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Case Name:

**I Waxman v. Waxman**

APPLICATION UNDER sections 207 and 248 of the  
Business Corporations Act (Ontario)

Between

Morris J. Waxman, applicant, and  
Chester Waxman, Robert Waxman, Gary Waxman, Warren  
Waxman, Lightning Distribution Inc., CHW Holdings  
Inc., Chesterton Investments Limited, Gawix Financial  
Corporation, Waxtek Metals Inc., Bailey Waxman,  
I. Waxman & Sons Limited and Chester Waxman, Wayne  
Linton and Gary Waxman in their capacities as Trustees  
of the Chester Waxman Family Trust, respondents

[\[2005\] O.J. No. 3804](#)

Court File No. 02-CL-4794

**Ontario Superior Court of Justice  
Commercial List  
J.M. Farley J.**

Heard: June 23 and 24, 2005.

Judgment: September 1, 2005.

(33 paras.)

*Corporations and associations law — Corporations — Shareholders — Agreements — Shares —  
Application for an order declaring a shareholder to have no legal or beneficial interest in shares dismissed  
— Application to set aside a purported profit sharing agreement allowed — Application to set aside a  
transfer of property allowed in part.*

**Statutes, Regulations and Rules Cited:**

Business Corporations Act, s. 207, s. 248, s. 248(3)

Courts of Justice Act,

Fraudulent Conveyances Act,

**Counsel:**

Robert S. Harrison, Richard B. Swan and Gideon C. Forrest, for Morris Waxman

W. Zimmerman, for Bailey Waxman

Lorne Silver, for Chester Waxman and Warren Waxman

Paul LeVay and Alice Mrozek, for Chester Waxman and Wayne Linton as Trustees and Lightning Distribution Inc.

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**J.M. FARLEY J.:—**

**(A) RE BAILEY CLAIM TO BENEFICIAL INTEREST IN SHARES**

¶ 1 Morris ("M") moved for a final order declaring that Bailey Waxman ("B") has no legal or beneficial interest in any shares of I. Waxman & Sons Limited ("IWS") in his fresh as amended application. It is unclear how this was presented as an old issue (i.e. dating back to 2002) as it appears that this has become a live issue only in 2004. B has a "Hamilton Application" in regard to her claim to be the beneficial owner (and hence able to be the legal owner) of the 56 1/2 shares of IWS. These shares originate out of the 50% holdings of her husband Chester ("C") who held 250 shares (with M owning the remaining 250 shares) when both M and C transferred 56 1/2 shares to each of their wives in 1971 for capital gains splitting purposes. According to income attribution rules for tax purposes, dividends and other income related to these shares, but not capital gains, would be and continue to be taxable in the hands of the transferring husbands as if it were their income. In 1983, both wives transferred the shares back to their husbands; it is not clear whether capital gains were realized and the tax on such paid by the wives at that time.

¶ 2 B then apparently sat through the very lengthy trial as an observer, but never questioned the testimony of C when he asserted that he was the sole owner of all the shares of IWS as a result of the deal he did with M. Even after Sanderson, J. gave judgment, C continued to assert that he was the sole owner, only subject to the decision of Sanderson J. C's submission that he was referring to legal ownership (and having the permission of the beneficial owner, B, to hold the shares with legal title and to assert that ownership) and not to beneficial ownership rings hollow and untrue. I reject his evidence in that regard given that at Q. 60 of his cross-examination on May 14, 2004, he acknowledged that he owned the shares free and clear. That is a rather simple concept which C should have no difficulty in understanding, even if not a lawyer - namely no one had a claim against those shares including a claim of beneficial ownership. I further reject his explanation as untrue that he now asserts that his previous claim of ownership was "no longer operative" as B had asked for her shares back. It is unfortunate, but it seems that C will assert anything which he thinks is expedient in his interests at any time and from time to time.

¶ 3 However that said, it appears to me that the appropriate way of dealing with the beneficial ownership of the subject 56 1/4 shares would be to have a trial of an issue with the participants including B, C and M and with such a trial allowing B and C and possibly M testifying viva voce so that the judge could assess credibility fully. I make this observation in dismissing this part of M's motion, notwithstanding M's reliance on the abuse of process/privity cases such as *Bank of Montreal v. Mitchell* (1997), [143 D.L.R. \(4th\) 697](#) (Ont. Gen. Div.) affirmed (1997), [151 D.L.R. \(4th\) 574](#) (Ont. C.A.); *House of Spring Gardens Ltd. v. Waite*, [1990] 2 All E.R. 990 (C.A.); *Nana Ofori Atta II v. Nana Abu Bonsra II*, [1958] A.C. 95 (P.C.). The issue in the Sanderson J. trial was whether C had cheated M as to M's shareholdings - and as a result, inter alia, M was claiming his shares back. It was not a trial about whether C beneficially owned the subject 56 1/4 shares claimed by B as a beneficial ownership claim.

¶ 4 One may take a dim view of B allowing the testimony of C to go in as it did, without any clarification or correction if she thought that necessary. I would note in this respect that she was a very handsomely paid senior executive of IWS so one perhaps should not view her as a sheltered spouse

incapable of making her own decisions. However in my view that should not preclude B from asserting her claim in the trial of issue.

¶ 5 M's application re the 56 1/4 shares is dismissed without prejudice to his full participation in the trial of issue. One of course will have to determine if C and B are truly opposed in interest or truly joined in interest.

¶ 6 If there are any pleading amendments which have to be made so as to have the issue of ownership determined once and for all in the Hamilton Application, that should be done immediately - this would include M being able to execute against C's shares to the extent necessary to satisfy his judgment (and this would include whether C beneficially owns 250 shares or that amount less 56 1/4 shares - namely 193 3/4 shares).

¶ 7 Keeping in mind the problem of C's assertions discussed above, C should bear his own costs. M is to pay \$5,000 costs forthwith to B, and in no event later than October 6, 2005.

#### (B) RE PROFIT SHARING

¶ 8 M also brought his application for:

- (h) a final order pursuant to subsection 248(3) of the OBCA, or at law, setting aside the profit sharing agreement purportedly entered into in 2002 between IWS and the respondents Waxtek Metals Inc. [Warren's ("W's") company] and Gawix Financial Corporation [Gary's ("G's") company]; (i) a final order pursuant to subsection 248 (3) of the OBCA directing Waxtek Metals Inc. to forthwith repay all sums received from IWS to the date of order, with interest.

¶ 9 I was advised that M was close to reaching a deal with G and I take it that that was the reason that Gawix was not included in relief item (i). I would therefore appreciate being advised if this resolution vis-à-vis G has been accomplished; if it has not, then how do these parties plan to proceed re this aspect.

¶ 10 I am of the view that M is a suitable complainant under that definition in the OBCA in these particular circumstances. True enough that Sanderson J.'s decision did not come out until sometime in 2002 later than the purported profit sharing agreement had been reached in early 2002. However I would note that this profit sharing deal was well after the evidence and argument in respect of the trial. C, G and W were thus all aware of the testimony, other evidence and argument and one would reasonably think the problem with forged documents as well. C continues to assert that he remains surprised about the result of the trial; I find this surprise to be very disingenuous. I note in passing that the trial proceedings were intensely and extensively analyzed in a very detailed decision of the Court of Appeal (after a 13 day hearing on the appeal; the Court of Appeal's reasons found no material problem with any of Sanderson J.'s determinations).

¶ 11 Therefore it appears to me that at least by the time the trial had completed (but before the decision came out) and likely a good deal earlier, C, G and W ought to have recognized the inevitability of their exposure to M both as to his 50% share ownership and his further claim in damages. Instead it appears to me that these respondents went about the business of IWS in "their own business as usual basis". Namely, they continued to treat M as a complete stranger to IWS with no interest in IWS - and IWS as a cash machine for them to siphon off money as they wished. Even if IWS were truly a company owned 100% by C's side, I would observe that the record keeping and documentation is either a mess or sorely lacking: examples of this are (1) the \$150,000 payments in April, July and October of 2002 which were recorded in the IWS books as IWS general ledger account 6330 "Legal, Audit and Consulting Fees" but thereafter to "accrued profit sharing" and (2) there was no documentation re this profit sharing - not even a

memorandum, let alone a signed agreement setting out the mechanics.

¶ 12 C indicated that the profit sharing was a substitute for shares which he had previously promised W, G and Robert ("R"). R apparently was not with IWS in 2002 and thereafter. However while C may have been able to dispose of certain of the shares he owned if such disposition was for legitimate purposes, the profit sharing arrangement was the recipe for M to share the burden of this payment through his half ownership of IWS.

¶ 13 The respondents rely on *Awad v. Dover Investments Limited* (2004), [47 B.L.R. \(3d\) 55](#) (Ont. S.C.J.). However, it seems to me that they take that case's reference to both the decision of Cumming J. in *Ford Motor Co. of Canada Ltd. v. Ontario Municipal Employees Retirement Board*, [\[2004\] O.J. No. 191](#), in the analysis at paras. 46-48 of *Awad* out of context. Cumming J. was referring to the problem that the plaintiffs had in that case of shares being transferred with the transferor retaining the claim of possible oppression. That is not the situation here - M cannot be said to have abandoned his rights to be treated as a shareholder when he transferred his shares to C, when the basis of that transfer was that C was cheating M. Similarly my observations in *Royal Trust Corp. of Canada v. Hordo*, [\[1993\] O.J. No. 1560](#) (Gen. Div.) as referred to at paras. 58-59 of *Awad*. This applies as well to the *Lightning Distribution Inc. ("Lightning")* dispute.

¶ 14 In my view the profit sharing deal saddled, or attempted to saddle, M with at least half the cost of a remuneration deal for G and W which was unjustified. The only attempt at justification was the failure of C to make good on his purported agreement to give G, W and R some of his shares - and at a time when they realistically ought to have appreciated that they would lose the case before Sanderson J. An ostrich with its head in the sand is not justification in these circumstances, no matter how badly they wished Sanderson J. to come down in their favour. In doing so, C, G and W were involved in an arrangement which was oppressive to M, unfairly disregarded his interests, and was unfairly prejudicial to him.

¶ 15 M is entitled to the relief which he sought in this regard.

¶ 16 I would note that in passing, even if G and W were to be entitled to money as a result of this profit sharing arrangement, it would be inappropriate to have IWS issue any cheques (and Deloitte to countersign same) since any such payments would be subject to the \$100,000/month cap to the C side.

¶ 17 M is to receive costs of \$5,000 from C, G and W on a joint and several basis forthwith and in no event later than October 6, 2005.

### (C) LIGHTNING

¶ 18 M also applied for orders pursuant to s. 248(3) of the OBCA, the Fraudulent Conveyances Act or at law setting aside or otherwise nullifying ab initio the transfer of the Centennial Property (together with a repayment of rent paid of \$761,000 plus interest) purported to be effected by unregistered transfer dated September 30, 1998 between IWS and Lightning. M made a similar application regarding the North Service Road property effected by transfer dated December 3, 1995 between IWS and 1018932 Ontario Inc. ("1018") which later amalgamated with Lightning. M further asked on the same basis that the estate freeze by C dated September 30, 1998 be voided ab initio (this documentation was actually executed in November 1998, rather immediately before the commencement of the trial before Sanderson J.). The Centennial Road property was where IWS actively carried on business (Philip Services had rented the property before C and his sons were able to get back into business with the rejuvenation of IWS). I find that C's explanation concerning the transfer of the property by IWS to be lame - there was no need to raise funds by selling this vital property as IWS was very flush with "cash" then and if the property was to be "protected" from the possible financial misfortunes of the operating company, IWS, then this could have been accomplished by a spinout whereby the beneficial owners of IWS would have remained the beneficial owners of the Centennial

property. C asserted that the property was essential to IWS and he had no interest in selling to a third party.

¶ 19 This transaction made no sense from the point of view of IWS nor its 50% beneficial owner, M. Again, it must be kept in mind that the plain and obvious conclusion reached by Sanderson J. was that C had cheated M out of his 50% interest and that this conclusion was well supported by the evidence. C could not have been oblivious to this problem on any objective basis. Sanderson J. determined that C had fabricated a lot of his evidence. C asserts that he had a bona fide expectation that he would not lose; rather, it would appear to me that he had a mala fide expectation on a purely subjective basis that he would not be caught out.

¶ 20 Then there is the question of whether the property was transferred at fair market value. The transfer price was \$2.1 million but no money was paid at the time of the transfer. Nor was there any interest payable on the outstanding balance and this debt was unsecured. \$2.1 million was an estimate of value, not an effective appraisal. While these latter two factors may not have been important if the settlor of the estate freeze had been the true 100% beneficial owner, it is at least reckless that C would have exposed M to these potential difficulties. The Humphrey estimate of value did not take into account (as C did not reveal the interest in the property) the interest of Wal-Mart. It does not appear that Edwardh's views were anything more than an acknowledgement that Humphreys (now dead) complied with the requirements of compiling an estimate of value based on the information that Humphreys had. M had a full narrative appraisal prepared by Pocrnic who valued the land at \$4.825 million as at September 30, 1998. Lightning deprecated this appraisal as not giving sufficient discounts for environmental concerns, the difficulty of re-zoning, etc. However, Edwardh only did a superficial inquiry regarding re-zoning with a junior planner at the City and, in that regard, the City Gateway East Study advocating a re-zoning change to commercial was ignored. C himself had minimized the concerns re environmental contamination. While the Wal-Mart offers were conditional and involved a relatively small deposit, it would be reasonable to assume that Wal-Mart (as an end user) would be willing to negotiate on these aspects. The discrepancy in fair market value is too significant to push under the rug and ignore.

¶ 21 Then too IWS has paid \$761,000 rent to February 2005 on the property while not being paid anything on the transfer price. What is the business sense for IWS to go from "rent free" to rent in these circumstances? Edwardh agreed that \$10,000/month rent (even if it were less than fair market value rent) did not make good business sense in these circumstances.

¶ 22 The arrangement, keeping in mind that C would have to be cautious that because he cheated M so that he would have to consider M as a 50% beneficial shareholder, would be oppressive to M, as well as unfairly disregarding his interests and being unfairly prejudicial to him. The transfer and estate freeze came just before the trial (C and his lawyers would have been gearing up for trial well before the middle months of 1998); there was no evidence that the estate freeze had been in the works for a long time in the sense of being actively worked on or actively considered - and none that it pre-dated the run up to the trial. At the time of the estate freeze, C was in control of the trust. Given the lack of a reasonable and credible explanation for these transactions, it would seem a reasonable conclusion and I so find that C wished to have a keynote card to play in the event that the trial caught him out. He would have leverage with respect to dealings with M afterwards concerning IWS if IWS was not the owner of this vital, essential property but rather C controlled its fate. In that regard, it seems to me that C has run afoul of the Fraudulent Conveyances Act as this conveyance appears to have been done with the intention (gathered from the circumstances viewed objectively; see *Cybernetic Exchange Inc. v. JCN Equities Ltd.* (2002), [15 R.P.R. \(4th\) 74](#) (Ont. S.C.J.) re the use of "badges of fraud") of hindering, delaying or defrauding "others", namely M. The exception would not come into play as there does not appear to have been good faith in the transfer, C as settlor and controller of the Trust was on both sides so he was knowledgeable on the problem and "good consideration" must be interpreted as more than "consideration" but rather something which is arguably in the range of fair market value. As for M coming within the definition of "other" see *Bank of Nova Scotia v. Visentin*, [\[1996\] O.J. No. 4563](#) (Gen. Div.); *MacDonald v. Stanger* (c.o.b.) *Acorn Building Contractors*,

[\[2002\] O.J. No. 1958](#) (S.C.J.).

¶ 23 M was entitled to expect IWS would be managed in good faith in the best interests of that corporation. C, in his fiduciary relationship with IWS as a director, senior officer and controlling mind, infringed M's rights in that regard as to s. 248 OBCA in that he operated IWS in such a way as to diminish the values of that corporation and to divert money which would otherwise be available to satisfy M's claim to the benefit of C's family. See *SCI Systems Inc. v. Gornitzki Thompson & Little Co.*, [\[1998\] O.J. No. 2299](#) (Div. Ct.) at para. 2; *Tropxe Investments Inc. v. Ursus Securities Corp.*, [\[1993\] O.J. No. 1736](#) (Gen. Div.) at para. 6; *Downtown Eatery (1993) Ltd. v. Ontario* (2001), [54 O.R. \(3d\) 161](#) (C.A.); *Pillar Sausages & Delicatessens Ltd. v. Cobb International Corp.*, [\[2003\] O.J. No. 2647](#) (S.C.J.); *Prime Computer of Canada Ltd. v. Jeffrey* (1991), [6 O.R. \(3d\) 733](#) (Gen. Div.); *Adecco Canada Inc. v. J. Ward Broome Ltd.*, [\[2001\] O.J. No. 454](#) (S.C.J.-Commercial List). There is no upfront valid business reason to justify the transfer as there was in *Stabile v. Milani* (2004), [46 B.L.R. \(3d\) 294](#) (Ont. Ct.).

¶ 24 One should also note that the alienation of this property from IWS will detract from the desirability of IWS finding a purchaser as a going concern. This then diminishes directly M's half interest in IWS - and indirectly diminishes the value which C might obtain in such a sale, which proceeds (at least in part) are likely necessary to satisfy M's judgment against C.

¶ 25 As a side note, I think it of interest to see the rather casual attitude of C (and his non-litigation advisors) that the trust which C set up apparently according to him on September 30, 1998 but with his children as part beneficiaries is changed so that his children are taken out as beneficiaries, by the mere use of a "slip sheet"; it does not appear that C's children were consulted or advised of this change nor that their consent was obtained.

¶ 26 In the end result, it would seem to me that the fair way of rectifying this wrong would be for Lightning to reconvey the Centennial property to IWS, cancelling the Promissory Note and that Lightning repay to IWS the \$761,000 rent with interest (interest to be calculated on the amount "outstanding" from time to time at the rate set out in the Courts of Justice Act from time to time).

¶ 27 I would also note that although C was examined at trial by his own counsel as to the Centennial property, he did not disclose that this land had been conveyed to Lightning, rather he testified that it was owned by IWS.

¶ 28 The North Service Road property has been sold to a third party purchaser recently for \$9.25 million. Therefore, if I were to find that this situation was also a problem, it would not be appropriate to void the 1995 transfer. Rather, it would if that were the case, be appropriate to deal with the proceeds, or part thereof, now being held in trust pending my decision.

¶ 29 This property was acquired in 1994 under power of sale for \$2.625 million with IWS putting up the money through the CIBC and taking title. Fourteen months later, IWS transferred this property to 1018 (which later amalgamated with Lightning). C asserted that the deal was done this way since IWS had a credit history with the CIBC - and apparently 1018 did not, but that it was always treated internally that the true owner from the very start re the power of sale purchase in 1994 was 1018. Once again, it appears that there is no real paper trail except for some reference in financial statements. I would have to observe that once again it shows how flexible - and unreliable the record keeping and documentation is, where the trust agreement between IWS and 1018 is not executed until December 8, 1995, the date of the formal transfer from IWS to 1018. In any event, it appears that 1018 was able to raise funds through a Banker's Acceptance route to pay off IWS (or release it as primary obligor); however, this arrangement was only accomplished by the fact that IWS guaranteed 1018 indebtedness. IWS was given no compensation for this guarantee and no security. It does appear that this loan arrangement has been paid down to \$975,000 so that IWS has never been called upon its guarantee. Lightning is then put into the estate freeze in 1998.

¶ 30 As I understand it, this property is not one which has been or is in the course of being utilized for the business of IWS. Therefore, it would seem that the main thrust of concern is whether IWS was truly deprived of an asset for an undervalue assuming that there was not the trust arrangement validly in place. The evidence in this respect is unclear. While there may be suspicions as to the trust arrangement in October 1994, it does not appear that the value of the property radically changed in the 14 months. Further, with respect to the 1998 estate freeze arrangements, while the transfer value was set at \$3.025 million as per Humphreys valuation letter (not a formal appraisal, the Pocrnic appraisal indicating \$4.7 million has some difficulties with respect to comparables). There was no evidence presented which showed that IWS was materially disadvantaged by the unsecured guarantee which it gave.

¶ 31 Therefore, utilizing the same analysis and principles as for the Centennial Property (and incorporating in that the view of M as a continuing beneficial shareholder and realistic creditor of C as discussed in the Profit Sharing section), it would seem to me that M has only been disadvantaged in any material way by the North Service Road property situation as to any expenses which it has had with respect to the financing of this property in what appears limited to the 14 month period October, 1994 to December, 1995. Lightning is to pay such amount to IWS forthwith after such amount is calculated by Deloitte, together with interest at the rate set out in the Courts of Justice Act from time to time.

¶ 32 Thus M has achieved major success with respect to the Centennial Property and success to a much lesser extent with respect to the North Service Road property. However, part of the difficulty in dealing with transactions involving C is, as discussed above, the lack of accurate and transparent record keeping and documentation. One is struck by the rationalizations after the fact. Unfortunately for Lightning, because of the relationship with C, it will have to carry the burden of that in respect of costs. Lightning is to pay \$50,000 costs to M forthwith and, in no event, later than October 6, 2005 (this represents \$30,000 legals plus \$20,000 for appraisal reports).

¶ 33 The three parts of this decision and another decision which I released the same day (September 1, 2005) after hearing submissions on June 29, 2005 are to read conjunctively and inclusively. I have also fiat a judgment to reiterate the past relief granted in this case on an updated basis.

J.M. FARLEY J.

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