stipulated that Orca Bay would negotiate exclusively with Gaglardi and Beedie until October 1, 2004.

[20] When Aquilini learned that Gaglardi and Beedie were negotiating to acquire full ownership of the Canucks, he asked them whether he could participate in the deal. Gaglardi and Beedie said "no".

[21] Gaglardi and Beedie were unable to reach an agreement with Orca Bay by October 1, 2004. Many of the business terms remained contentious. The parties did

not negotiate an extension to the expiry date of the exclusivity period, but continued exchanging proposals in an effort to conclude an agreement.

[22] In late October 2004, Aquilini learned that Orca Bay had not yet come to terms with Gaglardi and Beedie. On October 29, 2004, Aquilini informed McCaw that he remained interested in purchasing a 20% interest in the Canucks. McCaw told Aquilini that he would think about the offer.

[23] On October 30, 2004 Orca Bay made a further proposal to Gaglardi and Beedie in an attempt to resolve the contentious business terms. Gaglardi and Beedie believed the proposal was not fair, and responded with a counter proposal on November 2, 2004. The counter proposal was not acceptable to McCaw. Orca Bay then entered into negotiations with Aquilini for the sale of 20% of the Enterprise without informing Gaglardi and Beedie.

[24] On November 5, 2004 Aquilini reached an agreement with Orca Bay to purchase 50% of the Enterprise with an option to purchase the remaining 50%. McCaw then advised Gaglardi and Beedie that Orca Bay had rejected their November 2, 2004 counter proposal and was ending the negotiations.

[25] Ten days later, Gaglardi and Beedie learned through the media that Aquilini had reached an agreement with Orca Bay concerning the sale of the Enterprise. They initiated this action as a result.

IV. Nature of the Claim

Claim against the Aquilini Defendants

[26] In their pleadings, Gaglardi and Beedie alleged that Aquilini misused confidential information and breached his duty of confidence to them. They also alleged a breach of fiduciary duty. At the conclusion of the trial, they abandoned the allegations concerning breach of confidence. The following is a summary of their claim concerning breach of fiduciary duty:

(a) Gaglardi and Beedie formed a partnership with Aquilini, or, alternatively, a joint venture, which arose from an agreement among the three of them to jointly pursue the acquisition of an interest in the Enterprise on behalf of the partnership or joint venture;

(b) As a result, Aquilini owed a fiduciary duty to Gaglardi and Beedie during the time he was a member of the partnership or joint venture and following his withdrawal. That fiduciary duty required Aquilini not to negotiate for, or acquire, an interest in the Enterprise on his own behalf while Gaglardi and Beedie were pursuing the opportunity; and

(c) After his departure from the partnership or joint venture, Aquilini breached his ongoing fiduciary duty to Gaglardi and Beedie by negotiating for, and acquiring, an interest in the Enterprise on his own behalf.

Claim against the Orca Bay Defendants

[27] In their pleadings, Gaglardi and Beedie alleged that the Orca Bay Defendants breached their obligation to negotiate in good faith, negotiated with Aquilini during the exclusivity period provided in the Term Sheet, and knowingly assisted Aquilini in his breach of the fiduciary duty he owed to his former partners or joint venturers.

[28] At the conclusion of the evidence at trial, Gaglardi and Beedie abandoned the first two of those allegations. They limited their claim against Orca Bay to knowing assistance, which can be summarized as follows: Orca Bay knowingly assisted Aquilini in the breach of his fiduciary duty by surreptitiously negotiating, and ultimately contracting, with Aquilini at a time when Gaglardi and Beedie were actively pursuing an interest in the Enterprise.

The Remedy Sought

[29] Gaglardi and Beedie argued that because of the unique nature of the asset at the centre of the dispute, the only appropriate remedy was an order that Aquilini holds the Enterprise on a constructive trust for them as his former partners or joint venturers. They also argued that the knowing assistance by Orca Bay made it personally liable as a constructive trustee for Aquilini's breach of fiduciary duty.

Response of the Aquilini and Orca Bay Defendants

[30] The Aquilini Defendants denied that any partnership or joint venture was formed among Gaglardi, Beedie and Aquilini. In the alternative, if a partnership or joint venture existed, it ended when Aquilini withdrew from it as did any fiduciary duties existing before his withdrawal.

[31] The Orca Bay Defendants argued that if there was a relationship giving rise to ongoing fiduciary duties on the part of Aquilini (which was denied), Orca Bay was not advised, and had no knowledge, of the relationship. Accordingly, at the time it entered

into the agreement with Aquilini concerning the Enterprise, Orca Bay had no knowledge of any fiduciary duty that may have been owed by Aquilini to Gaglardi and Beedie and could not have knowingly assisted Aquilini in the breach of that duty.

[32] By way of remedy, the Aquilini and Orca Bay Defendants asked that the action be dismissed in its entirety.

V. The Legal Framework

[33] The claims of Gaglardi and Beedie rested on the assertion that their relationship with Aquilini gave rise to fiduciary duties which disabled Aquilini from pursuing his own interest in the ownership of the Canucks after he left the group.

[34] The evidence bearing on that assertion is best reviewed in the context of the legal principles governing partnerships and joint ventures. I will discuss the legal principles applicable to the claim and then review the facts relevant to that framework.

A. The Requirements of Partnership and Joint Venture

1. The Characteristics of a Partnership

[35] The law does not permit partners to take advantage of one another. At common law, partnership is a presumptively fiduciary relationship. While a partnership exists, the law imposes on its members the duty of utmost loyalty with respect to the business and assets of the partnership. In addition to the duties existing at common law, partners in this province are required by statute to act with "utmost fairness and good faith" toward one another (***Partnership Act***, R.S.B.C. 1996, c. 348, s. 22(1)).

[36] However, the law requires cogent evidence establishing the presence of the prerequisites of partnership before it will impose these onerous duties.

[37] A partnership exists only if:

a) There is a valid contract of partnership; and

b) The members of the partnership are

(i) carrying on business;

(ii) in common; and

(iii) with a view to profit.

(a) The contractual requirement

[38] Partnership is defined in s. 2 of the ***Partnership Act*** as the "relation which subsists between persons carrying on business in common with a view to profit". While the statute does not mention contract, the existence of a contractual foundation of partnership is essential:

> Partnership, although often called a contract, is more accurately described as a relationship *resulting from* contract. This was made clear in the original statutory definition introduced into the House of Lords but not, ultimately, in the Act [of 1890] itself. Nevertheless, the origin of the relationship in an agreement, whether express or implied, was clearly established before the Act and may legitimately be inferred from its provisions.
>
> (R.C. l'Anson Banks, *Lindley & Banks on Partnership*, 18th ed. (London: Sweet & Maxwell, 2002) [***Lindley & Banks***] at para. 2-13) (Emphasis in the original)

[39] Whether oral or written, there must be a completed agreement before a partnership will be found to exist. In the case of ***Porter v. Armstrong***, [1926] S.C.R. 328, 2 D.L.R. 340 [***Porter***] at para. 3, the court said the following:

> Partnership, it is needless to say, does not arise from ownership in common, or from joint ownership. *Partnership arises from contract*, evidenced either by express declaration or by conduct signifying the same thing. *It is not sufficient there should be community of interest; there must be contract*. (Emphasis added)

[40] Partnerships arise from contract, and it follows that the contract underlying a partnership must meet all of the prerequisites of a contract. Those prerequisites are the following:

a) An offer containing all of the essential terms, and an acceptance of the offer (that is, a meeting of the minds or *consensus ad idem*);

b) Certainty of the agreed terms;

c) Consideration; and

d) The intention to create legal relations.

(see ***Whistler Mountain Ski Corporation v. Projex Management Ltd.*** (1994), 90 B.C.L.R. (2d) 283 at para. 41, [1994] B.C.J. No. 282 (QL) (B.C.C.A.))

[41] In ***Surerus Construction and Development Ltd. v. Rudiger*** (2000) BCSC 1746, 11 B.L.R. (3d) 21 [***Surerus***], Wilson J., citing ***Porter*** and other cases applying its principles, stated the following at para. 14:

> As “partnership arises from contract”, it is necessary that there be certainty of the essential terms for there to be a binding contract.

[42] In ***Surerus***, Wilson J. concluded there was no contract of partnership because some of the essential terms were missing. Whether the contract is written or oral, said Wilson J., there must be consensus as to the contract's essential terms. Even though the parties may have considered themselves to be partners and held themselves out as partners, Wilson J. held at para. 33 that the alleged contract of partnership failed for lack of certainty:

> In conclusion, notwithstanding the fact that both Mr. Surerus and Mr. Rudiger considered themselves to be partners, held themselves out as such, and acted accordingly, there is not sufficient certainty in the terms of any agreement to enable a determination of the basis upon which a partnership was to be established, or conducted. The court may imply terms in order to give an agreement business efficacy. However, before the court can do so, there must be agreement on the essential terms of the contract.

[43] ***Milroy v. Klapstein***, 2003 ABQB 871, 24 Alta. L.R. (4th) 349 addressed the question of whether two real estate developers had entered into a partnership to acquire and develop certain properties. Slatter J. concluded that no partnership had been formed. While there was agreement between the partners as to the first phase of the undertaking -- the acquisition of the lands -- there was no agreement as to the decision-making process for the second phase -- the preparation of a master development plan. Further, the agreement concerning the final phase (the actual development of the properties) was too vague to be enforceable. At para. 24, the court said:

> All contracts, including partnership agreements and joint ventures, must be sufficiently precise to be enforceable. The identification of the exact terms upon which final agreement must be reached varies from contract to contract. A partnership agreement contemplates a long-term business arrangement between the partners; it is obviously impossible to anticipate

> and agree on every business decision that will ever be made. *Therefore with a partnership agreement, what must be agreed to are the essential terms of the partnership per se: the identity of the partners, the fact that there is to be a partnership, the business of the partnership, and usually some of the essential financial terms.* (Emphasis added)

[44] Where the parties have not entered into a written partnership agreement, there must be other evidence of their intention to be bound as partners. In ***Cullen v. Minister of National Revenue***, [1985] 2 C.T.C. 2059, 85 D.T.C. 409 (T.C.C.) [***Cullen***] the court said the following at p. 2064:

> … [T]he courts must be careful not to attribute to the parties intentions which they never had and which are not supported by the evidence. … The fact that the appellant and his wife describe themselves as partners is not conclusive…. In cases such as the case at bar where no written partnership agreement exists the intention of the parties may be ascertained from their conduct, the mode in which they have dealt with each other, and the mode in which each has, with the knowledge of the other, dealt with other people. …
>
> (see also: ***Chung v. Hoy*** (1994), 19 C.L.R. (2d) 297(B.C.S.C.) at paras. 45-46; ***Surerus*** at para. 13).

[45] In ***Backman v. Canada***, 2001 SCC 10, [2001] 1 S.C.R. 367 [***Backman***], the court observed that a pragmatic approach must be taken when determining whether the ingredients of partnership are present. The existence of a contract of partnership was not an issue in the case, however. The parties had entered into a written partnership agreement and clearly intended to create a partnership.

[46] The role of the parties' intentions in determining whether a partnership exists was discussed by the court in ***Backman*** at para. 25:

> As adopted in *Continental Bank*, *supra*, at para. 23, and stated in *Lindley & Banks on Partnership*, *supra*, at p. 73: "in determining the existence of a partnership ... regard must be paid to the true contract and intention of the parties as appearing from the whole facts of the case". In other words, to ascertain the existence of a partnership the courts must inquire into whether the objective, documentary evidence and the surrounding facts, including what the parties actually did, are consistent with a subjective intention to carry on business in common with a view to profit.

(b) The Statutory Ingredients of Partnership

(i) Carrying on Business

[47] "Business" is defined in most provincial legislation governing partnerships (except in British Columbia, which has no definition) as "every trade, occupation and profession". In ***Backman*** at para. 19, the court referred with approval to two existing legal definitions. The first is contained in Black's Law Dictionary (6th ed. 1990): "To hold one's self out to others as engaged in the selling of goods or services." The second, noted the court (citing ***Gordon v. The Queen***, [1961] S.C.R. 592):

> … [R]equires at least three elements to be present: (1) the occupation of time, attention and labour; (2) the incurring of liabilities to other persons; and (3) the purpose of a livelihood or profit. ...

[48] The court in ***Backman*** went on to observe that a valid partnership does not require the creation of a new business, or anything more than a single transaction. Further, the partnership need not necessarily hold meetings, enter into new transactions or make decisions.

[49] However, the business must be "carried out". The parties involved must do more than simply agree to carry out a business; they must in fact carry it out. As noted in

Lindley & Banks at para. 2-15, "it is the carrying on of a business, not a mere agreement to carry it on, which is the test of partnership."

[50] Whether parties have begun to carry on the business of the partnership depends largely on the true characterization of the partnership's objective or enterprise. That principle was emphasized by the English House of Lords in ***Khan v. Miah***, [2001] 1 All E.R. 20 H.L. [***Khan***], a case in which the parties agreed to start a restaurant in partnership. The plaintiff provided the capital. The defendants, who were experienced in the restaurant business, were to operate the restaurant. The plaintiff invested substantial capital to purchase and renovate the premises. A matter of weeks before the restaurant opened, the parties had a falling out and parted ways. The defendants opened the restaurant and operated it on their own.

[51] The Court of Appeal held that no partnership had been created because the restaurant had not begun operating when the parties parted ways. The House of Lords disagreed, concluding that the Court of Appeal had characterized too narrowly the nature of the partnership's enterprise. The parties, said the court, did not agree to operate an existing restaurant. They agreed to find suitable premises, renovate them and then open a restaurant.

[52] The question, said the court in ***Khan*** at p. 24, is the true scope of the venture in question:

> … The rule is that persons who agree to carry on a business activity as a joint venture do not become partners until they actually embark on the activity in question. It is necessary to identify the venture in order to

> decide whether the parties have actually embarked upon it, but it is not necessary to attach any particular name to it. …

[53] That approach was endorsed by our Court of Appeal in ***Scragg v. Lotzkar***, 2005 BCCA 596. Ryan J.A. said the following at para. 34:

> The real question is whether it can be said … that the partnership's enterprise had commenced. That is, had the parties done enough to be found to have commenced *the joint enterprise in which they had agreed to engage.* (Emphasis added)

(ii) Carrying on the business "in common"

[54] It is not sufficient that the business of the partnership be carried out. It must be carried out in common. As observed by the court in ***Backman*** at para. 21, partnerships are created by contract and the common purpose of the partnership will usually be found in the partnership agreement setting out the respective rights and obligations of the partners.

[55] A relevant consideration in determining whether the business is being carried out in common is the authority of any one partner to bind the partnership. The fact that the management of a partnership rests with a single partner may not undermine the legal status of the partnership, so long as the arrangement is the subject of agreement by all partners: ***Backman*** at para. 21.

(iii) Carrying on business "with a view to profit"

[56] The enterprise must be created or operated with the expectation by the partners of receiving a profit. Whether there exists a "view to profit" depends upon the intentions

of the parties entering into the alleged partnership and the nature of the enterprise itself. Profit need not be the overriding intention. It is sufficient to demonstrate that the enterprise has an ancillary or secondary profit-making purpose: ***Backman*** at para. 22.

2. The Characteristics of a Joint Venture

[57] The ingredients of a joint venture are the following:

> a) As is the case with partnerships, the joint venture must have a contractual basis; and
>
> b) There must be:
>
> (i) a contribution of money, property, effort, knowledge or other asset to a common undertaking;
>
> (ii) a joint property interest in the subject matter of the venture, which is usually a single or ad hoc undertaking;
>
> (iii) a right of mutual control or management of the venture;
>
> (iv) an expectation of profit and the right to participate in the profits;
>
> (***Canlan Investment Corp. v. Gettling*** (1997), 37 B.C.L.R. (3d) 140, 95 B.C.A.C. 16 [***Canlan (B.C.C.A)***])

[58] As with a partnership, a joint venture is founded on a contract between the parties. In ***Central Mortgage & Housing Corp. v. Graham*** (1973), 43 D.L.R. (3d) 686, 13 N.S.R. (2d) 183 (N.S.T.D.) [***Central Mortgage***], the court cited ***Williston on Contracts***, 3rd ed. (1959) at p. 706:

> …. A joint venture is an association of persons, natural or corporate, *who agree by contract* to engage in some common, usually ad hoc undertaking for joint profit by combining their respective resources, without, however,

> forming a partnership in the legal sense (of creating that status) or corporation… (Emphasis added)

[59] ***Central Mortgage*** has been followed in this province. In ***Canlan Investment Corp. v. Gettling***, [1996] B.C.J. 1803 (QL) (B.C.S.C.) aff'd, (1997), 37 B.C.L.R. (3d) 140 (B.C.C.A.) [***Canlan***], Tysoe J. (as he then was) accepted as a correct proposition of law that a joint venture must have a contractual basis. The facts of the case are as follows. One of the parties to the dispute owned land in the Township of Langley suitable for the construction of an ice rink. The other party had experience in operating ice rinks and had the necessary capital on hand. The two responded to a proposal by the Township to construct an ice rink. Their proposal was accepted by the Township, and the parties then began negotiating a formal agreement to govern their venture. They agreed on most essential terms, but could not agree on the handling of a tax issue arising from the ownership structure they intended to use. Their relationship broke down. One of the parties sued, claiming the parties had entered into a joint venture.

[60] Mr. Justice Tysoe concluded at para. 56 that while the parties had agreed to work together toward the objective of the joint venture, they did not "manifest an intention to be legally bound".

[61] The joint venture in ***Canlan*** was the building and operating of the ice rink, which was to be governed by a shareholder agreement, rather than the acquisition of the opportunity to do so. Because the parties did not ultimately come to an agreement on all of the terms of the shareholder agreement, no joint venture had been created.

[62] The decision of Tysoe J. was upheld on appeal (see ***Canlan (B.C.C.A.)***). Goldie J.A., writing for the court, said the following at para. 35:

> While a joint venture may take many forms and may be described in many ways, I am of the view that for legal consequences to arise as between the co-adventurers on the ground their association has become a joint venture there must be a contractual underpinning of some description.

[63] The existence of a contractual underpinning was also the issue in the recent case of ***Zynik Capital Corp. v. Faris***, 2007 BCSC 527 [***Zynik***], the facts of which bear resemblance to those in the present case. Zynik and Intergulf, an investment company, agreed to jointly pursue an opportunity to purchase the Versatile Shipyards. The parties signed a memorandum of understanding describing the basic terms of the venture pending the execution of a formal agreement.

[64] The memorandum specified a date on which the joint venture would end if the acquisition did not occur. Negotiations ensued with the bank holding security over the property. Intergulf took responsibility for finalizing the negotiations. A few days before the closing date, a dispute arose between the parties and Intergulf decided to acquire the property for itself. However, Intergulf failed to close the transaction and the bank sold the property to a third party.

[65] Zynik sued, claiming that Intergulf breached its obligations arising from the joint venture allegedly created by the memorandum. Tysoe J. held that the joint venture described in the memorandum was not a binding contract for two reasons:

a) First, the parties had not agreed on the price they would pay for the asset, and had not even agreed on a maximum price they would be willing to bid for the asset; and

b) Second, even if the price had been agreed, Intergulf would not have been bound because it had reserved the right to conduct due diligence on the property. By implication, Intergulf would not have been bound to proceed with the transaction if it was dissatisfied with the results of its due diligence.

[66] Because the parties had failed to agree on essential terms, their arrangement amounted to an agreement to agree, which is not enforceable. Tysoe J. referred to the leading English case of ***May v. Butcher v. The King***, ***(1929)***, [1934] 2 K.B. 17 (H.L.) at p. 21:

> To be a good contract there must be a concluded bargain, and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties.

[67] In summary, while the constituent ingredients of a partnership differ slightly from that of a joint venture, both require as their foundation a binding contract among the partners or joint venturers which contains all of the essential terms of the agreement between the parties.

B. Duties arising from Partnerships and Joint Venture Agreements

[68] As noted earlier, partnerships are presumptively fiduciary relationships at common law. Section 22 of the ***Partnership Act*** imposes on partners the additional duties of utmost fairness and good faith in their conduct toward one another.

[69] By contrast, judicial opinion is divided on the issue of whether joint venture agreements presumptively create fiduciary relationships. (***Cadbury Schweppes Inc. v. FBI Foods Ltd***., [1999] 1 S.C.R. 142, 167 D.L.R. (4th) 577 [***Cadbury Schweppes***]; ***Visagie v. TVX Gold Inc.*** (2000), 187 D.L.R. (4th) 193, 132 O.A.C. 231 [***Visagie***]).

[70] Parties enter into joint venture agreements in circumstances that vary greatly. They are sometimes concluded by experienced businessmen with similar expertise and equal bargaining power acting at arm's length in a commercial transaction. Other joint venture agreements are concluded in circumstances where one of the parties is particularly vulnerable to the unilateral power or discretion of another (or others). The question is whether the prohibition against self-dealing should be applied to both situations.

[71] The reasons of Sopinka J. in ***Lac Minerals Ltd. v. International Corona Resources Ltd.***, [1989] 2 S.C.R. 574, 61 D.L.R. (4th) 14 continue to be regarded as the touchstone on the limited role of fiduciary duties in relationships between arm's length commercial parties. Mr. Justice Sopinka said the following at p. 595:

> The consequences attendant on a finding of a fiduciary relationship and its breach have resulted in judicial reluctance to do so except where the application of this "blunt tool of equity" is really necessary. It is rare that it is required in the context of an arm's length commercial transaction. ...
>
> ... In my opinion, equity's blunt tool must be reserved for situations that are truly in need of the special protection that equity affords.

[72] It is the nature of the relationship, not the specific category of actor involved, which gives rise to fiduciary duties. Sopinka J. adopted at p. 599 the characteristics of

a fiduciary relationship described by Wilson J. in ***Frame v. Smith***, [1987] 2 S.C.R. 99 at para. 40, 42 D.L.R. (4th) 81 [***Frame***]:

1) The fiduciary has scope for the exercise of some discretion or power.
2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

[73] Sopinka J. made two further cautionary statements. First, self-dealing, of itself, cannot create fiduciary duties. Only where a fiduciary duty exists do the equitable rules about self-dealing apply. Second, the fact that confidential information is obtained and misused cannot itself create a fiduciary obligation. The exchange of confidential information and restrictions on its use may be incidents of a fiduciary relationship but are not constituent elements of the relationship.

[74] ***Visagie*** concerned a joint venture in which the plaintiffs disclosed commercially valuable information to the defendants about a potential mine site in Greece. The information was protected by a written confidentiality agreement. Ultimately, the Greek government decided not to sell the mine privately. The joint venture agreement was terminated as a result. Thereafter, the defendants successfully bid on the mine in a public offering and developed a lucrative gold mine. The plaintiffs sued for breach of fiduciary duty a breach of confidence.

[75] The trial judge, Feldman J. (as she then was), relied on the decision of ***Wonsch Construction Co. v. National Bank of Canada*** (1990), 75 D.L.R. (4th) 732, 42 O.A.C.

195 [***Wonsch***] to conclude that the parties owed one another fiduciary duties as a result of the joint venture. She also concluded, on the basis of ***Wonsch***, that the fiduciary duties extended beyond the termination of the joint venture agreement and prohibited the defendants from competing for the mine site.

[76] On appeal, the court unanimously concluded the trial judge erred in holding that the joint venture gave rise to fiduciary duties and that those duties survived the termination of the joint venture. Charron J.A. (as she then was) observed that any duties owed by parties to one another during the life of a joint venture agreement, and following its termination, arose from the terms of the agreement itself and not from any fiduciary obligation imposed by law. Charron J.A. in ***Visagie*** said the following at para. 25:

> The Supreme Court of Canada in *Cadbury Schweppes, supra,* makes it clear that fiduciary obligations are seldom present in a commercial context between parties acting at arm's length. Binnie J., in writing for the Court, quoted at pp. 163-164 the following from *Frame v. Smith,* [1987] 2 S.C.R. 99:
>
> > Because of the requirement of vulnerability of the beneficiary at the hands of the fiduciary, fiduciary obligations are seldom present in the dealings of experienced businessmen of similar bargaining strength acting at arm's length…. The law takes the position that such individuals are perfectly capable of agreeing as to the scope of the discretion or power to be exercised, i.e., any "vulnerability" could have been prevented through the more prudent exercise of their bargaining power and the remedies for the wrongful exercise or abuse of that discretion or power, namely damages, are adequate in such a case.

[77] Since ***Visagie*** there has been increasing judicial reluctance to accept the proposition that fiduciary obligations presumptively arise from joint ventures. In ***Chitel v. Bank of Montreal*** (2002), 26 B.L.R. (3d) 83, 45 E.T.R. (2d) 167 (Ont. S.C.J.), Boyko J. comprehensively reviewed the case law and concluded as follows at para. 167:

> Although some cases support the proposition that a joint venture agreement automatically creates fiduciary obligations, the more compelling line of cases require a case specific approach to determining fiduciary duty.
>
> (see also: ***Canadian Southern Petroleum v. Amoco Canada Petroleum***, 2001 ABQB 803, 97 Alta. L.R. (3d) 123).

[78] I agree with the approach taken by the court in ***Chitel***.

C. Consequences of a Partner's Departure

1. The Common Law View

[79] Unlike a corporation, a partnership is not a legal person. As noted earlier, partnership is the *relationship* -- created by contract -- between individuals carrying on business in common.

[80] Because a corporation is a legal person, it survives the departure of an officer or director. That is not the case with a partnership. A partnership does not have any separate legal existence from the partners that comprise it. The rule at common law is that when a partner leaves the partnership, the relationship ends. The end of the

relationship marks the end of the partnership. The remaining partners who continue to carry on the business do so as a newly formed partnership.

[81] The ***Canadian Encyclopaedic Digest*** (Western), 3rd ed. (Toronto: Carswell) [***CED (Western)***] Partnership, at §3 summarizes the common law position as follows:

> Partnership law is one of the few areas in which legal theory departs entirely from commercial reality. The law does not recognize the firm as distinct from its members. Accordingly, the concept of a continuing firm is impossible. The firm is the partners, the partners are the firm.

[82] A similar articulation by ***Lindley & Banks*** was cited with approval by the Supreme Court of Canada in ***Backman*** at para. 41:

> The law, ignoring the firm, looks to the partners composing it; any change amongst them destroys the identity of the firm; what is called the property of the firm is their property, and what are called the debts and liabilities of the firm are their debts and liabilities.

[83] The court in ***Backman***, after citing with approval the "conventional legal view" described by ***Lindley & Banks***, said the following at para. 42:

> A validly constituted partnership, therefore, is a continuing entity so long as none of the statutory or contractual events of dissolution occurs *and the composition of that partnership remains the same.* (Emphasis added)

[84] Partnerships are often referred to as "firms". The ***Partnership Act*** defines "firm" in s. 1 as follows:

> "**firm**" is the collective term for persons who have entered into partnership with one another.

[85] The definition of "firm" restates the common law view. The significance of the definition is explained by ***Lindley & Banks*** at para. 1-10:

> This definition highlights a feature which is peculiar to the English law of partnership…*i.e.* a refusal to recognize the firm as an entity separate and distinct from the partners who compose it. Notwithstanding a number of inroads in recent years, this feature remains as central to the law of partnership as it was in Lord Lindley's day.

[86] The principle that "the partners are the firm, the firm is the partners" was discussed in some detail in ***Davies v. Institute of Chartered Accountants of Saskatchewan*** (1985), 19 D.L.R. (4th) 447, 40 Sask. R. 221 (Sask. Q.B.) [***Davies***]. Davies was expelled from his accounting partnership. He then wrote to clients of his former firm to ask whether they wanted him to continue handling their accounts. Davies' former partners accused him of soliciting the firm's clients in breach of the professions standards of conduct, and complained to the Disciplinary Committee of the accountants' professional college. One of the standards set by the professional college prohibited the solicitation of accounts "entrusted to another public accountant". The Disciplinary Committee found that Davies had breached that rule.

[87] Davies sought judicial review of the decision, and the decision of the Disciplinary Committee was reversed. McLeod J. held that the committee had failed to address a "fundamental concept of partnership law", which court described at para. 21:

That concept includes the following essentials:

a) a partnership is not recognized in law as distinct from the members who constitute partnership;

b) a partnership expires when a partner leaves; and,

c) partnership rights, and assets, as between themselves, is in proportion to their partnership interest and, in the absence of agreement, a partner is not to be deprived thereof by a majority of partners.

[88] The consequence of those essentials, said the court at para. 22, is that Davies was as much entitled to the business opportunities of the firm as was any other individual partner or the remaining partners in concert.

[89] At para. 28 of ***Davies***, McLeod J. cited passages from ***Lindley & Banks*** to explain the distinction in law between corporations and partnerships:

> …A corporation, it is true, consists of a number of individuals, but the rights and obligations of these individuals are not the rights and obligations of the artificial person composed of those individuals…
>
> *With partnerships the case is otherwise;* the members of these do not form a collective whole, distinct from the individuals composing it; nor are they collectively endowed with any capacity of acquiring rights or incurring obligations. The rights and liabilities of a partnership are the rights and liabilities of partners and are enforceable by and against them individually. (Emphasis in original).

2. Effect of the Partnership Act on the Common Law

[90] The ***Partnership Act*** contains several provisions concerning dissolution of partnerships which modify to some extent the common law view as to the circumstances under which a partnership may continue despite a change in its

composition. However, the ***Partnership Act*** does not alter the fundamental legal concept embedded in the common law that a partnership does not exist apart from its partners.

[91] Section 2 of the ***Partnership Act*** mirrors the definition of partnership found in the English statute. As already noted, the Supreme Court of Canada in ***Backman*** expressly approved the view stated in ***Lindley & Banks*** that the definition preserves the common law view of partnership.

[92] Other provisions demonstrate that the scheme of the ***Partnership Act*** contemplates the dissolution of a partnership upon a change in its composition. Among them are the following:

> **Liability of Partners**
>
> **19**(3) A retiring partner may be discharged from any existing liabilities by an agreement to that effect between the retiring partners and *the members of the firm as newly constituted* and the creditors.
>
> **Rights where partnership is dissolved by death or retirement**
>
> **45**(1) …[I]f any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with its capital or assets without any final settlement of accounts as between the firm and the outgoing partner or his or her estate, in the absence of any agreement to the contrary, the outgoing partner or estate is entitled, at the option of himself or herself or his or her representatives, to
>
> > (a) the share of the profits made *since the dissolution* that the court may find to be attributable to the use of his or her share of the partnership assets….
> >
> > (Emphasis added)

[93] In the case of ***Diefenbacher v. Young*** (1995), 123 D.L.R. (4th) 641, 80 O.A.C. 216, 22).R. (3d) 641 (C.A.) Carthy J.A. described the operation of s. 42(1) of the ***Ontario Partnerships Act***, which is substantively identical to s. 45(1) of the ***Partnership Act*** reproduced above. The section provides for compensation to an outgoing partner for any delay in payment of his or her share of the capital or assets of the firm following departure. According to Carthy J.A. at para. 11,, the section is a reinforcement of the common law position that a partnership does not survive a change in its composition:

> A partnership is dissolved when a partner leaves in the absence of an agreement to the contrary. Another partnership then takes its place. Section 42 gives a clear entitlement to the outgoing partner to the profits made on that partner's share after dissolution.

[94] Although the broad scheme of the ***Partnership Act*** reflects the traditional common law position, it is noteworthy that certain provisions allow for the continuation of a partnership in certain circumstances where dissolution would otherwise result. Partial dissolution is a concept not recognized at common law, but is provided for in s. 36:

> **Dissolution by bankruptcy, death, dissolution of partner or charging order**
>
> **36**(1) On the death, bankruptcy or dissolution of a partner,
>
> a) a partnership of 2 partners is dissolved, and
>
> b) subject to agreement among the partners, a partnership of more than 2 partners is dissolved *as between the bankrupt, dead or dissolved partner and the other partners.*

> (2) If the share in the partnership property of a partner is charged under section 26 for the separate debt of the partner, the other partners may by notice in writing to the partner whose share is charged,
>
> a) dissolve the partnership, or
>
> b) if there are 3 or more partners, *dissolve the partnership as between the partner whose share is charged and the other partners.*
>
> (Emphasis added)

[95] Section 38(2) of the ***Partnership Act*** gives partners, where there are 3 or more of them, the right to apply to court for partial dissolution where one of the partners is guilty of misconduct or has become incapacitated, or the circumstances otherwise make dissolution just and equitable:

> **Power of court to decree dissolution in certain cases**
>
> **38**(2) If there are 3 or more partners, the partnership may be dissolved or may be dissolved as between the partner whose condition or conduct gave rise to the application and the remaining partners.

[96] From the inclusion of these provisions I infer that the circumstances they address are exceptions to the rule that any change in the composition of a partnership results in its dissolution.

[97] The ***Partnership Act*** addresses the duration of partnerships where dissolution is not triggered by the special circumstances enumerated in sections 36 and 38. Section 29 provides that where there is no set term for the duration of the partnership, one partner may dissolve it upon notice:

> **Ending of the partnership**
>
> **29**(1) If no set term has been agreed on for the duration of the partnership, any partner *may end the partnership* at any time on giving notice to all the other partners of his or her intention to do so.
>
> (Emphasis added)

[98] Section 35 addresses three circumstances which automatically trigger dissolution:

> **Dissolution of partnership**
>
> **35**(1) Subject to any agreement between the partners, a partnership is dissolved
>
> a) if entered into for a set term, by the expiration of that term,
>
> b) if entered into for a single adventure or undertaking, by the termination of that adventure or undertaking, or
>
> c) if entered into for an undefined time, by any partner giving notice to the other or others of his or her intention to dissolve the partnership.

[99] Both s. 29 (describing a partnership with "no set term") and s. 35(1)(c) (describing a partnership for "an undefined time") address partnerships "at will" which may be dissolved by notice. In the case of ***Moss v. Elphick***, [1910] 1 K.B. 846 (C.A.) [***Moss***], the court was faced with the difficulty that still exists under the ***Partnership Act***. Under the English ***Partnership Act, 1890***, both s. 26(1) and s. 32 (the equivalent of our ss. 29 and 35(1)(c)) would appear to apply where a partnership is not for a set term. The agreement in that case was for a partnership of indefinite term, terminable only by mutual agreement of the parties. The appellant argued that because the agreement did

not identify a "fixed term", the equivalent of our s. 29 applied and the partnership could be terminated by notice. The three law lords disagreed. For slightly different reasons, each concluded that the partnership could not be terminated on notice.

[100] Farwell L.J. cited with approval the statement in ***Lindley & Banks*** that "the result of a contract of partnership is a partnership at will, unless some agreement to the contrary can be proved." Since the partnership at issue could not be terminated except by mutual agreement, it was not a partnership at will and did not fall within the equivalent of our s. 29.

[101] Fletcher Moulton L.J. held that the provision equivalent to our s. 29 addressed only those cases where the partnership agreement was silent as to the duration of the partnership and was not meant to render inoperative any provision the parties may choose respecting the duration of the partnership (such as the one between the parties in ***Moss***).

[102] Finally, Vaughan Williams L.J. concluded that it was not the intention of the Act to prevent partners from making an agreement that their partnership is not terminable at will. Where there is agreement of the parties as to the method of termination, that agreement will govern.

[103] ***Moss*** has been followed in this and other provinces where the issue to be decided was whether the disputed relationship was a set term partnership as distinct from a s. 29 partnership and therefore terminable at will (see ***Gendron v. Begin***, [1996] B.C.J. No. 1353 (QL) (B.C.S.C.); ***Kirkham v. Vandegoede***, [1999] B.C.J. No. 1566

(QL) (B.C.S.C.); ***Dia Kas Inc. v. Virani***, [1995] B.C.J. No. 1747 (QL) (B.C.S.C.) rev'd, (1997), 88 BCAC 26, 144 W.A.C. 26; ***Partridge v. Seguin***, [1991] O.J. No. 1355 (QL) (Ont. Gen. Div.)).

[104] The question that arises in the present case, however, is whether a partnership falling within s. 35(1)(b) (that is, a single adventure partnership) falls within the rule cited by Farwell L.J. in ***Moss*** -- that is to say, is it presumptively a partnership at will that can be terminated upon notice by one partner? The issue is how one reconciles s. 29, which creates a presumption of termination of the partnership on notice in the absence of agreement as to duration, with s. 35(1)(b), which says a single adventure partnership dissolves when the adventure is terminated.

[105] The question of whether a single adventure partnership is terminable upon notice arises in this case because Gaglardi and Beedie allege that the agreement made in November 2003 with Aquilini was a single adventure partnership that could not be terminated by Aquilini upon notice of his intention to leave. ***Moss*** did not address termination of single adventure partnerships, and none of the cases cited above addresses the issue directly.

[106] I have concluded that s. 35(1)(b) will generally exclude the operation of s. 29 because the creation of a partnership for the purpose of a single undertaking will usually imply an agreement that it will continue until the undertaking is completed. The rationale is as stated in ***Lindley & Banks*** at para. 9-11:

> If a partnership is entered into for a single adventure or undertaking, it will usually be possible to infer an agreement that the partnership is to endure until its completion.

[107] The focus of the inquiry under s. 35(1)(b) is whether the evidence establishes an intention by the parties to have the partnership continue until the adventure or undertaking is completed. If so, it is not a partnership at will and cannot be dissolved by one of the partners unilaterally.

[108] The principal authority on which the statement in ***Lindley & Banks*** is based is ***Reade v. Bentley*** (1859) 4 K. & J. 656. The result in that case illustrates the policy underlying s. 35(1)(b): If terminable on notice, a single adventure partnership could be dissolved prematurely by one partner to prevent the other partners -- who may have contributed substantially to the partnership venture -- from realizing a return on their contribution.

[109] Individuals considering partnership are not without means to craft an exit from a set term or single adventure partnership. Section 35(1) expressly says dissolution of a partnership is "subject to any agreement between the partners". Agreement may be express or implied. Partners in a single adventure partnership may agree that a partner is entitled to withdraw at any time. Such agreement would result in a partnership at will.

[110] Similarly, a single adventure partnership may end if the conduct of the partners is inconsistent with its continuation. That was the case in ***Davis v. Oulette*** (1981), 27 B.C.L.R. 162 (S.C.). McEachern C.J.S.C. (as he then was) held at pp. 172-173 that as

a general rule a partnership under s. 35(1)(b) of the ***Partnership Act*** could not be terminated by the unilateral conduct of one partner:

> There can hardly be any doubt that the defendant treated the partnership as being over after 12th -13th October. But that would not make it so. …. I do not think it would be fair to say that the partnership was over as soon as the plaintiff realized the defendant was going his own way. That would convert a partnership such as this into a partnership at will

[111] However, what did dissolve the partnership was the subsequent conduct of the plaintiff, who took a series of steps that were inconsistent with a continuing partnership and consistent with his intention to dissolve it. On that point, the court said the following at p. 172:

> I believe that at some point in time this single adventure or undertaking came to an end. Each of the former partners was pursuing the project separately and at some point each of them walked away from it as a partnership undertaking.

[112] It must be noted that in the same paragraph, McEachern C.J.S.C. made the following comment:

> As this was a s. 35(b) partnership, the plaintiff could have insisted that the partnership continue (*in the absence of reasonable notice of termination*), even though he could not require the defendant to perform. But the plaintiff could not keep the partnership alive and, at the same time, conduct himself in a manner inconsistent with a continuing partnership. (Emphasis added)

[113] The parenthetical comment is inconsistent with the overall reasoning of the court and its conclusion that the partnership in question was not a partnership at will. McEachern C.J.S.C. made abundantly clear that the defendant was not entitled to

unilaterally terminate the single adventure partnership on notice. It was only the plaintiff's conduct after the defendant's departure that persuaded the court the plaintiff had acquiesced to the termination of the partnership. Implicit in the conduct of both partners was their acceptance that the partnership was over.

[114] The suggestion that the partnership could have been terminated on notice is, in any event, *obiter*.

D. Continuing Obligations Following Dissolution

[115] The ***Partnership Act*** deals expressly with the rights and obligations of partners in the wake of dissolution. Section 41(1) provides that, subject to the need to complete transactions already underway and wind up the partnership's affairs, the rights and obligations of partners come to an end with the dissolution of the partnership:

> **Authority of partners after dissolution**
>
> **41** (1) Subject to subsections (2) and (3), after the dissolution of a partnership, the authority of each partner to bind the firm and the other rights and obligations of the partners continue despite the dissolution so far as may be necessary to wind up the affairs of the partnership, and to complete transactions begun but unfinished at the time of the dissolution, *but not otherwise.* (Emphasis added)

[116] Former partners can continue to owe fiduciary duties to one another but those duties are of a particular and limited kind. They consist essentially of the duty to ensure that ongoing transactions are completed and the assets of the partnership are realized for the benefit of all the partners. A partner who takes partnership property for his or her

own benefit following dissolution is liable to account to his or her partners. That is because the assets of the partnership belong to all of the partners.

[117] Where fiduciary duties of partners survive the dissolution of a partnership, they are reciprocal in nature. Partnership, unlike the relationship between a corporation and its officers, is a symmetrical relationship. Any continuing duties following dissolution bind all of the partners equally.

[118] So far as I am aware, there has been no judicial comment in British Columbia on the effect of s. 41 of the ***Partnership Act***. A parallel provision, s. 38 of the British ***Partnership Act, 1890,*** was considered by the House of Lords in ***Inland Revenue Commissioners v. Graham's Trustees***, 1971 SC 1 (H.L.) [***Graham***]. The case involved farm property belonging to the deceased Graham. Graham had leased the farm to a family partnership of which he was a member. When he died, the remaining partners sought to maintain the lease on the farm.

[119] Lord Reid, delivering the principal judgment, determined that the partnership had dissolved on the death of one of the partners in accordance with the ***Partnership Act, 1890***. It followed that after Graham's death the farm had no tenant because the tenant had been the partnership.

[120] Lord Reid then considered the language of s. 38 which stipulated that upon dissolution of a partnership the rights and obligations of the parties continue only as may be necessary to "complete transactions begun but unfinished at the time of

dissolution". He concluded at p. 21 that the phrase is limited to contracts already in existence at the time of dissolution:

> What is meant by transactions begun but unfinished when the partnership was dissolved? …. It was argued that "transactions" means bargains. But that would deprive this provision of all content, *for it is clear that surviving partners have no right to bind the assets of the dissolved firm by making new bargains or contracts.* Their right and duty is to wind up its affairs. In my view this must mean that the surviving partners have the right and duty to *complete all unfinished operations necessary to fulfill contracts of the firm which were still in force when the firm was dissolved.* (Emphasis added)
>
> (see also: ***Sew Hoy v. Sew Hoy***, [2001] 1 N.Z.L.R. 391)

[121] I accept the conclusions of Lord Reid with respect to both the dissolution of partnership following a change in membership and the limited scope of the rights and obligations that partners continue to possess following dissolution.

E. Entitlement of Former Partners to Compete

[122] As the authorities establish, the fiduciary duties of former partners extend only to the completion of unfinished transactions and the winding up of the partnership's affairs. Further, any ongoing fiduciary duties owed by the partners to one another are mutual obligations binding all of the partners.

[123] Except as constrained by those limited continuing obligations, former partners are free to compete with one another unless they have entered into an agreement to the contrary.

[124] As the court in ***Davies*** concluded, former partners are entitled to pursue the business following the dissolution of the partnership. The fact that some of the partners decided to continue to pursue the business together did not give them any greater rights than the individual former partners. Of the fact that the expelled partner solicited the clients of the former partnership, the court said this at p. 451:

> The fact that five of six partners chose one path does not entitle them by weight of numbers, to take the assets, and the firm name, or to presume that they continue to be entrusted with the engagements with which a former partnership was entrusted.

[125] In ***Sinclair v. Ridout and Moran*** [1955] O.R. 167, 4 D.L.R. 468 (Ont. H.C.), leave to appeal to O.C.A. granted, [1955] O.W.N. 633 [***Sinclair***], two individuals formed a partnership to purchase and reorganize a manufacturing business. Sinclair was to do the work; Ridout was to supply funds for the transaction costs. Upon a successful reorganization of the business, they were to share the profits equally. Sinclair hired an engineer named Moran to help him assess the business. When the transaction was in its advanced stages, Sinclair encountered difficulty raising the necessary capital. Ridout terminated the relationship and, together with Moran, bought the business on his own account.

[126] McRuer C.J.H.C. concluded that Ridout and Moran acted in bad faith in ousting Sinclair from the transaction. He held that Moran was Sinclair's agent and had breached the fiduciary duties he owed as a result of the agency relationship. On the other hand, Ridout's fiduciary obligation to Sinclair ended with the dissolution of the partnership:

> While the partnership existed, they were agents of a particular character for one another within the scope of the partnership. When the partnership was terminated the agency was terminated. I know of no law, and no law was cited to me, that would support a finding that, upon the dissolution of a partnership, in the absence of any agreement to the contrary, the partners cannot make use of information acquired by them in the course of the partnership in competition with each other with respect to matters for which the partnership was formed. Since the parties failed to have a written agreement relating to this matter to the contrary, I think they were both at liberty upon the termination of the relationship to compete with one another for the purchase of [the business]. (at pp.187-188)

[127] The relationship between Sinclair and Ridout was one of partnership. They owed one another fiduciary duties because they were partners. Such rights as arose in the course of their relationship belonged to them both. Upon the dissolution of the partnership, neither continued to owe any duty of loyalty to the other. Each had the right to use the information he had acquired during the partnership. In the absence of an agreement to the contrary, each had the right to compete with the other.

[128] The principle in ***Sinclair*** is expressed as follows in the ***CED (Western)***:

> §298 Upon dissolution of a partnership, the partners, unless there is an agreement prohibiting it, may make use of information acquired by them in the course of the partnership in competition with each other with respect to matters for which the partnership was formed. *Sinclair v. Ridout*, [1955] O.R. 167 (Ont. H.C.)

[129] As was subsequently observed by Catzman J. in ***Nufort Resources v. Eustace*** (1985), 29 B.L.R. 282 (Ont. H.C.) [***Nufort***], ***Sinclair*** was a case in which the former partner clearly formed a plan, during the life of the partnership, “to seek the first opportunity to oust the plaintiff and to proceed with the proposed transaction without him” (at p. 310).

[130] In ***Nufort***, Catzman J. adopted the general principal stated in ***Sinclair***, which is that where a partnership or joint venture ends, any fiduciary duty that once existed between the parties is also terminated. Several Canadian texts cite ***Nufort*** for that general principle: Alison R. Manzer, *A Practical Guide to Canadian Partnership Law* (Aurora: Canada Law Book, curr. Dec. 2001) at paras. 5 - 760; Michael Ng, *Fiduciary Duties: Obligations of Loyalty and Faithfulness* (Aurora: Canada Law Book, cur. Feb. 2003) at p. 5 - 49. ***Nufort*** was cited to similar effect in the *Canadian Encyclopaedic Digest* (Ontario), 3rd ed. (Toronto: Carswell) Partnership, at 211.

[131] The parties in ***Nufort*** went their separate ways as a result of a disagreement. The relationship was not terminated unilaterally by one of the partners for an improper purpose. The court observed the following at p. 309:

> In the present case, the relationship between the partners or joint venture had clearly terminated before the defendants went their own way and succeeded in the acquisition which they had previously been pursuing in common with the plaintiff. …. In the circumstances, the parties were, to use the words of McRuer C.J.H.C., "at liberty…to compete with one another", as in fact, they did in the days that followed the termination of the relationship….

[132] The result in ***Sinclair*** might be different today. On the particular facts of the case, the errant partner may have been precluded by s. 35(1)(b) of the ***Partnership Act*** from ending the partnership on notice by operation of s. 35(1)(b) or by s. 41 from appropriating the maturing partnership opportunity. Nevertheless, the general principle for which the case stands remains good law.

[133] As noted earlier, a corporation is a legal person. Directors and officers of a corporation, particularly when they are developing company business, act exclusively as agents of the corporation and not in their personal capacities or on their own behalf. The opportunities they develop are the opportunities belonging to the corporation.

[134] When an officer departs, the corporation continues. The opportunities developed by the departing officer continue to be the corporation's opportunities. The decision of the Supreme Court of Canada in ***Canadian Aero Services Ltd. v. O'Malley***, [1974] S.C.R. 592, 40 D.L.R. (3d) 371 [***Canaero***], illustrates this principle.

[135] The facts of ***Canaero***, briefly stated, are these. Canaero was the subsidiary of a large American company. The two individual defendants were its top management personnel (president and vice-president). Over a period of 5 years, Canaero had devoted significant resources in pursuit of an opportunity to perform airborne topographical mapping for the government of Guyana. To that end, one of the defendants had repeatedly traveled to Guyana to meet with officials in its government and gather information about the project. At Canaero's expense, the defendants had engaged a local agent in Guyana. They also worked with the Canadian government, which was to fund the project by way of international government aid. When the defendants learned that the project had been approved in principle by both governments and that the bidding deadline was imminent, they began preparations to make their own bid in competition with Canaero. They then resigned their corporate positions without notice and submitted their own bid, which was accepted.

[136] The court held that the defendants had been fiduciaries of Canaero and taking the contract on their own account was a breach of their duty of loyalty to the company. While the defendants owed fiduciary duties to the company, the company owed no reciprocal fiduciary duties to the defendants. The company was thus exclusively entitled to pursue the opportunity without regard to the interests of the defendants. On this point, Mr. Justice Laskin (as he then was) said the following at p. 619:

> I find no obstructing considerations to the conclusion that [the defendants] continued, after their resignations, *to be under a fiduciary duty to respect Canaero's priority, as against them…*in seeking to capture the contract for the Guyana project. They entered the lists in the heat of the maturation of the project, known to them to be under active Government consideration when they resigned from Canaero and when they proposed to bid on behalf of Terra [the newly-formed company of the defendants]. (Emphasis added)

[137] In ***Davis v. Ouellette***, McEachern C.J.S.C. concluded that the partnership had dissolved and that, following dissolution, neither partner owed any fiduciary duty to the other. However, at p. 175 he considered the effect of ***Canaero*** on the general principle expressed in ***Sinclair*** that following the termination of a partnership any partner is free to pursue the former partnership business in competition with the others:

> … I doubt if the authority of *Sinclair*, supra, survives *Can. Aero Service Ltd. v. O'Malley* [citation omitted], which appears materially to update the law relating to fiduciary duties, particularly in respect of maturing business opportunities. I will be mentioning *Can.Aero* later, but I doubt if *Sinclair* states the present law. If it were decided today, I think the acquisition in question would be held to be a ripe or maturing business opportunity and the paths to liability would be re-routed …

[138] It was not necessary on the facts of ***Davis v. Oulette*** to resolve that doubt. McEachern C.J.S.C. concluded at p. 176 that ***Canaero*** did not apply because the former partnership had ended before the opportunity had ripened to the stage where it might be described as a maturing opportunity of the partnership:

> While *Can. Aero* furnishes a useful guide to the approach one should take to the solution of fiduciary problems, I do not think the result of that case is one that I should apply here because the possible acquisition of control of the company in this case could hardly be described as a maturing business opportunity.

[139] The discussion concerning ***Canaero*** contained in ***Davis v. Oulette*** was the subject of comment by Catzman J. in ***Nufort***, at pp. 309-310 to the following effect:

> I am aware of the doubt expressed by Chief Justice McEachern in *Davis v. Oulette* [citation omitted] whether *Sinclair* – in which it should be noted, Chief Justice McRuer expressly found, as I do not find in the present case, that the defendants were acting in bad faith and had made up their minds to seek the first opportunity to oust the plaintiff and to proceed with the proposed transaction without him – continues to be authoritative in view of the subsequent decision of… *Can.Aero Services Ltd. v. O'Malley* [citation omitted]. *Whatever the force of that observation, I consider that the circumstances of the present case, as outlined in my recitation of the facts, are significantly different from those which were determined to exist in Canaero and, indeed, in Davis, and that the factual situation disclosed by those circumstances does not engage the principle enunciated…in Canaero.* (Emphasis added)

[140] ***Davis v. Oullette*** is the only British Columbia authority of which I am aware that suggests the principles expressed in ***Canaero*** may apply to former partners. As McEachern C.J.B.C. observed, it may be a breach of a partner's duties, during the currency of a single adventure partnership, to formulate a plan to appropriate a ripening partnership opportunity, and to end the partnership for the specific purpose of

implementing that plan. Such circumstances (which are similar to those present in ***Sinclair***) may engage s. 35(1)(b) or s. 41 of the ***Partnership Act***.

[141] I was cited a handful of cases in which ***Canaero*** was considered in circumstances other than the corporate context: ***Moffat v. Wetstein***, (1996), 29 O.R. (3d) 371, 135 D.L.R. (4th) 298 (Ont. Gen. Div.), leave to appeal to Ont. Div. Ct. refused, (1997), 144 D.L.R. (4th) 188, 29 O.T.C. 65; ***Tourangeau v. Taillefer***, [2000] O.J. No. 184 (QL) (Sup. Ct. J.); and ***Edmonds v. Donovan***, [2005] VSCA 27 (Vict. C.A.). I did not find any of these authorities helpful in the context of the present case or persuasive generally.

[142] Gaglardi and Beedie also cited ***Wonsch*** as authority for the proposition that the principles expressed in ***Canaero*** may apply to former members of a partnership or joint venture. I think it important to make the following observations about the ***Wonsch*** decision***.***

[143] The plaintiff Wonsch and the defendant Danzig entered into a joint venture agreement to develop an apartment complex. Some considerable time after the joint venture had ended according to its terms, but before the parties had settled their accounts under the joint venture agreement, Wonsch continued to owe his bank $400,000 in respect of a construction loan. When Wonsch and Danzig had a falling out, Danzig purchased the loan and security from the bank at a discount (without disclosing the discounted price to Wonsch) and immediately commenced foreclosure proceedings.

He did so (in the words of the court at para. 30) in order "to bring his former joint venture partner to his knees". Wonsch sued.

[144] Carthy J.A., following the decision of the Supreme Court of Canada in ***Hitchcock v. Sykes*** (1914), 49 S.C.R. 403, 23 D.L.R. 518, accepted that joint venturers owe one another fiduciary obligations with respect to the common interest in the joint venture. The court then cited ***Canaero*** for the proposition that fiduciary duties could extend beyond the termination of the relationship giving rise to them. In the view of the court, the facts of the case justified the finding that the fiduciary obligation extended beyond the termination of the venture. As the court explained, that finding hinged on the fact that Danzig had made a secret profit from an asset acquired during the life of the joint venture. Even though the joint venture had come to an end, Danzig was obliged to account for the profit he had made from the asset.

[145] ***Wonsch*** does not stand for the proposition that parties to a joint venture are precluded from competing with one another after the joint venture ends. It stands for the proposition that where a joint venture agreement gives rise to fiduciary duties, the joint venturers will continue to owe fiduciary obligations with respect to the realization or disposition of the assets belonging to the joint venture.

[146] Even where a joint venture agreement does give rise to a fiduciary relationship, the relationship cannot result in obligations following termination of the agreement that are more onerous than those applying to partnerships unless, of course, the parties specifically contract for ongoing obligations. In the absence of such specific contractual

terms, any duties arising during the currency of the joint venture agreement will survive the termination of the agreement only to bring about a proper disposition of assets acquired by the parties during the joint venture.

[147] The decision in ***Visagie*** supports the proposition, which I accept, that upon the termination of a joint venture, the former joint venturers are (like partners) free to compete with one another unless they have included a non-competition clause as part of their agreement.

F. Summary of Conclusions on the Legal Framework

[148] The following is a summary of my conclusions concerning the legal framework governing this dispute.

1) Partnerships and joint ventures differ somewhat in their constituent elements, but both arise from contract. The contract underlying a partnership or joint venture must meet all of the prerequisites of a contract, including the intention to create legal relations.

2) (a) Partnerships are presumptively fiduciary in nature. The ***Partnership Act*** imposes on partners, in addition to the fiduciary duties existing at common law, the duties of utmost fairness and good faith.

(b) By contrast, joint venture agreements do not presumptively create fiduciary relationships. Whether fiduciary obligations arise from a joint venture agreement depends on the characteristics of the particular relationship in issue.

3) A partnership is not recognized in law as distinct from its constituent members. Absent an agreement to the contrary, a partnership dissolves upon a change in its composition and a new partnership takes its place. The ***Partnership Act*** has created certain specific exceptions to this common law rule, but does not

otherwise alter the fundamental common law concept that a partnership does not exist apart from its partners.

4) (a) Duration of the partnership is always subject to the agreement of the partners. The general rule it that a contract of partnership is a partnership "at will" capable of dissolution by a partner on notice unless the partners otherwise agree.

(b) If a partnership is entered into for a single adventure or undertaking (as provided by s. 35(1)(b) of the ***Partnership Act***), the partnership will endure until the completion of the undertaking or adventure unless the partners otherwise agree or the conduct of the partners is inconsistent with its continuation.

5) (a) Except as provided by s. 41 of the ***Partnership Act***, the rights and obligations of partners come to an end with the dissolution of the partnership unless the partners agree otherwise.

(b) Where fiduciary duties of partners survive dissolution of the partnership, they are reciprocal in nature. Any continuing duties bind all of the partners equally.

6) Where a specific joint venture agreement gives rise to fiduciary obligations, those obligations will survive the termination of the agreement only to bring about a proper disposition of the assets acquired by the parties during the joint venture.

7) Former partners and joint venturers are free to compete with one another unless they have negotiated a non-competition clause as part of their agreement.

VI. The Facts

[149] Orca Bay, which is ultimately controlled by McCaw, owned the Enterprise in 2003. The President and CEO of Orca Bay was Stanley McCammon ("McCammon").

[150] McCaw first became an owner of an interest in the Enterprise in 1993, when he acquired a 15% interest. His co-owner was Arthur Griffiths, who also owned the Vancouver Grizzlies basketball team. The Canucks and Grizzlies suffered financial

losses which Griffiths was unable to fund. McCaw funded the losses through his companies and, as a result, eventually acquired 100% of both the Canucks and the Grizzlies.

[151] McCaw eventually sold the Grizzlies to an American buyer who moved the team from Vancouver.

[152] The financial troubles of the Canucks were not behind the team in 2001. Aquilini had been a Canucks fan most of his life. He was concerned the Canucks might be purchased by someone outside Vancouver and, like the Grizzlies, moved to another city. He was aware that a similar concern had arisen in Edmonton with the Oilers hockey team. To address the problem, a large number of people in the Edmonton business community had formed a syndicate and purchased the Oilers. Aquilini thought a similar response might be required to keep the Canucks in Vancouver.

[153] Aquilini had the financial resources to acquire an interest in the Canucks. The Aquilini family owns and develops real estate. It owns numerous income-generating properties, blueberry and cranberry farms and real estate-based businesses such as golf courses. The net worth of the Aquilini family is in the hundreds of millions of dollars.

[154] Aquilini discussed his idea with Lyall Knott (“Knott”), a solicitor practicing with the law firm of Clark Wilson in Vancouver. The Aquilini family had retained Knott over the years to advise them on business law issues. Knott was, at the time, a member of Orca Bay’s Advisory Board and acquainted with McCammon.

[155] Knott introduced Aquilini to McCammon in early 2001. Aquilini told McCammon he would be interested, as the leader of a community group, in making an offer for the Canucks. A series of meetings ensued in which the value of the Enterprise was discussed. McCammon provided Aquilini with financial information concerning the Enterprise, and they discussed forecast and planning issues.

[156] Aquilini had a brief discussion at this time with Gaglardi to determine whether he would be interested in becoming an investor in the Canucks. Gaglardi declined. He doubted the team would be a wise investment in light of its history of financial problems.

[157] Aquilini was prepared to be the lead investor by purchasing a 20% interest in the Enterprise at a value of $210 million. Orca Bay refused the offer. McCammon told Aquilini the Enterprise was worth $250 million. Aquilini believed the team's financial performance did not merit an asking price that high. He told McCammon that he would consider raising his offer in the future if the team's fortunes improved.

[158] Following his initial offer to Orca Bay, Aquilini continued to acquaint himself with the business of the Canucks and the hockey business in general. He met with senior members of Orca Bay management including Dave Cobb, Chief Operating Officer of Orca Bay, Brian Burke, General Manager of the Canucks at the time, and Harvey Jones, General Manager of the Arena. He also met with Steve Bellringer, McCammon's predecessor as Orca Bay's CEO. Aquilini continued to meet from time to time with McCammon to discuss developments in the team's financial performance.

[159] By 2003, McCammon had decided to leave his position as CEO. He lived in Seattle with his spouse and young children, but his position with Orca Bay required that he spend significant amounts of time in Vancouver. McCammon believed that the Enterprise required a full-time commitment from the CEO, and he was finding it increasingly difficult to make that commitment. He suggested to McCaw that Orca Bay hire someone permanently based in Vancouver to take on the position of CEO. McCammon agreed to stay on as CEO to assist with the sale of the Canucks.

[160] McCaw was increasingly interested in divesting himself of the Enterprise. In 2003, Orca Bay retained KPMG Corporate Finance Inc. ("KPMG") to identify potential investors interested in purchasing the Enterprise, or, alternatively, purchasing an interest in the Enterprise and forming a partnership with Orca Bay.

[161] KPMG prepared a confidential information memorandum detailing the financial performance and forecasts of Orca Bay (the "CIM") and a form of non-disclosure agreement (the "NDA") to be executed by potential investors before receiving a copy of the CIM. The NDA required the recipient of the CIM, among other things, to hold all confidential information in strict confidence and to agree that Orca Bay owned all of the confidential information.

[162] The CIM contained a significant amount of confidential information concerning the Enterprise. It stated that the objective of Orca Bay was to bring together a group of locally based investors to purchase the Canucks as well as the Arena. The offering price for the Canucks and related assets was $224 million, the Arena $56 million. The

CIM disclosed that Orca Bay was prepared to make available to purchasers secured non-recourse debt financing in the amount of $80 million at an interest rate of 5.5%.

[163] The CIM was distributed to many individuals in the Vancouver business community in July 2003. Each of Gaglardi, Beedie and Aquilini separately received a copy of the CIM.

[164] The Gaglardi family owns Northland Properties Corporation which has numerous divisions, one of which operates the various hotel and restaurant holdings of Northland. Those holdings include the Sandman chain of hotels, the Moxie's Restaurant chain, the Denny's Restaurant chain, and a chain of nightclubs known as the Shark Club. Northland has a real estate division which owns apartment, commercial and office buildings. It also has a construction division. Northland employs approximately 7,000 employees.

[165] Gaglardi is the CEO of each of the operating divisions as well as President of Northland. He oversees the assets of Northland whose worth exceeds $250 million.

[166] Ryan Beedie is the president of a group of companies known as the Beedie Group. The business of the Beedie Group is the design, construction, development and management of industrial real estate, primarily in greater Vancouver. The companies own and manage approximately 5.4 million square feet of industrial space, making them the largest landlord in British Columbia. In 2004, the worth of the assets of the Beedie Group was in excess of $300 million.

[167] The Beedie Group consists of various companies and limited partnerships. Kery Ventures Limited Partnership is a limited partnership comprised of two trusts. Beedie is involved on a full-time basis in the management and operation of the Beedie Group, and has been for approximately 15 years. Ultimately, he has control of the two trusts.

[168] The CIM prepared by Orca Bay concerning the Enterprise described in some detail the structure of the proposed transaction, which involved potential investors subscribing to partnership units in two new limited partnerships that would own the Enterprise. It disclosed that upon a change in control of the Enterprise, McCammon would leave his position as CEO of Orca Bay.

[169] Aquilini executed a copy of the NDA on July 3, 2003; Beedie executed a copy on July 23, 2003, and Gaglardi on August 8, 2003.

[170] In September 2003, KPMG prepared and issued a private placement summary offering the Enterprise at a revised price of $250 million with indicative financing at a rate of 5.5%.

[171] In September 2003, Gaglardi had discussions about the opportunity with Bob Byford (“Byford”), the KPMG partner retained by Orca Bay to put together a group of investors. In about mid-October, Byford told Gaglardi that KPMG had not succeeded in generating sufficient interest to put together an investors’ group. He said he knew of only one individual other than Gaglardi who might be qualified to pursue an interest in the Canucks. That individual was Ryan Beedie. Byford contacted Beedie and obtained his consent to have Gaglardi contact him directly.

[172] Gaglardi called Beedie and they discussed the information each had obtained to date about Orca Bay's offering through their meetings with KPMG and Byford. They exchanged information about their families and businesses. At the conclusion of the call, they agreed to meet.

[173] At about the same time, Gaglardi had a discussion with Aquilini about the possibility of pursuing an interest in the Canucks.

[174] The Aquilini and Gaglardi families had a history of business dealings dating from the late 1980's. Northland had encountered some financial difficulties at that time and underwent financial restructuring. The company required debt financing, which it received with the assistance of the Aquilini family over a period of several years.

[175] In 2002, the Aquilinis brought to the Gaglardis an opportunity to become involved in a large recreational and property development project at Mount Garibaldi near Squamish, British Columbia. The project continues to be financed equally by the two families.

[176] In early October 2003, Aquilini was involved in meetings with Gaglardi's father, Bob Gaglardi ("Gaglardi Sr."), about the Mount Garibaldi project. Gaglardi Sr. mentioned his son's interest in the Canucks, and suggested that Aquilini contact Gaglardi to discuss the possibility of participating in the purchase of an interest in the team. Aquilini told Gaglardi Sr. that he had been interested in investing in the Canucks for several years, and would contact Gaglardi to discuss the matter. Gaglardi Sr. told his son of Aquilini's interest, and Gaglardi decided he should meet with Aquilini.

[177] In his telephone discussion with Beedie, Gaglardi disclosed that Aquilini might be interested in pursuing the opportunity with them. Beedie's response was favourable.

[178] Gaglardi arranged a lunch meeting with Aquilini on October 31, 2003. He arranged to meet with Beedie following the lunch.

[179] At the time of their lunch meeting on October 31, Gaglardi and Aquilini were acquainted with each other as a result of the prior business dealings between their families and the occasional chance encounter. They otherwise had little contact.

[180] At the lunch, Gaglardi told Aquilini of his discussions with KMPG and Byford and his introduction to Beedie. He told Aquilini that Beedie was the only other individual identified by KPMG as a possible investor, and that Byford was encouraging him to put together a letter of intent to present to Orca Bay. Aquilini told Gaglardi about his previous efforts to pursue an interest in the Canucks, including his relationship with McCammon and his efforts to learn about the business.

[181] As Gaglardi had not yet met Beedie in person, his discussion with Aquilini about the three of them jointly pursuing an interest in the Canucks was preliminary at most. Aquilini and Beedie had met as a result of their mutual membership in the Young Presidents Organization, but barely knew one another. Gaglardi told Aquilini he would be meeting with Beedie that afternoon. Aquilini agreed to meet in the near future with Beedie and Gaglardi to discuss the opportunity further.

[182] Gaglardi gave the following evidence as to what he told Aquilini he intended to do following their lunch meeting:

> …. I advised Francesco that once I left our lunch I was proceeding to the Wedgewood Hotel to meet Ryan for the first time. And I told Francesco that Ryan and I had agreed to look at this thing together and we were going to talk about that further, and I further extended the invitation that my dad had extended to Francesco a few days earlier that he should join our team as well. And that was the fundamental purpose of the meeting with Francesco to say it looks like we're going to put together a -- you know, Ryan and I, why don't you come on board, this will be great.
>
> (Transcript: T. Gaglardi cross-examination, May 15, 2007 p. 33, l. 19-34)

[183] Gaglardi then met with Beedie. They talked about themselves and their businesses. They discussed their views generally about pursuing an interest in the Canucks in the manner proposed by Byford. Gaglardi told Beedie about his discussions with Aquilini and the history of the Gaglardi family's dealings with the Aquilini family. Beedie agreed that the three men should meet to discuss the possibility of working together.

[184] Beedie's recollection of his meeting with Gaglardi on October 31 was as follows:

> A: We met at the Wedgewood Hotel in the afternoon at around 2:30 or 3:00 o'clock.
>
> Q: And was there anyone else there?
>
> A: No, it was just the two of us.
>
> Q: Can you tell me what you and Mr. Gaglardi discussed, as best you can recall.
>
> A: The purpose of the meeting from my perspective was to see whether or not I was comfortable working with Mr. Gaglardi on a potential acquisition. He had had lunch, just prior to the meeting,

> with Francesco Aquilini. I recall asking Tom whether he thought Francesco would want to participate, you know, with us in the endeavour. Tom said he thought that he would; but he hadn't received full confirmation yet. You know, what I recall from the drinks -- I think we sat for an hour or so as social in nature. ….
>
> But at the end of the session I told Mr. Gaglardi that I was -- I was interested in working with him. And I would like to proceed forward. I was very comfortable with Tom and said, let's move on from here.
>
> (Transcript: R. Beedie examination-in-chief, May 18, 2007 p. 66, l. 32-47; p. 67, l. 1-9)

[185] Following his discussions with Aquilini and Beedie, Gaglardi called Ralph McRae ("McRae"), a lawyer and family friend who had acted for Northland over the years and was involved in certain aspects of the family's business as an advisor. He told McRae about the CIM and his interest in pursing the opportunity. McRae indicated his willingness to assist Gaglardi.

[186] Gaglardi then called Aquilini and told him he had enjoyed his meeting with Beedie, who was also interested in participating. Aquilini agreed to a meeting among the three of them the following week.

[187] On November 3, 2003, the three men met for an early dinner at the Glowbal restaurant in downtown Vancouver before attending a Canucks game. Gaglardi described the beginning of the dinner meeting as follows:

> Q: Can you tell the court about what was discussed amongst the three of you at that time.
>
> A: Well, we -- we discussed our involvement to date. It was a chance for Ryan to sit down with Francesco and meet, so they traded pleasantries and sort of introductions of each other to each other. Of course, I met Ryan the Friday before. We discussed how

> exciting this opportunity was and to be in a position of the key bidder, if you will, and the person that -- the group that Orca Bay was desirous of working with. So that was an exciting prospect. We were all hockey fans. We were all Canucks fans. We had all season tickets and it was an exciting meeting
>
> We spoke roughly about, you know, what we were going to be embarking on in terms of a letter of intent. The kinds of things we thought we would be able to accomplish with the kinds of terms and we talked about price.
>
> (Transcript: T. Gaglardi examination-in-chief, May 1, 2007; p. 24, l. 42-47, p. 25, l. 1-13).

[188] The three men discussed the asking price for the team and their concerns about it. They talked about the impending NHL lockout, and the effect the lockout may have on the Enterprise. There were discussions about the underlying value of the property on which the Arena was situated. There were also discussions about the possible involvement of McRae as an advisor in the negotiations and the options available in terms of legal counsel.

[189] Gaglardi testified that the three also talked generally about the terms of an offer:

> A …. And we talked about terms, what our offer might be. We talked about some vendor financing. We talked roughly about what kind of cash piece we thought we might need to, you know, need to offer.
>
> Q: What do you mean the cash piece?
>
> A: In terms of how much cash the three of us would be putting down.
>
> …
>
> Q: Was there discussion about amounts?
>
> A: You know, there was certainly -- there was discussion about amounts, yes. I'm not -- I don't know that I -- that on the 3rd we had agreed where we would finally be on that, but we were always

> kind of in that $15 million range per person for an initial offer, and those amounts were discussed then. You know, vendor financing was discussed as a way of bridging, you know, the gap between price and cash.
>
> (Transcript: T. Gaglardi, examination-in-chief, May 1, 2003, p. 25, l. 42-47, p. 26, l. 1-13).

[190] Gaglardi testified that at the November 3 meeting, there were no discussions about terms of an agreement among the three of them beyond their consensus that they would work together to make a bid for a 50% interest in the Canucks on the basis that each would contribute an equal amount and own an equal share:

> Q: So the meeting -- the November 3rd meeting, did you have a discussion about terms of partnership outside of the fact that we agreed to work together -- you know, work together on a single bid for the three of us?
>
> A: I don't know that there were any specific terms of the partnership discussed outside of that necessarily.
>
> (Transcript: T. Gaglardi cross-examination, May 14, 2007, p. 53, l. 35-43)

[191] Gaglardi's evidence was that the three men formed a partnership, at the latest, by November 3, 2003:

> Q: ... As you saw it, what you call the partnership was formed on October 31st and certainly by November 3rd?
>
> A: That's my understanding. And if not by then, then within the ensuing days. But I believe that on the 3rd there was an agreement for the three of us to work together. And it may have commenced on the 31st. I just don't know whether it did or whether it didn't. But certainly by the 3rd I believe it was.
>
> (Transcript: T. Gaglardi cross-examination, May 15, 2007, p. 39, l. 21-30)

[192] An experienced businessman, Gaglardi was familiar with the different legal structures used in business transactions. His evidence was as follows:

> Q: And you understand as a businessman that those three -- partnerships, corporations and trusts -- are different legal structures?
>
> A: Yes.
>
> Q: And have different characteristics, which is why you use one rather than another in particular situations. For instance, if what you seek is transparency from a tax perspective, then you'd choose a partnership; right?
>
> A: You might.
>
> Q: Where your family uses partnerships for this purpose, those partnerships have written partnership agreements, do they not?
>
> A: Yes.
>
> (Transcript: T. Gaglardi cross-examination, May 15, 2007, p. 11, l. 10-23)

[193] Beedie did not recall the details of the discussion that took place at the Glowbal on November 3. His understanding of the outcome of the dinner meeting was as follows:

> Again, I believe there was a general discussion on the acquisition. I can't remember the specifics. I know that from my perspective, you know, we had agreed at that time to work together to pursue an interest in 50 percent of the team.
>
> Q: And do you recall anything else of the meeting?
>
> A: That's all I can remember right now.
>
> (Transcript: R. Beedie, examination-in-chief, May 18, 2003 p. 68, l. 19-25.)

[194] Beedie recalled that the three men agreed each would own one-third of the interest they hoped to acquire in the Canucks. His evidence was that no other terms of partnership were discussed on November 3 or at any time thereafter:

> Q: Now, your recollection is that the group came together on November 3rd; is that right?
>
> A: Yes.
>
> Q: There is no written agreement that was reached at that time; isn't that right?
>
> A: Agreed.
>
> Q: Or at any time after that?
>
> A: Agreed.
>
> Q: And you have no recollection, do you of a discussion on November 3rd of terms of a partnership other than the points we've already mentioned?
>
> A: I agree with that.
>
> Q: After November 3rd, there was a discussion at Borden Ladner Gervais about the lead negotiator role?
>
> A: Yes
>
> Q: And apart from that discussion, you have no recollection of a further discussion of terms of partnership; isn't that right?
>
> A: I think that's fair to say. I mean, you know, I have a vague recollection of discussing that things should be kept confidential between us. But I don't know if that's a term of partnership or not. But if that counts, that would be potentially one but beyond that, I don't -- I can't recall anything else.
>
> (Transcript: R. Beedie, cross-examination, May 28, 2003, p. 46, l. 1-26)

[195] The first goal of the group was to devise a letter of intent that would be acceptable to Orca Bay. They contemplated a proposal modelled on the September

private placement summary in which Orca Bay offered a half-interest in the team and an option on the Arena. The Enterprise as a whole was priced at $250 million.

[196] Gaglardi testified that between November 3 and 13, 2003, he had discussions with Beedie and Aquilini about the proposal they might make to Orca Bay. It was understood that none of the three had the authority to bind the others in any transaction. They agreed that all proposals would be in the form of expressions of interest. Before any proposal could form the basis of a binding agreement with Orca Bay, a consensus was required among the three of them concerning its terms.

[197] There was no discussion among the three men as to the terms they were ultimately prepared to accept in order to complete the transaction. They did not discuss the upper limit of the price they were ultimately prepared to pay for the Enterprise or the maximum interest they were prepared to purchase. They deferred any decision on the actual participants in the proposed transaction. Beedie, for example, did not know whether he or his father would purchase the share on behalf of the Beedie family. Aquilini did not know whether he would purchase his share individually or as part of his family.

[198] It was understood that once the transaction took shape, each member of the group, in consultation with his family, was free to decide whether or not to participate. Each would seek the approval of his family as to whether to proceed with the transaction.

[199] The group held a conference call on November 5, 2003, to discuss their choice of legal counsel. After some discussion, they agreed to retain Tim Sehmer ("Sehmer") of Borden Ladner Gervais ("BLG").

[200] The first meeting of the group with Sehmer occurred on November 10, 2003. McRae, Gaglardi, Beedie, and Aquilini met at the BLG offices. McRae described the three members of the group and the discussions they had held to date. He told Sehmer that the three had decided to work together to pursue an equal interest in the Canucks. McRae described his role as that of business advisor.

[201] McRae had prepared an agenda for the meeting which delineated some of the terms of a proposal they might consider advancing. The proposed purchaser was described as "a tax-effective entity owned equally by each of the three partners." The group discussed the idea of using a limited or general partnership as the vehicle to acquire the interest in the Enterprise in order to realize the benefit of the tax losses.

[202] The group agreed that the $150 million proposal for the team would consist of $75 million on closing with $45 million in cash and the balance as vendor take-back financing ("VTB") at an interest rate of 0%. They also agreed to seek a 5-year option to acquire an additional 10% of the team at the original price, a 15-year option to acquire the remaining interest at market price, and a 15-year option to acquire an interest in the Arena.

[203] With respect to the possibility of a lockout going into the 2005-2006 season, the group discussed a proposal that would include Orca Bay bearing responsibility for all net losses incurred by the team until uninterrupted play resumed.

[204] There was some discussion about governance within the purchasing entity once the transaction was concluded. Beedie and Aquilini favoured the suggestion that the three interest-holders each have a one-sixth vote in the affairs of the partnership with McCaw. Gaglardi's view was that the acquiring entity should vote a 50% interest in the partnership with McCaw. In general, the discussion focussed on governance concerning the entity that would be formed to purchase the Enterprise once all of the business terms had been negotiated. There was no discussion about governance among the three members of the group while they were advancing their proposals to Orca Bay, with the exception of an agreement that Gaglardi would act as spokesperson for the group.

[205] Gaglardi gave the following evidence concerning his understanding of the relationship the group intended to have once the shape of the transaction was known:

> Q: Now, when you were giving your evidence, you frequently used the words "partner" and "partnership". Do you recall that?
>
> A: I might have.
>
> Q: And am I right in thinking that when you used those words, you used them in the colloquial sense, just as you might call Ralph McRae your partner, or the Aquilinis and the Gaglardis partners in Garibaldi, and you did not seek to use it in a sense that will attract the implication that is disputed?
>
> A: Well, I don't know that I can agree with that because from the very beginning we discussed and agreed to use a limited partnership or

a general partnership vehicle to do the deal. So, you know, from the first BLG meeting we had. So, I mean, we were, in my view, partners in a partnership. And so I don't -- I don't think I can agree with your characterization of it.

Q: The partnership that you have just mentioned, is that the partnership that was to be the purchaser?

A: Yes, it's the entity that we, you know, would form to buy an interest in the enterprise.

…

Q: …. Let me say it more simply: at that time, early November '03, you didn't know what the deal was going to look like, did you? The ultimate deal that you might do?

A: I guess that's a fair statement.

Q: And you did not foresee the partnership that would be formed to make the acquisition realizing any profit until the closing of the acquisition and thereafter; isn't that right?

A: It seems logical.

(Transcript: T. Gaglardi cross-examination, May 15 2003, p. 14, l. 42-47; p. 15, l. 1-37)

[206] Beedie understood that the purchase of an interest in the Enterprise would be made through a tax-effective entity, most likely a limited partnership. The precise structure of the partnership was not yet known. On that point, Beedie's evidence was as follows:

Q: Now, when you were sitting in Mr. Sehmer's boardroom working on the letter of intent of November 13th, that described the purchaser as an entity to be formed. Do you recall that?

A: Yes.

Q: And, in fact, that entity at the time, November 13th, 2003, had not been created?

A: I think you're right. I assume you're right.

Q: ... And, in fact, you began to create a structure only after the August 13th, 2004 term sheet?

A: Yes.

Q: And as you were sitting in the BLG boardroom, you were content to postpone an investment in creating a structure until you had some certainty that there was a deal?

A: Yeah. It's something that didn't need to be dealt with right away. I think that's fair to say.

(Transcript: R. Beedie, cross-examination, May 29, 2007, p. 9, l. 30-47)

[207] On November 12, 2003, Gaglardi, McRae and Aquilini met with Dave Cobb and Orca Bay's Chief Financial Officer, Victor de Bonis ("de Bonis"). De Bonis and Cobb gave the group a presentation on the recent financial results of the Enterprise.

[208] Another meeting of the group was scheduled to take place with Sehmer on November 13, 2003. Whether Aquilini attended the meeting was a matter of controversy. Gaglardi testified that Aquilini attended the meeting, but arrived late. Aquilini's evidence was that he did not attend at all. Rather, he took a flight to Victoria on the morning of November 13 to attend a meeting and did not arrive back until late in the afternoon.

[209] On the basis of the evidence concerning the time of day the meeting took place, Aquilini's cell phone records, and the billing records of Sehmer concerning the November 13 meeting, I am satisfied that Aquilini did not attend the meeting. In his absence, Gaglardi, Beedie and McRae finalized the first letter of intent that was to be presented to Orca Bay.

[210] The letter of intent dated November 13, 2003 included the terms discussed by the group on November 10, 2003 with a few modifications. The letter began by identifying the purchaser in the following terms:

> We are representing an entity (the "Purchaser") to be formed by Northland Properties Corp., The Beedie Group and Aquilini Investment Group for the purpose of acquiring a 50% interest in the Vancouver Canucks (the "Team") and an option to purchase General Motors Place ("GM Place").

[211] In general terms, it was proposed that the purchasing entity acquire an initial 50% interest in a limited partnership that would own the Canucks and its general partner with options to acquire further interests in the team and the Area.

[212] With respect to proposed governance, the letter of intent included a term that the purchasing entity and McCaw as vendor would have equal representation on the board of the team's general partnership.

[213] Orca Bay was not interested in the proposal for various reasons. McCammon, who was negotiating on behalf of Orca Bay, was particularly unhappy with the proposed interest rate for the VTB financing. At 0% interest, it represented a discount on the purchase price McCaw wanted to obtain for the Enterprise. McCammon also strongly disagreed with the various financial projections built into the proposal.

[214] The gist of the position taken by Orca Bay in response to the first proposal became a recurrent theme in the negotiations. First, the $250 million selling price was not negotiable. Second, McCaw wanted his new partners to "step into his shoes" -- that is, to take their share of the assets and the liabilities "as is, where is".

[215] Orca Bay did not make a counter-offer in response to the group's November 13, 2004 offer.

[216] Gaglardi, Beedie and Aquilini met with Sehmer again on November 18, 2003 to discuss a further letter of intent. They discussed changes to the proposal, including an interest rate of 3% on the VTB financing.

[217] Gaglardi and McRae met with McCammon on November 19, 2003, to discuss further aspects of the business and Orca Bay's position on the business points. At that meeting, McCammon told Gaglardi that Gary Betteman, the commissioner of the NHL, and Bill Daley, his next-in-command, would be in Vancouver the following day. McCaw was coming to Vancouver to have dinner with them and attend a Canucks game. McCammon invited Gaglardi, Beedie and Aquilini to join them at dinner. He also invited the group, along with their fathers, to attend the game with Betteman, Daley and McCaw in the Orca Bay suite.

[218] At the dinner with Betteman and Daley on November 20, 2003, the group asked questions about the NHL and the looming lockout. Following the dinner, Gaglardi Sr., Luigi Aquilini ("Aquilini Sr."), and Ryan Beedie's father, Keith Beedie ("Beedie Sr.") joined the others to watch the game in the suite.

[219] On November 28, 2003 Gaglardi and McRae presented another non-binding proposal to Orca Bay, with modifications such as a 3% interest rate on the VTB financing. Orca Bay again indicated that it was not interested in the proposal, and again declined to make a counter-offer.

[220] By early December 2003, Gaglardi, Beedie and McRae had developed a dislike for McCammon. They did not trust him. They suspected he had ulterior motives for some of the positions he was advancing on behalf of Orca Bay. Gaglardi viewed McCammon as behaving at times in a deliberately obtuse manner, and at other times in a dishonest manner. Despite McCammon's intention (disclosed to potential investors in the CIM) to leave the Orca Bay organization once the Enterprise was sold, Gaglardi, Beedie and McRae suspected that McCammon was obstructing negotiations, and any potential sale of the Enterprise, in order to keep himself in the position of CEO.

[221] In December 2003, Gaglardi heard a rumour that the group had a competitor for the Enterprise, an American entrepreneur by the name of Dennis Washington who owned substantial interests in British Columbia. Washington had previously held discussions with Orca Bay concerning the purchase of an interest in the Canucks. McRae spoke to Byford, who assured McRae that Washington had not expressed an interest.

[222] On January 13 and 14, 2004, Gaglardi and McRae met with McCammon in Los Angeles in an attempt to negotiate a new framework agreement. McCaw attended part of the meeting. At one point in the meeting, McCammon and McRae had an unfriendly exchange.

[223] On their return to Vancouver on January 15, 2004, Gaglardi and McRae drafted a third proposal which contained a material change from the first and second proposals. Instead of calling for an option on the Arena, the proposal contained a commitment to

purchase it. For purposes of the transaction, the Arena was valued at $100 million. The proposal called for a relatively short closing.

[224] Gaglardi did not discuss the January 15, 2004 proposal with Aquilini before it was presented to Orca Bay. Aquilini was not comfortable with the short period to closing proposed by Gaglardi. He could generate the necessary cash for the down payment but required time to do so, particularly if the cash was to be generated by the sale of an asset. Aquilini expressed the concern that any asset sale would also generate tax liabilities. If the group was not successful in its negotiations with Orca Bay, the tax liabilities would have been needlessly incurred. Aquilini was not confident that the group was going to succeed in concluding an agreement, and was not prepared to sell assets in anticipation of a closing that might not occur.

[225] It was becoming apparent to the three members of the group that Aquilini's requirements for a transaction differed from those of Gaglardi and Beedie.

[226] On February 24, 2004, Orca Bay delivered its first counter-offer. It was unacceptable to the group. Gaglardi began to form the view that the model based on equal ownership with McCaw was not workable. Orca Bay's proposal brought home to Gaglardi that McCaw had a very different vision of governance than he did. At that point, Gaglardi began considering alternatives to the equal ownership structure.

[227] In late February or early March 2004, Aquilini decided to leave the group. There were conflicts in the evidence as to the reasons for Aquilini's departure but it was common ground that Aquilini and Gaglardi disagreed on several matters. Gaglardi did

not like the fact that Aquilini continued to meet with McCammon to discuss the business of the Canucks after the group agreed that Gaglardi would be chief spokesperson for the group. Gaglardi believed that Aquilini should not meet with McCammon for any reason because he might inadvertently disclose the group's bargaining strategy.

[228] Aquilini had a different perspective. He had agreed to Gaglardi's role as spokesperson for the group, but did not understand that agreement to preclude him from speaking with McCammon about the Enterprise generally. Aquilini believed each member of the group had the right to conduct his own due diligence so long as there were no discussions about business terms. He was increasingly uncomfortable with Gaglardi's exercise of complete control over the venture. Aquilini was not comfortable with the fact that he had not been told of the meetings between Gaglardi and McCammon in mid-January or consulted about the January 15, 2004 proposal before it was tabled with Orca Bay.

[229] The issue came to a head when Gaglardi learned that Aquilini had met with McCammon without advising Gaglardi in advance. There was an acrimonious telephone discussion about the issue between the two men in late January 2004.

[230] Aquilini had expressed to Gaglardi from the outset of the negotiations his discomfort with the proposed brief period of time to close the transaction. Gaglardi and Beedie wanted to continue advancing proposals that contemplated a quick closing. Aquilini's attention and resources were focussed on a large condominium complex his family was developing in east Vancouver. The family had decided to stay with the

project through the marketing phase. Liquidation of assets to fund Aquilini's cash contribution toward the transaction would take time.

[231] Aquilini's evidence was that he asked for a longer closing period in light of his concerns. Gaglardi's recollection was that in February 2004 Aquilini asked the group to consider postponing negotiations altogether until the fall of 2004. Aquilini's evidence on the issue is more consistent with the ongoing discussions he had with Gaglardi about the concern he had with raising his share of the down payment quickly.

[232] Whether Aquilini sought a longer closing or a complete postponing of the negotiations, it is clear that Gaglardi and Beedie were not prepared to accommodate his request.

[233] In late February or early March 2004, Aquilini told Gaglardi of his decision to leave the group. Gaglardi and Beedie did not, upon hearing the news, suggest to Aquilini that he was constrained from doing so. There was no discussion among the three men about the consequences of Aquilini's departure. Gaglardi and Beedie did not ask Aquilini for a commitment that he would not pursue an interest in the Canucks on his own account, or request that he not to speak to McCammon or McCaw about their negotiations.

[234] Gaglardi knew that Aquilini remained interested in acquiring a share in the Canucks. Aquilini told Gaglardi he would like the opportunity to invest in a 20% share should the opportunity arise in the future, but neither Gaglardi nor Beedie made any commitment to include Aquilini in the transaction at a later date.

[235] Gaglardi recalled that Aquilini asked to be kept informed about the negotiations. Aquilini denied making such a request. Whether or not such a discussion occurred, following his departure Aquilini was not copied on any correspondence between Gaglardi and Beedie or any documents they exchanged with Orca Bay.

[236] Gaglardi did not know how Orca Bay would react to Aquilini's departure from the group. He asked Aquilini not to tell McCammon or McCaw of his departure because he wanted the opportunity to tell them himself. Aquilini agreed.

[237] On March 4, 2004, Gaglardi met with Byford to discuss his frustration with McCammon and the possibility of attempting to acquire a larger interest in the Enterprise. Gaglardi told Byford that he had begun to view McCammon as an impediment to the negotiations. It was in part because of his distrust of McCammon that Gaglardi decided he ought to pursue a greater interest in the Enterprise. He told Byford that he had concluded it was unlikely an agreement could be reached on an equal ownership structure. Byford encouraged Gaglardi to consider offering to purchase a larger interest in the team.

[238] Gaglardi and Beedie met with McCaw over dinner on March 8, 2004 before a Canucks game. Gaglardi began the discussion by saying that he believed McCammon was an impediment to the negotiations. He told McCaw that McCammon liked his position with Orca Bay and appeared to want to keep it. McCaw assured Gaglardi that McCammon was a good person and, in any event, would not be staying on as CEO.

[239] In the course of the dinner, McCaw expressed the desire to pursue interests other than the business of the Canucks. Gaglardi took from the comment that McCaw might be interested in selling a greater percentage of the team.

[240] Gaglardi began drafting a proposal that increased the ownership interest of Gaglardi and Beedie in the Enterprise. As a preliminary step, he prepared a financial model representing his best estimate of the economic outcome should he and Beedie conclude a transaction for a greater interest. On the basis of that model, he drafted a letter proposing a transaction quite different from the ones previously proposed.

[241] The first draft of the letter, which Gaglardi sent to McRae for his review, referred in its opening paragraph only to Gaglardi and Beedie. After reviewing the draft, McRae sent an email to Gaglardi suggesting that he remove the reference to specific names because “it immediately telegraphs that Francesco is out”. Gaglardi agreed with McRae’s suggestion and modified the letter.

[242] The letter Gaglardi sent to Orca Bay on March 15, 2004 proposed an acquisition of 75% of both the team and the Arena, or, alternatively, 85% of the Enterprise. The cash component of the offer was less than it had been in earlier proposals. At an ownership level of 75%, Gaglardi proposed VTB financing of $75 million at an interest rate of 4%, senior debt at $105 million, cash on closing of $23,750,000 and a cash payment of $10 million on October 31, 2004 or, in the case of a lockout, upon the resumption of play.

[243] Orca Bay was not enthusiastic about the proposal. While the percentage that Gaglardi and Beedie offered to buy was larger, the dollar amount of the down payment was smaller. The effect was to increase the capital McCaw had at risk while reducing his control. McCaw invited Gaglardi to meet with him in Los Angeles on March 24, 2004 to discuss the offer. They met for 3 or 4 hours at McCaw's home. Gaglardi emphasized the risks involved in purchasing the Enterprise, particularly as the NHL was heading into a lockout that might result in the loss of not one, but two, playing seasons.

[244] Gaglardi and McCaw then went for dinner. For the most part, the conversation at dinner did not involve the negotiations.

[245] None of the witnesses was able to say with any certainty when Orca Bay became aware of Aquilini's departure from the group. McRae's email of March 15, 2004, and Gaglardi's response, establishes that McCaw was not told until some time after the March 15 proposal was delivered.

[246] Aquilini was vacationing with his family in the Los Angeles area in late March 2004. He called McCaw, who invited him to have lunch on March 25, 2004. Both McCaw and Aquilini testified that the lunch was social in nature. Aquilini recalled telling McCaw he was still interested in acquiring an ownership interest in the Canucks at a 20% level.

[247] Gaglardi forwarded some additional information about the March 15 offer to McCaw following the March 24, 2004 dinner. However, McCaw rejected the offer. Over

the ensuing months, there were discussions from time to time between McCammon and Gaglardi but the negotiations lost momentum.

[248] Gaglardi testified that he asked McCammon not to talk to Aquilini about the negotiations with Orca Bay once Aquilini left the group, and that McCammon agreed. McCammon denied having such a discussion with Gaglardi.

[249] Gaglardi's evidence on the matter is not supported by the surrounding circumstances. He acknowledged that he did not regard Aquilini as a potential competitor. McCammon, for his part, had no reason to agree to such a request. He knew of Aquilini's continued interest in a minority share in the Enterprise and thought Aquilini might rejoin the group at some point in the future.

[250] Gaglardi did not confirm any such agreement in writing or allude to it in any of his correspondence with McCammon. There was no evidence from either Beedie or Gaglardi Sr. to suggest that they were aware of such an agreement.

[251] McRae met with Byford on June 18, 2004 to discuss, among other things, VTB financing and compensation for potential lockout losses. Following the meeting, McRae prepared a draft response focussing on those two issues. The draft begins with the comment, "It's time to determine if there's any reasonable prospect of a deal here." On the issue of VTB financing, McRae outlined his concerns and then made the following comment: "I therefore convey the following. The maximum fixed rate on the VTB that the purchasers will consider is 4 percent per annum". McRae then forwarded the draft to Gaglardi and Beedie for their comments.

[252] Beedie emailed his views concerning McRae's draft response on June 23, 2004, stating, in part, the following:

> As a general comment I think it is time for us to draw a line in the sand…enough is enough. These guys are unreasonable pricks and we have to make it clear what our position is on this issue and the issue of lockout costs. I thought the interest rate and VTB was already resolved. You know that once we deal with this they will play "hardball" on the other items, so we must negotiate comprehensively.
>
> …
>
> …. It takes a lot to get me angry, but these guys have done it. Tom was bang on some time ago that there is no way you could have these guys as partners…even minority ones at that!

[253] McRae's reply of the same date was, in part, as follows: "I don't disagree. Tom had similar comments".

[254] McRae discussed the draft response with Gaglardi and Beedie, and revised it to include more extensive comments on lockout costs and other contentious issues. On June 29, 2004, he emailed the response to McCammon.

[255] In early July 2004, Aquilini and McCammon were guests at a business dinner organized by Knott. They went for drinks after dinner. The topic of the Canucks arose. Aquilini told McCammon that if McCaw ever became interested in selling a 20% share in the Canucks, he would be interested in buying but would require minority protection. An entry in McCammon's diary in mid-July reflects a telephone conversation with Aquilini in which Aquilini said his family was interested in "doing something" and that he was "going to call Tom".

[256] By this time, McCammon had come to the view that negotiations on the terms previously discussed with Gaglardi and Beedie were fruitless. He gave some thought to what he called "commoditizing" the transaction, which involved increasing the debt to $95 million (leaving equity of $155 million) and giving each of Aquilini, Gaglardi and Beedie an opportunity to purchase whatever interest each would like to take up to a total of 100% of the Enterprise. In an email he sent to Byford on July 19, 2004, McCammon said the following:

> Bob, I would like to respond to Ralph/Tom more definitively than we have to this point. As I think about the issues embedded in Ralph's proposal, I think it is too hard to try and make it work. We can talk about specific points in order to be explicate (sic) that comment, but that is for explanatory purposes as opposed to negotiating purposes. Having said that, I owe Tom a proposal on a deal that we would do, and this will also come as no surprise, I suspect. I think we would be prepared to bring any or all of them in as partners based on an enterprise value of $250, so reducing it by the debt that we could place against the assets (right now we are negotiating to have that at $95) would leave pre-money equity of $155. Whatever the three, or any one of them, wanted to invest would buy based on that amount (so $50 would buy roughly 33%). I think what would make the most sense would be to leave a bit in (say $10) if more than one of them wanted to do something (or if at least $35 was being invested) so that there is some capital that can be invested in T-bills, or something to provide for "rainy day" emergencies, if one ever materialized.

[257] In July 2004, Gaglardi invited McCammon to his golf club to play a round of golf. In the course of the game, McCammon told Gaglardi he did not think an agreement could be reached on the terms that had last been discussed. Gaglardi expressed frustration with the negotiations, saying he felt as though he was negotiating with himself. McCammon agreed that he owed Gaglardi a counter proposal. After further discussion, they agreed it would be worthwhile to keep talking about a possible transaction.

[258] On July 22, Gaglardi and Gaglardi Sr. met McCammon for lunch. They proposed to McCammon that the parties return to a transaction that contemplated Gaglardi and Beedie acquiring a 50% interest in the Enterprise but giving McCaw the "swing vote" to avoid further difficulties with the governance issue. McCammon said he would take the idea back to McCaw.

[259] However, Beedie did not agree with the idea of returning to a transaction involving equal ownership with McCaw. After further discussion, McRae suggested that he draft a new proposal based on an acquisition of a 75% interest but with considerably more cash on closing and the option of increasing their interest to 100% on the closing date by increasing the cash payments.

[260] Gaglardi and Beedie also discussed changing their approach to governance. They decided to propose a board of three directors, two of them sitting as their nominees and one as McCaw's nominee. Each director would vote independently. McCaw would also have the ability to veto specified items concerning the Enterprise.

[261] A proposal incorporating these ideas was drafted and sent to McCammon on July 27, 2004.

[262] McCammon met with Gaglardi and Beedie on July 28, 2004. He was pleased with the proposal, viewing it as considerable movement on the part of Gaglardi and Beedie. However, he urged them to increase their offer to 100% of the Enterprise rather than leaving McCaw with a minority interest. Gaglardi and Beedie thought the

suggestion of moving their offer to 100% was worth serious consideration, and told McCammon they would think about it.

[263] Beedie had been comfortable with a transaction involving an equal share in the acquisition of a 75% interest in the Enterprise, which would give him an ownership share of slightly more than 35%. He was less comfortable with a 50% share, but was reluctant to be in a minority position. On July 29, 2004 he sent an email to Gaglardi in which he raised the issue of relative ownership. The email states, in part, the following:

> We also need to discuss the relative ownership. You are much more comfortable at 50 than I am. I assume you are firm on this and you do not intend on offering the 25% to Francesco. As I see it, we (Beedie) have three or four options:
>
> 1) Go 50/50 with you.
>
> 2) Go 37/37 with you and Francesco takes 25
>
> 3) Go 33/33/33 with a third partner
>
> 4) Go 33-40 us, 60-67 with you. We would be your minority partner. I would really have to think this through and we would need strong minority protection on many issues, however this might make some more sense as you intend on committing more time to this than I do.

[264] Gaglardi denied having discussions with Beedie, before receiving the email, about the possibility of including Francesco in the transaction. Gaglardi said the message was a “blue sky” suggestion from Beedie. Beedie said it was possible he discussed the matter with Gaglardi but not before sending the email.

[265] In any event, Gaglardi and Beedie did not consider the inclusion of Aquilini in their bid for the Canucks as a possibility.

[266] At the meeting on July 28, 2004 McCammon had suggested that the parties sequester themselves at a secluded location, together with their professional advisors, for an intensive two or three day meeting to conclude a binding agreement. Gaglardi and Beedie declined that invitation. They were suspicious of McCammon's motives, and told him they preferred to continue negotiations toward a letter of intent that would provide the framework for a binding purchase and sale agreement.

[267] Renewed negotiations toward a framework agreement ensued after the July 28, 2004 meeting. The negotiations were based on the purchase by Gaglardi and Beedie of 100% of the Enterprise. The final version of the framework agreement, known as the 'Term Sheet', was signed on August 13, 2004.

[268] Clause 1(a) of the Term Sheet describes its legal status:

> (a) With certain limited exceptions set out below, this Term Sheet does not constitute a binding agreement, but sets out the principal business terms of an agreement to be negotiated and entered into upon satisfactory completion of Purchaser's due diligence and receipt of all required assurances, approvals, rulings and consents.

[269] The purchaser is described in clause 1(b) as an entity yet to be formed:

> (b) 0700278 B.C. Ltd., on behalf of a limited partnership to be formed (of which it will be the general partner) (the "Purchaser") an entity to be controlled by Northland Properties Corporation ("Northland") and The Beedie Group ("Beedie") …

[270] The "headline" terms were the selling price of $250 million with VTB financing of $85 million at an interest rate of 5% and cash on closing of $70 million. The Term

Sheet also identified a multitude of business terms, many of which remained contentious at the date of the document's execution.

[271] Clause 12, entitled "Definitive Agreement and Exclusivity", states, in part, the following:

> a. As mentioned at the outset, this Term Sheet is intended to set out the principal points of the proposed transaction. Upon execution of this Term Sheet, the parties will instruct their lawyers to prepare the definitive agreements (the "Definitive Agreements"). Purchaser's lawyers will prepare the main purchase agreements and Vendor's lawyers will prepare VTB documentation.
>
> b. …. Until execution of the definitive agreements, the only binding obligations of the parties will be:
>
> …
>
> (ii) Vendor's grant to Purchaser of an exclusive right to negotiate an acquisition of the Team and/or GM Place during the period ending on the earlier of (A) the execution by all parties of the Definitive Agreements, (B) October 1, 2004 or (C) the termination by Purchaser of its efforts to purchase the Enterprise, …

[272] In all of their previous proposals, Gaglardi and Beedie had requested exclusivity in the negotiations until closing. In each instance, Orca Bay resisted the request. One of the few binding obligations under the Term Sheet was the exclusivity period expiring October 1, 2004. Gaglardi and Beedie were aware that they had a period of approximately six weeks to resolve the contentious issues and close the deal, failing which Orca Bay was free to negotiate with any other interested party.

[273] Once the Term Sheet was signed and the transaction with Orca Bay taking shape, Gaglardi and Beedie began discussing the partnership they would create to

complete the transaction. In an email exchange between the two in late August 2004, Beedie raised the issue of the percentage of ownership interest his family was prepared to purchase and the manner in which the parties would approach governance based on their respective interests in the Enterprise. Gaglardi's response was that the two ought to discuss "putting together [their] partnership".

[274] Gaglardi was clear that he wished to take at least a 50% ownership interest and was prepared to take considerably more. Beedie did not decide until October 22, 2004 to take a 35% share. His decision was contingent on an agreement that he and Gaglardi would each hold 50% of the corporate general partner such that the voting power of the two partners was equal. Following discussions between Beedie and his father, it was decided that Beedie would own the 35% equity but Beedie Sr. would have absolute voting control of the interest.

[275] At some point after Gaglardi and Beedie began negotiating for 100% of the Enterprise, Aquilini contacted Gaglardi about participating in the transaction. Aquilini's recollection was that the conversation took place in August. Gaglardi said he recalled the conversation occurring in September.

[276] According to Aquilini, he asked Gaglardi about the negotiations and was surprised to learn that Gaglardi and Beedie were now pursuing ownership of 100% of the Enterprise. He reminded Gaglardi that he had always been interested in 20%, and asked whether there was room for him in the transaction. Gaglardi's response was that he and Beedie did not need another person. He said they had their financing in place and were ready to proceed with the transaction. Aquilini congratulated Gaglardi and

rang off. He then called Gaglardi Sr. to let him know that if the Gaglardi family ever considered selling a 20% share, Aquilini was interested. The response of Gaglardi Sr. was that it was his son's deal and Aquilini should speak to him.

[277] Gaglardi's evidence was that Aquilini called him in September and asked how the due diligence was progressing. Gaglardi responded that it was going well. Aquilini then reminded Gaglardi of his earlier expression of interest in a minority ownership share, and asked again to be included. Gaglardi told Aquilini that it did not make much sense to include Aquilini at that point in time, particularly at such a small percentage.

[278] Whether the discussion between Gaglardi and Aquilini took place in August or September 2004, it was common ground that Aquilini asked to participate in the venture while it was still being actively pursued by Gaglardi and Beedie, and was refused.

[279] Shortly after the Term Sheet was executed, McRae's involvement in the negotiations ended. He and Gaglardi had a disagreement about the compensation to which McRae was entitled for the work he had done, and would continue to do, on the transaction. Gaglardi took on the work McRae had been performing.

[280] Orca Bay established a "data room" at KPMG which contained all of the documentation the purchasers required to become familiar with the operation and finances of the Enterprise. Gaglardi decided to perform most of the due diligence on his own rather than engaging professional assistance. As a result, his review of the documentation took several weeks.

[281] In September 2004, the Vancouver Sun newspaper published an article written by one of its columnists, Gary Mason, which disclosed that Gaglardi and Beedie were negotiating with Orca Bay for the ownership of the Canucks and that a deal appeared to be imminent.

[282] On September 21, 2004, the solicitors for Gaglardi and Beedie delivered a draft purchase and sale agreement (the "Definitive Agreement") to Orca Bay. The draft Definitive Agreement required extensive redrafting by Orca Bay's solicitors.

[283] The expiry date for the exclusivity period under the Term Sheet -- October 1, 2004 -- came and went. Many business points remained contentious. Gaglardi and Beedie did not seek an extension of the exclusivity period.

[284] Much remained to be done to finance the transaction. Gaglardi and Beedie were required to put into place three separate financing packages. The first concerned the $95 million senior debt to be secured against the Enterprise. Orca Bay's senior debt facility was held by a bank club consisting of three banks. Gaglardi and Beedie had the option of either coming to terms with the bank club to assume the existing senior debt facility or finding another lender. They required the approval of each of the three banks in order to assume the existing debt facility, and it was anticipated that each of the banks would first conduct its own due diligence on the holdings of Gaglardi and Beedie.

[285] The second package concerned the $85 million in VTB financing, with respect to which Gaglardi and Beedie were in the process of negotiating credit agreements with Orca Bay.

[286] The third package concerned financing of the $70,000 cash down payment. Gaglardi and Beedie were pursuing negotiations with several lenders concerning the down payment.

[287] The NHL reserved to itself the right to review and approve all of the financial arrangements associated with ownership of the league's franchises. Gaglardi and Beedie were required to provide the NHL with all of the financial information necessary for its approval process.

[288] Gaglardi began meeting with the members of the bank club, and other lenders, in mid-October, 2004.

[289] On October 15, 2004 Gaglardi met with de Bonis to review financial issues concerning the Enterprise. Following the meeting, the two went for dinner. De Bonis recalled that in the course of the dinner, Gaglardi said he was confident that he was going to negotiate a better deal than the Term Sheet reflected. According to de Bonis, Gaglardi said that "he was in the driver's seat because John was desperate to sell and did not have another buyer".

[290] Gaglardi acknowledged that he told de Bonis he was confident Orca Bay would come to his view on the items under discussion, but said he explained that his confidence was based on the obligation of the parties under the Term Sheet to negotiate in good faith.

[291] On October 19, 2004 McCammon attended a meeting with Gaglardi, Gaglardi Sr. and Beedie to discuss the major unresolved business points. Some of them were highly

contentious. Gaglardi had prepared a list of twenty-two business points for discussion. The parties put forward their respective positions on each of the deal points. The parties had another lengthy meeting on October 20 during which they again discussed all of the listed deal points. Despite the two meetings, the parties resolved very little.

[292] A "critical path" memorandum was prepared at the October 20 meeting which identified timelines for the completion of various matters. Those timelines included the following:

- The outstanding business points were to be resolved by October 31, 2004. Their resolution was required before the Definitive Agreement could be finalized.
- Gaglardi and Beedie were to determine by October 31 whether they were going to assume the existing senior debt facility or establish a new one.
- Materials in support of the application to obtain NHL consent to the new ownership were to be submitted to the NHL by October 28.
- A further draft of the Definitive Agreement was to be prepared by the solicitors for Gaglardi and Beedie by October 27, with a view to having the final agreement settled and signed by November 5, 2004.

[293] On October 26, 2004, Gaglardi sent an email to McCammon attaching a memorandum which addressed each of twenty-two outstanding business points. The covering email described the memorandum as the "long thought final position" of Gaglardi and Beedie:

> As we discussed, here is our long thought final position on the outstanding matters. While you may have difficulty with certain individual points on their own, we have made certain concessions that we believe more than offset them, most notably a fair resolution to the Olympic matter given its enormous relevance to this transaction from nearly the beginning.

[294] One of the most contentious of the twenty-two deal points was Orca Bay's budget for the year 2005, which Gaglardi believed was inaccurate. Agreement on the 2005 budget was critical. Orca Bay was prepared to compensate the purchasers for actual cash losses during the period ending June 30, 2005 on the basis of an agreed upon budget, reflecting the anticipated lockout losses, with a stipulated cap.

[295] Gaglardi and Beedie were seeking a broader indemnity, including indemnity for potential losses not necessarily incurred prior to June 30, 2005. While they were prepared to agree to some cap on the indemnity, it was at a much higher amount. The parties' disagreement concerning the losses that would be experienced from the lockout, and the obligation of Orca Bay to fund those losses, had been a matter of contention from the outset of negotiations in November 2003. Gaglardi was convinced the lockout costs would be in the range of $22 million. Orca Bay's budget for 2005 indicated much lower lockout costs.

[296] Another issue addressed in the October 26, 2004 memorandum -- one that had also been contentious from the outset -- concerned the certainty of payments in the amount of $18.5 million that Orca Bay was to receive from the use of the Arena for the 2010 Winter Olympics, and the apportionment of those payments. Gaglardi and Beedie were of the view that the Olympic Organizing Committee had not provided a binding commitment to make the payments. Further, they had gained the impression from earlier discussions that they were entitled to all of the Olympic money that was forthcoming. Now they understood that Orca Bay was claiming part of it. As a

compromise, Gaglardi proposed, among other things, a reduction of $8 million from the purchase price to be reflected in the purchaser's cash on closing.

[297] The October 26, 2004 memorandum from Gaglardi concluded as follows:

> This transaction is by far the largest that our company has ever undertaken in its 41 year history, and the risk for our company is substantial (the Beedies are in the same boat). This is especially owing to the uncertainty surrounding the current lockout and whether it could last longer than one season. We have agreed that we will not get any return for our equity for one year, but to also be at risk for a further $20,000,000 or more for a second lockout year is a rather daunting circumstance. It is a risk we are not taking lightly, which I believe you understand and acknowledge.

[298] On October 26, McCammon attended a dinner cruise hosted by Lyall Knott. Aquilini was also in attendance. There was some discussion about the status of the negotiations between Gaglardi and Orca Bay. Aquilini learned that the negotiations were not going well.

[299] Aquilini invited McCammon for drinks after the cruise. Over drinks, McCammon reiterated that the negotiations with Gaglardi were difficult but that Orca Bay was doing its best to close the deal. Aquilini told McCammon he was still interested in a 20% interest in the Canucks. McCammon responded that if Aquilini was interested, he should call McCaw and let him know.

[300] On October 27, 2004, Gaglardi met with representatives of the Royal Bank to discuss the possible assumption of the senior debt facility. De Bonis and Dave Nonis, General Manager of the Canucks, attended the meeting with Gaglardi and participated in the discussions. According to Nonis, Gaglardi told the bankers that he was going to

negotiate a better deal with Orca Bay than the one they had seen in the Term Sheet. De Bonis, too, recalled Gaglardi telling the bankers that he was going to negotiate a better deal than the one currently on the table and that the debt would be reduced accordingly.

[301] Gaglardi disagreed with the recollections of Nonis and de Bonis. He said the comment about negotiating a better deal was in the context of a discussion about the Olympic payment issue. He said he explained to the bankers that Orca Bay had offered to reduce the price of the purchasers' equity account because of the uncertainty of the Olympic payments.

[302] If that was Gaglardi's advice to the bankers, it was not accurate. Gaglardi had proposed to Orca Bay that the price reduction come from the purchasers' cash on closing, but had not yet received a response.

[303] On October 28, 2004 McCammon met with Gaglardi and Gaglardi Sr. to discuss Gaglardi's October 26 memorandum. At some point in the meeting, Gaglardi recounted a conversation he had with Arthur Griffiths, the former owner of the Canucks, in which Griffiths made some unflattering comments about McCammon's integrity and negotiating tactics.

[304] The meeting with McCammon did not go well. The parties revisited issues that had been covered in earlier discussions. Both McCammon and Gaglardi Sr. expressed the view that there was not much more ground to give on either side. Gaglardi Sr.

recalled McCammon saying he could not recommend Gaglardi's October 26, 2004 proposal to McCaw.

[305] On October 29, 2004 Aquilini called McCaw, as he had been invited to do by McCammon on October 26. He told McCaw he was still interested in pursuing a 20% share in the Enterprise, but would want some kind of minority protection. He also indicated to McCaw the amount of cash that he would likely have available to put down at closing. McCaw said he would consider Aquilini's proposal.

[306] Aquilini called Knott and told him about the contents of his discussion with McCaw. He told Knott that negotiations might begin with Orca Bay and asked whether Knott could act for him if that occurred. Aquilini discussed with Knott some of the business terms he anticipated tabling in the event that negotiations with Orca Bay went forward.

[307] On October 29, McCaw instructed McCammon to draft a counter proposal to Gaglardi's October 26 proposal. McCammon did so, and emailed it to Gaglardi on October 30. The introduction to the memorandum states, in part, the following:

> We have discussed throughout the week the issues reflected in Tom's memo of October 26, 2004. Each side seems convinced as to the merits of their respective positions. What is obvious is that, if a deal is to be done, these issues need to be resolved now and the parties need to devote their mutual energies to the task of closing within the limited time frame available.
>
> In the spirit of concluding the open points, I have summarized the Vendor's positions on these matters. As is obvious, the positions herein reflect significant compromise by the Vendors, particularly when considered against the backdrop of a transaction that includes the following:

1. A purchase price of $250m when as recently as this summer an independent appraiser, with extensive investment banking experience related to sports enterprises, valued the enterprise at $350-400m;

2. Even while selling the enterprise, the Vendors have agreed to subsidize future losses of the enterprise;

3. Vendors have agreed to provide Purchasers with financing on very favorable terms relative to market. We have never done anything remotely close to this before, and would not even consider it but for the fact that you are the Purchasers and we have gotten to know each other well;

4. Vendors have also agreed to subsidize the interest charges associated with the Purchasers' senior debt purchase finance for the first year, and have agreed to forego interest on the VTB for a similar period; and

5. Vendors are providing the VTB on a subordinated basis, a material credit enhancement, yet charging no fee of any type therewith.

While these points were all agreed to and provide the basis by which the transaction was constructed, each of these are unusual concessions by a vendor, come at significant cost, and should influence the overall analysis of what is or is not fair under the circumstances.

[308] The memorandum then addressed each of the twenty-two outstanding deal points. On the issue of the 2005 budget, McCammon explained that the budget was cash based and would not reflect cash expenses or non-cash revenue. That was consistent with the concern of Gaglardi and Beedie that they not go out-of-pocket during a possible work stoppage, and consistent with Orca Bay's agreement to provide a subsidy. The budget would reflect the actual cash costs anticipated by Orca Bay as though it had run the business in 2005. McCammon emphasized that the subsidy would not exceed $16 million.

[309] McCammon also addressed Orca Bay's position on the $18.5 million in Olympic revenues. The perspective of Orca Bay was that it had never agreed the purchasers were entitled to receive all of the revenues. Further, Orca Bay remained of the view that the $18.5 million was a binding commitment enforceable by the purchasers. McCammon proposed, as a compromise, that Orca Bay would accept an $8 million purchase price reduction but that the reduction must be reflected in the payments due under the VTB rather than the purchaser's cash on closing. All revenue and other financial benefits from the Olympic payments would go to Orca Bay until a total of $8 million was received, with any amounts received thereafter split on a 50% - 50% basis.

[310] In the memorandum, McCammon conceded several business points and proposed compromises on several others.

[311] The October 30 proposal of Orca Bay was not acceptable to Gaglardi and Beedie. They did consider it to be a compromise in some respects. It moved the parties somewhat closer than they had been two days earlier. However, Gaglardi and Beedie continued to disagree with Orca Bay's position on several money items. Their disagreement on those items totalled approximately $4 million. The largest stumbling block, however, was Orca Bay's proposed $16 million cap on lockout losses. Gaglardi was convinced the 2005 budget should disclose losses almost $6 million higher, and that Orca Bay ought to commit to subsidizing a $22 million loss. It total, the parties were approximately $10 million apart.

[312] Gaglardi testified that McCammon's October 30, 2004 proposal was "simply too unfair, and the part that was the most unfair was the cap".

[313] Gaglardi spent much of the day on November 1, 2004 discussing a possible response to McCammon's proposal with Gaglardi Sr. and Beedie. Gaglardi Sr. suggested that he write the first draft of the response and Gaglardi agreed. The introduction to the draft memorandum stated the purchasers' view that the parties continued to have differences of opinion on most of the twenty-two business points, but that they had decided to revisit only a few of the meaningful ones.

[314] On the issue of the Olympic payments, Gaglardi and Beedie decided to accept Orca Bay's offer to reduce the purchase price by $8 million. However, they countered with the proviso that $4 million must be from their cash on closing with the balance coming from the VTB account.

[315] The first draft of the memorandum addressed a handful of other cost issues but did not address the 2005 budget and the cap on the lockout losses. It concluded as follows:

> Our feeling now is that we have been beaten up by this process, and we are paying for more than we were supposed to, all in the name of trying to finalize a deal with we both have invested. We are now very much at the end of the road, and if you are not in agreement to the above than it will have become time to leave this deal and look forward to perhaps visiting it again in the future. We would hope that in this event we would be able to remain friends.

[316] Gaglardi emailed the draft to Beedie for his comments. Beedie did not like some parts of the draft, and, in particular, he disagreed with the content of the last paragraph.

[317] Gaglardi Sr. prepared a second draft. This draft included a reference to some additional money items. It also referenced the contentious issue of lockout losses, but only indirectly. Instead of identifying the significant gap between the parties on the projected amount of the lockout losses, the memorandum states the following:

> **Budget for F2005**
>
> The budget will be what it is, and it is difficult to comment on it without seeing it. We can only comment as to the "cap" you specified at that time. We would urge you to deliver the budget to us as soon as possible.

[318] Gaglardi's evidence was that he decided to address the issue of the cap on lockout losses in that manner because it was "a friendly way to go about doing it". He denied the suggestion that he had deliberately avoided quantifying his estimate of the lockout losses because he knew it would create an insurmountable hurdle in the negotiations.

[319] Further discussions ensued between Gaglardi and Beedie, following which Gaglardi revised the memorandum and forwarded the new draft to Beedie. Gaglardi softened somewhat the language of the concluding paragraph.

[320] Beedie still was not satisfied with the final paragraph. His view was that while the parties were still some distance apart, McCammon had moved in their direction. Beedie did not want their counter proposal to inflame the relationship with Orca Bay or be construed as an ultimatum. At his urging, Gaglardi made more revisions. The final version of the memorandum was dated November 2, 2004 and sent to McCammon on that date. The concluding paragraph stated as follows:

> Our feeling now is that we have conceded far more than we ever envisioned (even as of last week), all in the name of trying to finalize a deal that we both have much invested.

[321] On November 2, 2004, before sending the counter proposal, Gaglardi spoke to McCammon by telephone. He told McCammon he was about to send him a counter proposal containing a careful assessment of the October 30 proposal of Orca Bay. He told McCammon he was frustrated by some of the positions Orca Bay was taking, and was disappointed by what he described as McCammon's "ignorance and disrespect" concerning one of the business terms in particular. Gaglardi expressed the view that the proposal, taken as a whole, was simply too unfair to accept.

[322] In the course of the telephone discussion with McCammon, Gaglardi alluded to the fact that previous drafts of the proposal had included some language he and Beedie ultimately decided to delete. McCammon surmised from Gaglardi's comments that the deleted language was designed to convey that the counter proposal was a final offer. He asked Gaglardi whether he should take from Gaglardi's comments that the proposal he was about to receive was Gaglardi's "final final" offer, because if it was, he would convey that to McCaw. According to McCammon, Gaglardi did not disagree with the characterization of his counter proposal as a final offer.

[323] Gaglardi denied telling McCammon the counter proposal amounted to his final position. He said he referred to the deleted language in a joking fashion and did not intend, by referring to the deletions, to convey to McCammon that the proposal was their final offer.

[324] McCammon made a note of his telephone discussion with Gaglardi shortly after it occurred. The note reflects that McCammon took from his discussion with Gaglardi that the proposal was, in effect, a final offer.

[325] The counter proposal was not acceptable to McCaw. He and McCammon discussed the prospects of reaching an agreement with Gaglardi and Beedie. McCammon told McCaw he thought the prospects were dim. The transaction had not advanced significantly since the meeting of October 20, 2004 and the drafting of the critical path memorandum. McCammon told McCaw that Gaglardi and Beedie had not finalized arrangements with any lenders to assume the senior debt, and that none of the financial information required for the NHL approval of the sale had been provided to the NHL.

[326] Orca Bay had not yet received any response to its redrafted Definitive Agreement, which Orca Bay's solicitors had sent to Gaglardi's solicitors ten days earlier. Nor had Orca Bay received any response to its draft credit agreement. The terms of both agreements were far from being settled. Gaglardi had instructed his solicitors not to do any further work on the Definitive Agreement and other documents required for closing until all of the business points had been finalized. Those instructions were conveyed to Orca Bay.

[327] McCaw and Gaglardi had a telephone discussion on November 3, 2004. Gaglardi's perspective on the discussion was quite different from McCaw's. Gaglardi understood McCaw to invite him to Los Angeles to try to work out the disputed deal points without McCammon in the middle. McCaw understood Gaglardi to say that he

wanted to come to Los Angeles not to negotiate but to "look him in the eye" and persuade him that the deal he had put on the table was one McCaw should accept.

[328] On November 3, 2004 McCaw instructed McCammon to begin negotiations with Aquilini to determine whether Orca Bay could come to satisfactory terms concerning the sale of 20% of the Enterprise. McCammon called Knott to ask whether he would act for Aquilini in the negotiations. Knott had done some legal work for McCaw and sat on the board of one of the Orca Bay companies. He was familiar with the business aspects of the Enterprise. McCammon advised Knott that despite his previous relationship with Orca Bay, McCaw wanted Knott to act for Aquilini in the negotiations. Knott agreed.

[329] McCammon met with Knott at 4:00 p.m. on November 3 at Knott's office. McCammon told Knott that McCaw wished to move forward with negotiations for the sale of a 20% interest in the Enterprise to Aquilini. They discussed the structure that a transaction might take, and some of the main business terms of a possible transaction. Aquilini joined McCammon and Knott for dinner that evening at Don Francesco's restaurant in downtown Vancouver. There were further discussions about "big block" business terms.

[330] In the course of the dinner, Aquilini sought McCammon's assurance that Orca Bay was not attempting to use negotiations with his family to "shop" the Gaglardi and Beedie deal. McCammon gave him that assurance. Aquilini agreed to bring the people he required to conclude a binding agreement to Knott's office the following morning for intensive negotiations with Orca Bay.

[331] McCammon assembled the individuals within Orca Bay whose participation would be necessary to conclude a binding agreement. One of them was de Bonis, who gave the following evidence concerning the point in time at which arrangements were made by McCammon to begin negotiations with Aquilini:

> Q: Sir, at any point prior to November 4th, 2004, had you been instructed by Mr. McCammon to stop or hold off working on the potential Gaglardi/Beedie transaction?
>
> A: No.
>
> Q: Can you please describe what occurred on the morning of November 4th and how you found out about the involvement of Mr. Aquilini.
>
> A: I arrived at work that day, and Stan called me into his office. And he told me that John was not able to come to terms with Tom and Ryan. And he then went on to say that the Aquilini family has expressed an interest in buying 20 percent of the businesses, and that there was a meeting scheduled later on that morning to try and negotiate a deal, and that he wanted me to participate in that meeting to support due diligence that would happen as part of the meeting. And we talked about what information we should bring to the meeting, and I went and prepared it.
>
> Q: And in this discussion with Mr. McCammon, did he advise you of any terms that had been agreed upon between Orca Bay and the Aquilini family?
>
> A: He just told me that they were interested in buying 20 percent.
>
> (Transcript: V. de Bonis examination-in-chief, August 13, 2007 p. 34, l. 15-39)

[332] The member of the Aquilini family primarily responsible for finance and taxation issues is Aquilini's brother, Roberto Aquilini ("Roberto"). Aquilini called Roberto to tell him of the decision to meet on November 4, 2004 at Clark Wilson to attempt to

negotiate a binding agreement. He also notified the Aquilinis' chief financial officer, Chuck Wright.

[333] On the morning of November 4, Aquilini, Roberto and Wright, together with Knott, met the Orca Bay representatives, McCammon and de Bonis, at Clark Wilson. The first part of the day was spent on financial due diligence. The financial statements satisfied the Aquilinis that the Enterprise had generated significantly more profit during fiscal 2004 (that is, the year ending June 30, 2004) than the previous year. Further, the actual results for fiscal 2004 were well ahead of the budget for 2004, and management was forecasting better results in fiscal 2005, assuming no lockout occurred.

[334] The improvements were the result of the stronger Canadian dollar and the better on-ice performance of the Canucks leading to improved ticket sales. There was an expectation that the team would continue to perform well and that the new collective bargaining agreement would limit the growth of the player payroll.

[335] As a result of the actual and forecasted performance of the Enterprise, the Aquilinis were satisfied that the asking price of $250 million was reasonable.

[336] The rest of the day was spent discussing business points. McCammon took the position that the purchasers must simply step into McCaw's shoes with respect to their 20% interest. The Aquilinis were in agreement with the approach in principle, but many deal points had yet to be resolved. The agreement that was finally concluded (the "Investment Agreement") underwent several drafts. The central features of the agreement to purchase 20% of the Enterprise were the following:

- The Enterprise would have $95 million in bank debt and $5 million negative working capital, leaving equity of $150 million;
- The Aquilinis would pay $30 million for 20 percent of the equity, with $10 payable by way of a VTB at 5% and $20 million in cash; and
- Of the $20 million in cash, $500,000 would be payable immediately, with $2.5 million payable 3 weeks from closing, and the remaining $17 million payable in 8 months.

[337] Late in the day on November 4, 2004 de Bonis raised the issue of whether the tax benefits, a key element of the transaction for the Aquilinis, would be available if the transaction involved the sale of only 20% of the Enterprise. De Bonis contacted Michael Brawn, a partner at KPMG, for an opinion on the issue. Brawn's advice was that the tax benefits would be available only if there was a change of ownership control, which meant that the sale must involve 50% of the Enterprise.

[338] Brawn's advice put an end to the negotiations for the day. However, the parties agreed to "sleep on" the advice and speak again the next day.

[339] On November 4, McCammon contacted Gaglardi by telephone to ask him whether there were any other comments he and Beedie wished to make about the draft documents or anything further they wished to say about the transaction generally. Gaglardi told McCammon he would speak with his lawyers and get back to him. Later in the day, Gaglardi called McCammon to say that his lawyers had identified some issues with the draft Definitive Agreement, but none that he felt were worth discussion. He told McCammon that there were, however, several aspects of the credit agreement that were unreasonable. Gaglardi's first comment to McCammon on that subject was, "I didn't know we were borrowing from the mob". That comment, Gaglardi explained in his

evidence, was made in a joking fashion to which McCammon responded, after some hesitation, with a laugh. Gaglardi then identified those aspects of the credit agreement he viewed as problematic.

[340] McCammon thought that Gaglardi had either not read the draft credit agreement or did not understand it. McCammon denied laughing at the comment about "borrowing from the mob". He did not take the comment literally, but did not think Gaglardi was joking about his objection to the terms of the credit agreement.

[341] During the evening of November 4, the Aquilinis discussed among themselves the prospect of bringing their offer up to 50% of the Enterprise. Roberto proposed a financing structure that might make a 50% purchase possible. It was based on the family's ownership of two large projects, one a pre-sold construction project in Vancouver that was expected to yield substantial net cash, and a large income property in Edmonton whose sale was also expected to bring substantial cash. Roberto proposed offering both assets to McCaw as security with a promise to repay the debt as and when the cash from the two projects came in. Based on the security of the hockey club itself and the two properties, Roberto proposed to finance the entire increase in the purchase price by increasing the VTB financing from $10 million to $55 million.

[342] The Aquilini family decided to proceed with Roberto's proposed deal structure. Aquilini spoke to McCaw the next morning about the family's decision to move from 20% to 50%. The parties then reconvened at the offices of Clark Wilson. Roberto explained the new deal structure and McCammon agreed to it. Most of the other

business points had been settled the day before. Late in the day on November 5, 2004 the parties signed the Investment Agreement with a closing date of March 8, 2005.

[343] The Investment Agreement included a term granting Aquilini the option of purchasing the remaining 50% of the Enterprise.

[344] After the Investment Agreement was signed but before closing, a disagreement arose over its interpretation. The losses during the lockout year were to be funded from the cash on the balance sheet, which was approximately $13.5 million. Aquilini understood that his family was entitled to receive 50% of that amount, but by the express terms of the agreement they were responsible for bearing only 25% of the losses. He sought recognition of the $4 million difference by a price reduction of that amount. McCammon's view was that he was not entitled to it. The difference was eventually settled by McCammon's agreement to a $1.5 million reduction in the price.

[345] McCammon advised McCaw late in the day on November 5, 2004 that a binding agreement had been concluded with Aquilini. McCaw then placed a call to Gaglardi and told him that Orca Bay had rejected the November 2 counter proposal and was terminating the negations with Gaglardi and Beedie.

[346] The recollection of the two men concerning the contents of the November 5 conversation differs in some respects, but it is common ground that the following comments were made. McCaw told Gaglardi that the failure of Gaglardi and Beedie to finalize arrangements for the senior debt and send the required materials to the NHL for its approval was of great concern to Orca Bay. Gaglardi's response was that he had not

seen to those matters because he wanted to travel to Los Angeles and finalize the deal points with McCaw. McCaw said he understood that Gaglardi wanted to meet in Los Angeles, but only for the purpose of "looking him in the eye" on his last proposal. McCaw also told Gaglardi that it was apparent to him the parties had never agreed on the value of the Enterprise.

[347] Beyond those subject areas, the recollections of the two men differed. Gaglardi recalled McCaw saying that Gaglardi and Beedie had "bargained too hard" and should have accepted the October 30 proposal. He also recalled McCaw saying that he had been told by McCammon that Gaglardi and Beedie had given Orca Bay an ultimatum with their last counter proposal. Gaglardi said McCaw alluded to the fact that Gaglardi had told the bankers he was going to "grind" McCaw in the negotiations.

[348] McCaw denied making those comments to Gaglardi.

[349] Gaglardi testified that he asked McCaw to consider putting the October 30 proposal back on the table. However, he did not tell McCaw that he would accept the proposal if it was re-tabled. His evidence concerning his conversation with McCaw was as follows:

> I said, well, John, if two parties go awry, what they normally do is trace their steps back to a deal that, you know, the other party would do; so that's takes us back to October 30th; is October 30th available?
>
> He said, no, it's not.
>
> I said, John, how can it not be available six days after you put it there; how can you just not make it available for us?
>
> And he said, you should have taken it before; it's not available to you now.

> And I said, well, John, if you could consider making [the October 30 proposal] available, then we'll have to consider accepting it; but, you know, I need to know whether it's available.
>
> And he hummed and hawed. And he said -- and at the end of the phone call, he said, I have to go; I have company coming over for dinner; I have got to go; let's talk Monday.
>
> I said, John, over the weekend, can you please consider putting October 30th back on the table.
>
> And he said, yes, Tom, I will, but don't hold out, you know, much hope for it.
>
> That's how the call ended.
>
> (Transcript: T. Gaglardi cross-examination, May 14, 2007, p. 31 l. 38-47; p. 32 l. 1-14)

[350] McCaw denied telling Gaglardi that he would consider putting the October 30, 2004 offer back on the table.

[351] Gaglardi had a telephone conversation with McCammon on November 6, 2004. McCammon reminded Gaglardi of the phone call during which Gaglardi had described the November 2 memorandum as his final offer. Gaglardi asked McCammon whether Orca Bay was prepared to put the October 30 proposal back on the table. McCammon's response was that he thought McCaw's decision was final. Gaglardi did not tell McCammon that if he was offered the October 30 terms he would accept them.

[352] On November 8, 2004 Gaglardi drafted a memorandum to McCaw in an attempt to persuade him that his perspective on the negotiations was not accurate and that the deal could still close in a timely fashion. In the first paragraph of the memorandum Gaglardi attempted to address McCaw's concern that as late as November 3, Gaglardi and Beedie did not have any arrangements for the senior debt in place:

> Royal Bank of Canada, who are not presently in this banking syndicate club, had made a proposal to underwrite a $110 million facility including $15 million in credit lines. That leaves us with two options and plenty of time to mobilize each of those to close by December 15th.

[353] Gaglardi acknowledged at trial that the statement about the Royal Bank was not entirely accurate. While he had a proposal from the bank, he had no commitment. He also acknowledged that as of the time he wrote the memorandum, neither Beedie nor Beedie's CFO had met with two of the three banks in the bank club.

[354] Gaglardi concluded the November 8, 2004 memorandum by saying that the differences between the parties could "be either solved or not", and that the parties should continue to negotiate:

> It now appears that we have some disagreement over certain adjustments (along with the other issue you raised in our Friday conversation). We perceive that the differences are quite small. These matters can be either solved or not, and we would suggest a sit-down, face to face meeting early this week to bring proper finality to this deal, once and for all.

[355] Gaglardi and Beedie suspected that McCaw had brought negotiations abruptly to an end as a bargaining ploy, and, for that reason, they did not tell him they were prepared to accept the October 30 proposal. Gaglardi's evidence was that they did not want to telegraph to McCaw that they would accept the proposal if it was tabled. I view that evidence with some scepticism. If they simply wanted McCaw to re-table the proposal so they could accept it, why not simply tell McCaw it was acceptable? The evidence is more consistent with the ongoing view of Gaglardi and Beedie, even in the face of McCaw's withdrawal from the negotiations, that the proposal was unacceptable.

[356] McCammon had a telephone conversation with Beedie on November 8, 2004. It was quite amicable. Beedie expressed his surprise at the abrupt termination of the negotiations by McCaw. McCammon told Beedie that he understood the November 2 counter proposal to be a final offer, particularly in light of his conversation with Gaglardi. Beedie's response was that neither he nor Gaglardi intended to convey such a message, and that he did not understand Gaglardi to have taken such a position. Beedie also told McCammon he continued to believe that he and Gaglardi were the likely buyers and that the parties would likely revisit the transaction in the future.

[357] McCammon responded to Gaglardi's November 8 memorandum by letter dated November 10, 2004. The letter commenced with McCammon's expression of regret that the parties could not come to terms after working so hard. McCammon then provided Orca Bay's perspective on the negotiations. He observed that the parties had never reached agreement on all deal points and a number of substantial matters were never settled. He referred to Gaglardi's "final offer" of November 2, 2004. McCammon reiterated his view expressed some days earlier to Gaglardi that in the past few weeks he and McCaw had become increasingly convinced there were too many material differences between the parties and that a deal would be too difficult to accomplish. McCammon concluded his letter by advising Gaglardi that Orca Bay had notified the banks and the NHL of its decision not to go forward with the transaction.

[358] On the evening of November 16, 2004, during a dinner meeting at a restaurant in Calgary, Gaglardi noticed a news item on the restaurant television about an announcement Orca Bay was expected to make imminently about the sale of a 50%

interest in the Canucks. Gaglardi called Beedie, who advised him that he had just been told by a media contact that Aquilini had concluded a deal for a 50% interest in the team. Both men were shocked and angered by the news.

[359] On November 18, McCammon attempted to reach Beedie by telephone. When he was unable to do so, he left a voicemail message for Beedie, in which he explained that Gaglardi had characterized the November 2 counter proposal as their "final, final offer". McCammon also indicated that the negotiations with Aquilini began after he received the November 2 memorandum and concluded in a matter of a couple of days. His voicemail message states, in part, the following:

> ... I think you may have a very incorrect perception of what occurred…um…you called…you guys had sent us an offer and Tom had framed it as…and I think I even mentioned this to you as your final, final position and…uhm…you know at some point - some point, it was I think fair for somebody to come to the conclusion that whether you're going to get your deal done or not. It was upon that…receiving that memo [on November 2] and having that conversation, that we were going to have a continuing problem trying to get a deal and it wasn't until then that we talked to the Aquilinis. ... We blew through our October 30 timeframe and you know…we sat down upon concluding the fact that we wouldn't get something done with you guys, we sat down with Francesco and basically something…a bit over 2 days, had a deal done.
>
> (Exhibit 54 – Telephone voicemail transcription)

[360] Beedie did not respond to McCammon's message.

[361] Aquilini was asked in cross-examination at trial why he did not tell Gaglardi and Beedie of his decision to enter into negotiations with Orca Bay. His answer was that he had asked Gaglardi and Beedie in August 2004 if he could participate in the deal and they had said "no". As a result, he had decided that if he wanted a 20% interest in the

Canucks he would have to pursue its acquisition with Orca Bay. Aquilini said that in his view, he was under no obligation to tell Gaglardi and Beedie of his decision to approach Orca Bay because at that point in time they were simply competitors for the opportunity.

[362] In March 2006, Aquilini exercised his option under the Investment Agreement to purchase the remaining 50% of the Enterprise.

VII. Discussion

A. Summary of the Arguments

[363] The arguments of Gaglardi and Beedie can be summarized as follows:

1) As a result of the discussions among the three men in late October and early November 2003, a single adventure partnership within the meaning of s. 35(1)(b) of the *Partnership Act* was formed. The objective of the partnership was to pursue the purchase of an interest in the Enterprise by a tax-effective entity.

2) From the fact of the single adventure partnership, it must be inferred that the parties agreed the partnership would continue until the adventure was concluded. As such, Aquilini required the consent of the other partners to withdraw.

3) Aquilini's departure resulted in only a partial dissolution of the partnership. In other words, the single adventure partnership continued even after Aquilini withdrew. Alternatively, the court can infer that the parties agreed the partnership would continue after Aquilini's departure.

4) As a former partner who withdrew from the partnership with the consent of his partners, Aquilini continued to be bound by the fiduciary duties arising from the partnership. He ceased to be a beneficiary but continued to be a fiduciary. Because he continued to be bound by his fiduciary duties, Aquilini was absolutely disentitled from competing with Gaglardi and Beedie.

5) In the alternative, if Aquilini was not absolutely disentitled from competing, he had a duty not to compete unfairly with his former

partners due to the circumstances of his withdrawal from the partnership.

[364] The response of the Aquilini and Orca Bay Defendants was as follows:

1) No partnership or other fiduciary relationship was formed. The three men, who barely knew one another, agreed to work together to advance non-binding proposals to Orca Bay, and nothing more.

2) The objective of the alleged partnership, as disclosed in the pleadings, was to come to an agreement with Orca Bay concerning a 50% interest in the Enterprise on behalf of the partnership. That partnership was not to be formed until a binding agreement with Orca Bay was reached.

3) Even assuming there was a partnership, it was a partnership at will that dissolved when Aquilini left the group;

4) Any ongoing rights and obligations were mutual rights and obligations. If Aquilini owed Gaglardi and Beedie fiduciary obligations, then they owed Aquilini the same fiduciary obligations. Gaglardi, Beedie and Aquilini were equally entitled to pursue the opportunity or were equally disentitled from pursuing it.

5) There was no duty on the part of Aquilini to compete fairly. In any event, neither Aquilini nor Orca Bay acted unfairly toward Gaglardi and Beedie.

B. The Nature of the Relationship

1. Was there a partnership?

[365] As the authorities discussed earlier establish, partnerships arise from contract. The contract need not be detailed, but must contain the essential terms of the partnership.

[366] In closing argument, the Plaintiffs described the scope of the alleged partnership as follows:

> 103. Beedie, Gaglardi and Aquilini agreed to jointly pursue the acquisition of an interest in the Enterprise. It is this agreement and the parties' conduct in pursuit of it, which constitute the partnership at issue in this case. The relationship that would have followed if the group had been successful in acquiring an interest in the Enterprise – and the terms of the actual acquisition – are distinct from, and irrelevant to, the business or venture which is the subject matter of this action, that is, the joint effort to acquire an interest in the Enterprise.

[367] As is apparent from their closing argument, the plaintiffs defined the alleged partnership narrowly. Properly characterized, said Gaglardi and Beedie, their partnership was one whose objective was to pursue an interest in the Enterprise as distinct from obtaining the interest. They argued that the parties intended to defer any agreement creating obligations in the event their negotiations were successful, such as the price they would pay and the precise form of the legal relationship they would enter once the acquisition occurred, until the acquisition was completed.

[368] Put another way, the plaintiffs said the contract giving rise to the partnership formed in November 2003 between Gaglardi, Beedie and Aquilini was the "pursuit" partnership, and a different partnership -- the "acquisition" partnership -- was to be created subsequently. For that reason, the group was not required to enter into binding obligations on issues such as the terms they were ultimately prepared to accept in a transaction with Orca Bay and the manner in which they would govern themselves once they acquired the Canucks.

[369] One difficulty with this argument is that it does not accord with the evidence of Gaglardi and Beedie. At trial, they did not distinguish between a partnership that would end just before concluding a transaction with Orca Bay and a partnership involving

different parties and on different terms that would commence with the closing of the deal. Neither Gaglardi nor Beedie described a partnership created for the pursuit of the opportunity that was distinct from the partnership that would acquire it. In fact, Gaglardi's evidence was that the "partnership" existing between himself, Beedie and Aquilini was the same partnership that would acquire an interest in the Enterprise and enter into the binding agreement with Orca Bay.

[370] As the court in ***Khan*** observed, it is necessary to identify the venture in order to define the scope of the partnership. In this case, the three men did not simply agree to form a group to *pursue* an ownership interest in the Canucks. They agreed to pursue ownership with a view to *acquiring* it. The objective of their joint effort was to acquire an interest in the Enterprise that the three of them would share equally as partners.

[371] Whether the terms of a partnership contract are oral or are to be implied from conduct, they must be sufficiently unequivocal to establish that the parties in fact made a partnership contract as distinct from some other agreement to work together.

[372] As the objective of the group was to acquire an interest in the Enterprise, the three men required (at a minimum) an agreement among themselves as to the nature of their relationship, the rights and obligations they shared as a result of the relationship, and the business terms with which each of them was prepared to go forward to conclude a binding transaction involving a $250 million asset.

[373] The following are the key facts concerning the relationship formed in November 2003.

[374] Gaglardi, Beedie and Aquilini agreed to work together to purchase an interest in the Canucks. They hired a lawyer and agreed to share the cost of his accounts. They put together an expression of interest that did not require from any of them a commitment to one another or to Orca Bay. They agreed that Gaglardi would be the spokesperson in the negotiations, but gave him no authority to enter into agreements or bind the other members of the group.

[375] The question is whether those facts suffice to create a partnership.

[376] As indicated by the authorities discussed earlier, the facts must establish both an intention to create a partnership and the actual creation of a partnership. An agreement to work together to pursue the acquisition of an asset does not, of itself, create a partnership.

[377] Gaglardi and Beedie asserted that a partnership with Aquilini was formed, at the latest, by November 3, 2003. They both testified there were no discussions after that date about the terms of the partnership. No evidence was called that would suggest otherwise.

[378] Before November 3, 2003 Gaglardi had met separately with Beedie and Aquilini and had determined, at most, that they were interested in meeting one another to hold further discussions about acquiring an interest in the Enterprise. The meeting on November 3 was the first time the three met as a group. They chatted for a couple of hours before a hockey game. Aquilini and Beedie barely knew one another. Gaglardi had only met Beedie the week before. They expressed concern about the price Orca

Bay was asking. They discussed hiring a lawyer to put forward a non-binding proposal to acquire a 50% interest in the Canucks.

[379] The shape of the transaction that might ultimately occur was far from materializing in November of 2003. As Gaglardi acknowledged in cross-examination, the only partnership the three men discussed was the one they would form to enter into the transaction with Orca Bay once the terms of the transaction were known.

[380] Even if the objective of the partnership in the present case was limited to the effort to make the acquisition, the three men must have contracted to form a partnership before one could come into existence. What were the terms of the contract governing their commitment to jointly pursue the interest? They did not agree to anything other than the equal sharing of Sehmer's accounts.

[381] The three men did not discuss any terms that would govern their pursuit of the opportunity despite the fact that they retained legal counsel to assist them. None of these sophisticated businessmen, all of whom were familiar with limited and general partnerships, suggested entering into a partnership agreement. They did not ask Sehmer to draft a partnership agreement for them, nor did Sehmer suggest such a course. No governance terms were proposed. Gaglardi and Beedie did not begin discussions about terms of governance between them until after the Term Sheet was signed in August 2004.

[382] The parties agreed to hire Sehmer as their legal counsel and to contribute equally to the accounts he rendered. No partnership accounts were ever established to

pay expenses such as Sehmer's bills. No contributions of capital were requested. Even after their meetings with Sehmer in November 2003, they did not put in place a structure of any kind that would serve to govern their relationship or otherwise evince an intention to enter into a partnership during the time they were advancing expressions of interest to Orca Bay.

[383] The common understandings among the group undermine, rather than strengthen, the assertion of Gaglardi and Beedie that a partnership was formed in November 2003.

[384] The proposals tabled with Orca Bay were expressions of interest only. There was a common understanding that the individuals were not bound to accept any expression of interest that Orca Bay might find acceptable. They all understood that their respective families had to agree to any terms of a transaction with Orca Bay before it was tabled as a binding proposal. There was also a common understanding that each member of the group was free at any time to decide whether or not to go forward with the negotiations or enter into an agreement with Orca Bay.

[385] The group was not pursuing only an interest in property. It was seeking to purchase a going concern in the nature of a professional sports franchise, its facilities and the underlying real estate. Yet there was no agreement concerning the multitude of business terms they would be required to settle in a complex transaction of this nature. There was not even agreement on the price they were ultimately prepared to pay.

[386] The members of the group did agree that if they were successful in concluding an agreement with Orca Bay to acquire an interest in the Enterprise, they would acquire the interest through a tax-effective entity such as a limited partnership. They understood that limited partnership would require a formal written contract. The only discussions concerning governance were directed to the partnership that would be formed if they succeeded in acquiring the Enterprise.

[387] Fundamental to the existence of a contract is the identity of the contracting parties. The identity of the partners in this case was critical because the objective of the alleged partnership was to form a partnership with McCaw. McCaw would only enter into a partnership with individuals with whom he was convinced he could work.

[388] Beedie, Gaglardi and Aquilini had not come to terms on the issue of the individuals or entities that would form the limited partnership created to acquire the interest in the Enterprise. In November 2003, Beedie did not know whether he would be the partner in the limited partnership that ultimately participated in the transaction. The partner might be him, his trusts, his father or a combination of all three. There had been no discussion at all about the identity of the Aquilini participants in the limited partnership.

[389] The decision the three men reached in November 2003 was to defer any agreement on the essential terms of the transaction with Orca Bay to which they would be prepared to commit, as well as the terms pursuant to which they would do business together as joint owners of the Enterprise. The conduct of the parties in the meeting of November 3, 2004 -- and thereafter -- is inconsistent with an intention to enter into legal

relations. Rather, it is consistent with an informal association created to explore the prospect of a partnership with McCaw that would not result in binding, reciprocal promises until the parties had identified and agreed to all of the terms of the transaction.

[390] The parties manifested by their conduct after November 3, 2003 that while they shared a common interest in the opportunity, they understood that any party could resile from the venture without consequence. It is telling that when Aquilini told Gaglardi and Beedie in March 2004 he was leaving the group, they did not suggest to Aquilini that he was not free to walk away. They did not suggest at the time that Aquilini was barred from pursuing the opportunity on his own. When Aquilini asked to rejoin the group in August 2004, Gaglardi and Beedie understood they were free to said “no”, and did so.

[391] The objective of the three men was to become owners of the Canucks and partners with McCaw in the operation of the Enterprise. They intended to enter into a partnership agreement at that time which would govern the relationship among themselves and their relationship with McCaw. In the interim, theirs was simply an informal agreement to work toward the formal arrangements. That agreement did not give rise to the legal relationship of partnership with its onerous duties of loyalty and good faith.

2. Alternatively, was there a Joint Venture?

[392] The plaintiffs’ primary position is that Gaglardi, Beedie and Aquilini were in a relationship of partnership. In the alternative, they say the three men entered into a joint venture akin to partnership.

[393] Like partnerships, joint ventures must be founded on contract. The necessary contract can be inferred from all of the circumstances, particularly where the business of the joint venture has become operational. The parties must intend to enter into a joint venture and must have agreed on all essential terms (***Canlan*** at para. 33). However, unlike a partnership, it is possible to commence a joint venture without actually carrying on a business.

[394] Did Gaglardi, Beedie and Aquilini, as a result of their discussions in November 2003, enter into a joint venture? Once again, the issue is whether they concluded an enforceable contract setting out all of the essential terms of the venture.

[395] As none of the three testified to discussions about a joint venture contract, one must be inferred from all of the circumstances.

[396] In ***Zynik***, Tysoe J. observed at para. 131 that there is an important distinction between "negotiations for the creation of a joint venture and dealings after the joint venture has been formed". The parties in that case were negotiating with a third party bank to acquire property, but had not yet agreed on a mutually acceptable price and other terms and conditions of the prospective purchase. For that reason, Tysoe J. concluded there was no joint venture agreement, only an unenforceable agreement to agree. Even though the parties could not have known the selling price the bank would ultimately accept, they could have agreed to a ceiling price. In that circumstance, they would have been committed to that price and all lesser prices without having to reach further agreement. Having not done so, the parties had failed to agree to all essential contractual terms and there was no binding joint venture contract.

[397] The circumstances of the present case are similar to those in ***Zynik***. In order to find a joint venture agreement among Aquilini, Gaglardi and Beedie, there must be sufficient evidence on which to base a finding that, as among the three of them, they had settled all of the essential terms of their joint relationship when they began advancing proposals to Orca Bay. I have already concluded that the evidence falls short of establishing such a contract.

[398] For substantially the same reasons that I concluded there existed no partnership agreement, I have concluded the evidence falls short of establishing a binding joint venture agreement. Not only was there no agreement as to the identity of the parties that would hold the interest in the Enterprise, should it be acquired, there was no certainty of subject matter because the scope of the acquisition had yet to be determined. The parties had yet to agree on the price they would ultimately be prepared to pay and the host of other conditions that required agreement in a complex acquisition of the kind they were contemplating.

[399] In short, the members of the group had not agreed to any of the terms necessary to bind themselves to one another in order to complete a transaction with Orca Bay.

[400] In summary, the relationship among Gaglardi, Beedie and Aquilini was not one of partnership or joint venture. None owed duties of loyalty or good faith to the others. Each was entitled to withdraw from the group at any time and pursue the opportunity for himself.

C. Consequences of Aquilini's Departure from the Group

1. What, if any, were the consequences of Aquilini's departure?

[401] I have concluded there was no partnership or joint venture. Even assuming there was such a relationship, Aquilini's departure ended it.

[402] The following are the key facts.

[403] It is common ground that Aquilini left the group in early March 2004. Gaglardi and Beedie do not dispute that Aquilini ceased to be a partner at that time.

[404] When Aquilini told Gaglardi that he was leaving the group, Gaglardi and Beedie did not object. They did not suggest that Aquilini required their consent. They did not seek Aquilini's consent to continue their pursuit of an interest in the Enterprise, nor did they seek any promise from Aquilini that he would not pursue the opportunity on his own. Aquilini told Gaglardi that he remained interested in acquiring a share in the Enterprise, but Gaglardi gave him no assurance that he could rejoin the group in the future.

[405] Gaglardi asserted that Aquilini asked to be kept informed about the negotiations because he may wish to rejoin the group at some future time, and that Gaglardi agreed. Aquilini disputed that assertion

[406] The documentary record does not support Gaglardi's evidence. If Gaglardi offered to do anything, it was an informal, non-binding offer to update Aquilini verbally from time to time on the progress of the negotiations. The arrangement was not

confirmed in writing. After Aquilini left the group, Gaglardi and Beedie ceased copying him on documents and correspondence. They did not copy Aquilini on their email exchanges, nor did they copy him on any of their correspondence with Orca Bay. There was no evidence to suggest that Gaglardi or Beedie provided Aquilini with any information of substance concerning their negotiations with Orca Bay.

[407] By the time Aquilini left the group in March 2004, the group had made three non-binding proposals, all of which contemplated the acquisition of a 50% interest in the Canucks and none of which was of interest to Orca Bay. They had received one non-binding proposal from Orca Bay that was not acceptable to the group. The lack of any progress prompted Gaglardi and Beedie to propose an entirely new ownership structure after Aquilini's departure.

[408] In final argument, Gaglardi and Beedie argued that despite Aquilini's departure from the group, the partnership continued. That is neither an accurate characterization of the facts nor a correct statement of the law.

[409] I have found as a fact there was no agreement among the three that the partnership would continue despite Aquilini's departure. There was no evidence to suggest any agreement or understanding concerning the continuation of the partnership. Aquilini simply left the group without objection by the other two, who then pursued the acquisition on their own. As a matter of law, either Aquilini ceased to be a partner, in which case the partnership, if any, dissolved, or the partnership continued and Aquilini continued to be a member. That is the result regardless of any agreement on the part of Gaglardi to keep Aquilini advised of the progress of the negotiations.

[410] In ***Davies***, McLeod J. held that the departure of one of the accounting firm's partners caused the dissolution of the partnership. The decision of the remaining partners to carry on the business of the former partnership did not give them greater rights than those of the partner who left the firm. The fact that five of the six partners chose to carry on did not entitle them, by weight of numbers, to lay exclusive claim to the engagements of the former partnership.

[411] The same holds true in the present case. Gaglardi and Beedie decided to carry on with the acquisition of an interest in the Canucks. In the absence of an agreement by Aquilini not to compete, they were not entitled to lay exclusive claim to the pursuit of the opportunity.

[412] Put a different way, absent an agreement to the contrary, Aquilini was bound only by the same duties that bound Gaglardi and Beedie to him. Gaglardi and Beedie pursued an interest in the Enterprise, but did so only on their own behalf. They could only do so if the former partnership had no ongoing interest in the opportunity. But if that was so, Aquilini was also entitled to pursue the opportunity on his own behalf.

[413] Gaglardi and Beedie argued that upon Aquilini's departure there was only a partial dissolution of the partnership such that the former partnership continued. I cannot accept that argument.

[414] First, sections 36 and 38 of the ***Partnership Act*** provide for the continuation of a partnership in certain limited circumstances where dissolution would have occurred at common law. None of those circumstances is present in this case.

[415] Second, if a partnership was formed in November 2003, and if it continued to exist after Aquilini's departure, then it was a partnership of three, not of two. In that event, Gaglardi and Beedie continued to owe the same obligations to Aquilini as he owed to them. It was asserted that following his departure, Aquilini was no longer a beneficiary of the alleged partnership but remained bound by all of the fiduciary obligations arising from partnership. I was cited no authority for the proposition that such asymmetrical partnership obligations could arise in the absence of an agreement, express or implied, to that effect.

[416] The actions of Gaglardi and Beedie following Aquilini's departure demonstrate that they considered the partnership, if it ever existed, to have ended, and that they were at liberty to pursue the opportunity without regard to the interests of their former partner. At the very least, as was the case with the partners in ***Davis v. Oulette***, the conduct of Gaglardi and Beedie after Aquilini's departure was inconsistent with the partnership's continuation and consistent with its dissolution. Gaglardi and Beedie pursued the acquisition of an entirely different ownership structure in the Enterprise after Aquilini's departure, and pursued the acquisition on their own account to the exclusion of Aquilini.

2. Did Aquilini owe any continuing duties?

(a) Continuing duties of partners

[417] The law on this issue can be summarized as follows. As long as the partnership persists, the parties are bound together by mutual obligations of loyalty and good faith.

If the relationship among the three men was one of partnership, they owed one another fiduciary duties because they were partners. The rights that arose in the course of their relationship belonged to all three of them, not just to Gaglardi and Beedie. When the partnership dissolved, the partners became free agents, equally at liberty to pursue their own interests. Any ongoing duty not to compete must be secured by agreement.

[418] Upon dissolution of the partnership, no one member of the group owed any fiduciary duties to the other, except as provided by s. 41 of the ***Partnership Act***. Former partners are free to compete with one another except as constrained by continuing s. 41 obligations.

[419] Section 41 refers to the ongoing "rights and obligations" of partners. If Aquilini had obligations to Gaglardi and Beedie, they had obligations to him. If Gaglardi and Beedie had ongoing rights to the opportunity in question, then Aquilini possessed those rights as well.

[420] As noted earlier, the fiduciary duties owed by former partners to one another are limited to the duty to ensure that ongoing transactions are completed and the assets of the partnership are realized for the benefit of all partners.

[421] In this case, if there was a partnership, it had acquired no assets at the time of Aquilini's departure. No maturing opportunity had been developed by the group. Nor had Gaglardi and Beedie brought a maturing opportunity to Aquilini. Each of the three men had received the CIM from Orca Bay separately in the summer of 2003. Each had executed a separate confidentiality agreement. Each knew of the opportunity

independently of the others and well in advance of the agreement of the three of them to work together.

[422] That Orca Bay wished to sell the Enterprise was widely known in the business community. The economic facts concerning the opportunity were also widely known. Orca Bay was prepared to disclose those facts to any credible potential purchaser.

[423] The acquisition the three were pursuing at the time of Aquilini's departure was one that held no attraction to Orca Bay. As at March 2004, the chances of acquiring an interest in the Enterprise were remote. For that reason, Gaglardi and Beedie changed course and decided to advance a proposal based on a very different ownership structure than the one advanced while Aquilini was part of the group. Any maturing business opportunity did not materialize, at the earliest, until late July 2004 when Gaglardi and Beedie began negotiating for 100% of the Enterprise.

[424] In short, there was no ripening or maturing opportunity that existed at the time of Aquilini's departure. There was no "transaction begun but unfinished" at the time of the partnership's dissolution. Significantly, neither Gaglardi nor Beedie suggested otherwise at the time Aquilini announced his departure from the group. When asked whether the alleged partnership had any tangible or intangible assets, Gaglardi said he could not think of any.

[425] In conclusion, Aquilini was not bound by any fiduciary obligation to Gaglardi and Beedie when he entered into negotiations with Orca Bay in late October or early November 2004.

(b) Continuing duties of joint venturers

[426] If the three men were engaged in a joint venture, the result is no different.

[427] None of the characteristics of fiduciary relationships described in ***Frame*** were present in the relationship among the three men. Aquilini did not occupy a position in the group that gave him any scope for the unilateral exercise of discretion or power, and Gaglardi and Beedie were not in a position of vulnerability. Assuming a joint venture agreement existed in this case, no fiduciary duties arose as a result.

[428] Any post-dissolution duties owed by joint venturers to one another cannot be more onerous than those owed by partners unless they are imposed by the terms of the joint venture contract. Gaglardi and Beedie did not seek an agreement from Aquilini upon his departure that he would not compete with them for the opportunity, nor did Aquilini offer any such commitment. Aquilini was thus entitled to pursue the opportunity without regard to the interests of Gaglardi and Beedie.

[429] The claim of knowing assistance against Orca Bay hinged on the allegation by Gaglardi and Beedie that Aquilini owed them fiduciary duties. As Aquilini owed no fiduciary duties to Gaglardi and Beedie, the claim of knowing assistance fails.

3. Did Aquilini owe a duty to compete fairly?

[430] In the further alternative, Gaglardi and Beedie alleged that Aquilini owed them a duty to compete fairly, which, at a minimum, obliged him to disclose his intention to pursue an interest in the Enterprise on his own account. They argued that the duty

arose on the unique facts of this case, including the fact that Aquilini sought, and obtained, the agreement of Gaglardi to keep him informed of the negotiations and to consider any future request to rejoin the group. Having sought and obtained that agreement, Aquilini was not entitled to compete surreptitiously with his former partners and thereby take advantage of them.

[431] I have concluded that the argument cannot succeed for several reasons.

[432] First, the duty as characterized by Gaglardi and Beedie is similar (if not identical) to the duty of "utmost fairness and good faith" imposed at common law and by s. 22 of the ***Partnership Act***. Any such duty can arise only from a fiduciary relationship. In the present case, the relationship did not give rise to fiduciary duties because it was neither a partnership nor a joint venture.

[433] Second, the evidence does not establish the existence of the unique circumstances from which the plaintiffs argued the duty of fairness arose. Any offer by Gaglardi to keep Aquilini apprised of the negotiations was vague and informal. Gaglardi may have occasionally told Aquilini about the progress of the negotiations, but there was no evidence to suggest that Aquilini received any information concerning the substance of the negotiations with Orca Bay.

[434] Third, even if Gaglardi and Beedie had kept Aquilini apprised of the substance of the negotiations and that information could be considered confidential, LaForest J. in ***Lac Minerals*** observed that the sharing of confidential information may be an incident of a fiduciary relationship but cannot of itself create such a relationship.

[435] Fourth, while Gaglardi may have agreed to consider Aquilini's inclusion in the group in the future, he did not commit to doing so. When Aquilini did make the request to rejoin the group, Gaglardi gave it very little consideration if he gave it any at all. When Gaglardi and Beedie decided in late July 2004 to pursue the acquisition of 100% of the Enterprise, Beedie raised the issue of offering Aquilini a percentage. Gaglardi rejected the idea out of hand. When Beedie decided in October 2004 to take only a 35% interest, Gaglardi took the remaining interest for himself even though he knew that Aquilini was still interested in acquiring 20%.

[436] Aquilini did not owe any duty of fairness or good faith. This was a high-stakes, arm's length business transaction and all of the players in the piece, including Gaglardi and Beedie, were entitled to act in their own self-interest. They all did so.

[437] In any event, neither Aquilini nor Orca Bay acted unfairly. The following chronology is instructive.

[438] When Aquilini left the group in March 2004, he made no secret of his ongoing interest in acquiring 20% of the Enterprise. He asked to rejoin the group on that basis, and was rejected. Aquilini also expressed his interest to McCaw, but McCaw hoped to sell a much larger interest in the Enterprise.

[439] By the end of July 2004, Gaglardi and Beedie knew McCaw was interested in selling 100% of the Enterprise. They had no reason to believe that Aquilini would not compete with them, particularly as he had told them of his continued interest in a 20% share. The only inference I could draw was that Gaglardi and Beedie did not regard

Aquilini as competitive because they assumed McCaw wanted to sell 100% of the Enterprise and Aquilini was interested in only 20%. They were correct in their assumption. McCaw's strong preference was to sell the entire Enterprise. He knew Aquilini was only interested in purchasing 20%. Orca Bay concentrated all of its efforts on selling the Enterprise to the purchasers who wanted 100%.

[440] To that end, McCammon proposed that the parties assemble their professional advisors at a remote location for a few days and engage in intensive negotiations with a view to reaching a binding agreement. Gaglardi and Beedie declined. They were suspicious of McCammon's motives. They continued to believe that the Enterprise was not worth $250 million, and preferred to negotiate a non-binding Term Sheet. Their bargaining strategy was to stay at the table as long as it took to obtain the Enterprise for less than McCaw's asking price.

[441] The Term Sheet gave Gaglardi and Beedie the exclusive right to bargain with Orca Bay until October 1, 2004. On September 21, their solicitors sent a draft purchase and sale agreement to Orca Bay's solicitors which required extensive reworking. Orca Bay's solicitors made substantial changes and returned the draft to the solicitors for Gaglardi and Beedie. No response to the Orca Bay draft was ever forthcoming.

[442] October 1, 2004 came and went. Gaglardi and Beedie did not negotiate an extension to the exclusivity period. They did not argue that Orca Bay's obligation to bargain exclusively with them continued beyond October 1, nor was their any evidence to support such an argument.

[443] On October 20, 2004 the parties put together a critical path memorandum which contemplated the concluding of a Definitive Agreement by the beginning of November.

[444] On October 26, 2004, Gaglardi and Beedie sent their "long thought final position" to McCammon. It was not acceptable to Orca Bay. McCammon met with Gaglardi and Beedie for several hours on October 28, 2004 to explain Orca Bay's position.

[445] Aquilini contacted McCaw on October 29, 2004 to tell him of his continued interest in 20% of the Enterprise. McCaw said he would consider the offer. However, he did not immediately commence negotiations with Aquilini. Instead, he instructed McCammon to make a further proposal in response to Gaglardi's October 26, 2004 memorandum in an effort to reach a deal for the sale of 100% of the Enterprise.

[446] McCammon sent Orca Bay's response on October 30, 2004. The response contained a number of concessions, but they were not sufficient for the purposes of Gaglardi and Beedie. There were several money items still in dispute, but the main issue continued to be indemnification for lockout losses. Gaglardi did not want to signal the magnitude of the difference that remained between the parties. Instead, he sent another proposal on November 2 in which he asked to be provided with the budget for 2005. It was a budget that Orca Bay had already provided and about which there had been exhaustive discussions.

[447] In his November 2, 2004 telephone discussion with McCammon, Gaglardi alluded to the language that had been deleted from the memorandum. The only plausible explanation for Gaglardi's actions is that he intended to convey to McCammon

the finality of the offer. McCammon understood Gaglardi's comments to convey that position.

[448] The November 2, 2004 counter proposal of Gaglardi and Beedie was not acceptable to McCaw. Closing of the deal was to occur December 15, 2004 yet no arrangements were in place with the banks for the assumption of the senior debt facility. Financial information had not been forwarded to the NHL. Gaglardi had instructed his solicitors not to perform any more work on the draft purchase and sale agreement until the business terms were settled.

[449] McCaw was not prepared to make any further concessions. He had good reason to believe that he was not going to conclude a deal with Gaglardi and Beedie on terms acceptable to Orca Bay. On November 3, 2004, he instructed McCammon to meet with Aquilini and Knott with a view to commencing negotiations.

[450] At trial, the plaintiffs attempted to establish the precise point in time at which the negotiations between Aquilini and Orca Bay began. There was no evidence to suggest those negotiations began during the exclusivity period. No argument was made to that effect. Indeed, the only question was whether the negotiations began on October 29 or at some later time. As a matter of law, the answer to that question is not relevant to the outcome of the action.

[451] It is likely, however, that negotiations between Aquilini and Orca Bay began on November 3 or 4, 2004. The October 29 conversation between Aquilini and McCaw was limited to Aquilini's expression of interest and McCaw's response that he would

consider it. It was not until November 3, 2004 that McCammon met with Knott and Aquilini to discuss the parameters of the transaction. As a result of those discussions, the parties met at Clark Wilson on November 4, 2004 for intensive negotiations.

[452] It is difficult to say precisely when the negotiations with Gaglardi and Beedie failed. While the answer to that question is not material to the outcome, it is reasonable to infer that McCaw instructed McCammon on November 3, 2004 to begin discussions with Aquilini for a 20% interest in the Enterprise because he had concluded that the chances of securing a deal with Gaglardi and Beedie for 100% of the Enterprise were remote. The strategy of Gaglardi and Beedie to stay at the bargaining table as long as possible was not an effective one in the circumstances. It was a strategy that eventually resulted in McCaw's decision to end the negotiations.

[453] Whether Aquilini and Orca Bay began their discussions before the negotiations with Gaglardi and Beedie ended in failure is of no legal consequence. Orca Bay was entitled at any time before August 14, 2004 and after October 1, 2004 to enter into negotiations with other prospective purchasers. Aquilini, for his part, owed no fiduciary duty to Gaglardi and Beedie at the time he began negotiations with Orca Bay, nor was he under any duty to inform them of those negotiations.

VIII. Summary of Conclusions

[454] My conclusions are as follows:

1) No partnership or joint venture was formed between Gaglardi, Beedie and Aquilini in November 2003 or at any time thereafter;

2) Even assuming the three men entered into a relationship giving rise to fiduciary duties, the relationship ended in March 2004 as did any fiduciary obligations arising from it.

3) Aquilini owed no duty to Gaglardi and Beedie to refrain from competing with them for the opportunity to purchase the Enterprise, nor did he owe any duty to advise Gaglardi and Beedie of his negotiations with Orca Bay.

4) Because Aquilini owed no fiduciary duties to Gaglardi and Beedie, Orca Bay's actions did not constitute knowing assistance. Orca Bay entered into negotiations with Aquilini well after the expiry of the exclusivity period under the Term Sheet, as it was entitled to do.

[455] The action is dismissed. The parties may speak to costs.

The Honourable Madam Justice C. A. Wedge