District of ONTARIO
Division No. 09 – Toronto
Court File No.: BK-24-03003083-0031
Estate File No.: 31-3003083

ONTARIO
SUPERIOR COURT OF JUSTICE
(In Bankruptcy and Insolvency)

IN THE MATTER OF THE BANKRUPTCY OF
CREATIVE WEALTH MEDIA FINANCE CORP.
OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO

BOOK OF AUTHORITIES OF CREATIVE WEALTH MEDIA LENDING INC. AND ITS RELATED LIMITED PARTNERSHIPS

March 5, 2024

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TAB 1

1996 CarswellOnt 5566
Ontario Court of Justice (General Division)

United States v. Friedland

1996 CarswellOnt 5566, [1996] O.J. No. 4399

U.S.A, Plaintiff and Robert Friedland, Defendant

Sharpe J.

Heard: October 22-31, 1996
Judgment: November 5, 1996
Docket: 96-CU-109731

Counsel: *Malcolm Ruby*, *R. Stephenson*, for Plaintiff
Alan Lenczner, *Howard Shapray*, for Defendant

Subject: Civil Practice and Procedure; International; Insolvency

***Sharpe J.*:**

1 HIS HONOUR: This motion arises from a claim by the United States of America for reimbursement for the costs of restoring environmental harm alleged to have resulted from a mining operation at Summitville in the State of Colorado. The claim is being pursued by the Environmental Protection Agency under the governing U.S. statute, the *Comprehensive Environmental Response Compensation and Liability Act (CERCLA)* in the United States District Court for the District of Colorado.

2 The United States alleges before this Court that the Defendant Robert Friedland has no assets in the United States. It intends to enforce in Ontario the judgment it hopes to obtain in the District Court. On August 21st, 1996, the United States obtained from the Court an *ex parte* injunction freezing U.S.$152 million worth of shares owned by the Defendant Friedland. As the United States proceeded *ex parte*, the Defendant was not heard by the Court before that order was granted.

3 The question before me on this contested motion is whether the United States is entitled to this injunction.

4 While the background facts are complex, for the purposes of this judgment, they might be summarized as follows:

5 The claim concerns the Summitville mine site which has been the subject of mining operations for over 100 years. The claim focuses on the activities of the Defendant Friedland in connection with three companies, Summitville Consolidated Mining Company (SCMCI), its parent company Galactic Resources Inc. (GRI), and GRI's parent Galactic Resources Limited (GRL).

6 From 1984 until 1992, SCMCI operated an open pit heap leach gold mine at Summitville. The construction of this mine commenced in October of 1984 and extended to October of 1986. Production began in June of 1986.

7 The heap leach process involves strip-mining ore from open pits. The ore is then crushed and heaped onto a synthetic pad known as the "heap leach pad". A solution containing sodium cyanide is sprayed over and allowed to percolate through the crushed ore to leach out the gold. That solution is processed. The gold is removed. The solution is rejuvenated and recycled. Waste ore is placed on a dump site.

8 The United States alleges that there have been serious leakage problems with the leach pad from the beginning; that there are serious problems with acid mine drainage which have posed environmental hazards.

9 It is clear that SCMCI experienced economic difficulties. On December 4, 1992, the company filed for bankruptcy and shortly thereafter abandoned the site. The EPA conducted an investigation which revealed what it alleges is a serious situation relating from failing equipment and treacherous weather conditions; and since December 15, 1992, the EPA has been involved with restoration activities connected with this mine site.

10 The Defendant Friedland was a co-founder of GRL and was president of that company from January 1981 to June of 1984 when Edward Roper became president and Friedland became GRL's chief executive officer. Friedland again served as interim president in June of 1987 when Roper left the company. He held that position until June of '90 when Peter Guest was hired as president. Friedland was the chairman of the board of GRL from June of 1984 and served as a director until his resignation on November 2nd, 1990. Friedland was also president of SCMCI from August, 1984 to January, 1987. He also served as a director of that company and as president of GRI from 1984 until January, 1987.

11 The governing section of *CERCLA*, section 107 enables the United States to recover cleanup costs incurred by the Environmental Protection Agency from parties responsible for contamination. To establish liability, four elements must be satisfied:

(a) that the subject is a "facility";

(b) that "release" or "threatened release" has taken place or will take place;

(c) that the release or threatened release has caused the plaintiff to incur response costs; and

(d) that the defendant falls within at least one of the four classes of responsible persons described in the section.

12 One of the classes described is "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous wastes were disposed of".

13 The key issue that has been argued before me relates to the question of whether the U.S.A. has a strong *prima facie* case that Robert Friedland operated the facility within the meaning of that statute.

14 It is the contention of the Plaintiff United States that, by reason of his involvement with the affairs of the companies I have mentioned, he is personally liable as an operator.

15 The United States initiated proceedings against Friedland in the United States District Court of Colorado on May 23rd, 1996, claiming reimbursement for response costs incurred to date and projected in the amount of U.S.$152 million.

16 Immediately, the United States brought three *ex parte* applications which were heard *in camera* at the request of the United States.

17 First, the United States sought and obtained from District Court Judge Nottingham an *ex parte* garnishment order under the *Federal Debt Collection Procedure Act*. That was granted on May 23rd, 1996. Judge Nottingham also granted an order sealing the file.

18 On May 27th, 1996, the United States brought a motion in the Supreme Court of British Columbia for an *ex parte Mareva* injunction. A similar motion was brought before this Court on May 29th. In both the British Columbia Court and this Court, the order sought was for an injunction restraining the Defendant Friedland from dissipating, disposing or, alienating, encumbering, removing, or otherwise dealing with, INCO Limited share certificates having an aggregate market value of U.S.$152 million pending disposition of the proceedings brought against the Defendant in the United States District Court for the District of Colorado.

19 When those motions were brought, the Plaintiff understood that a transaction between a company in which Friedland holds substantial interests, Diamond Fields Resources Inc. and INCO would close within days and that as a result of that transaction Friedland would acquire a substantial volume of INCO shares.

20 The transaction did not close in May as expected for factors not connected to this proceeding. The Plaintiff had argued the *ex parte* motion before Justice Spencer in the British Columbia

Supreme Court and he had reserved judgment. At the Plaintiff's request, that motion was adjourned *sine die*. Similarly, the motion brought in this Court before Judge Borins was adjourned *sine die*.

21 The Defendant Friedland was not served with any of these proceedings.

22 When the Plaintiff learned in the month of August that the transaction was expected to close on August 21st, it renewed the B.C. Motion. On August 20th, Justice Spencer granted the *Mareva* injunction and gave oral reasons.

23 The motion before Judge Borins was renewed and on August 21st, 1996, Judge Borins adopted the reasons of Justice Spencer and granted the injunction in Ontario. The Defendant Friedland was then served. The Plaintiff moved to continue the injunction. The order was continued by an order of Justice Borins on August 28th and further continued by me on September 6th, when a timetable for dealing with the contested motion was established.

24 The motion has been fully argued before me over eight days. Four broad issues have been presented:

> 1. Did the Plaintiff make full and frank disclosure of the case when it sought the *ex parte Mareva* injunction? If it did not, what are the consequences?
>
> 2. Has the Plaintiff established that it has a strong *prima facie* case on the merits against the Defendant?
>
> 3. Did this Court have jurisdiction to order injunctive relief in support of the action in the U.S. District Court?
>
> 4. Is it necessary for the Plaintiff to show that the Defendant intends to remove assets from Ontario for the purpose of avoiding execution or is it sufficient to show that there is a risk of removal that will have that effect?

25 The complexity of the issues and the extensive nature of the argument presented by the parties would ordinarily require written reasons. However, in my view, the interests of justice require an immediate response and hence I am delivering these oral reasons today. I turn to the first issue:

Did the Plaintiff make full and frank disclosure of the case when it sought the ex parte Mareva injunction?

26 It is a well established principle of our law that a party who seeks the extraordinary relief of an *ex parte* injunction must make full and frank disclosure of the case. The rationale for this rule is obvious. The Judge hearing an *ex parte* motion and the absent party are literally at the mercy of the party seeking injunctive relief. The ordinary checks and balances of the adversary system are not operative. The opposite party is deprived of the opportunity to challenge the factual and

legal contentions advanced by the moving party in support of the injunction. The situation is rife with the danger that an injustice will be done to the absent party. As a British Columbia judge noted recently:

> There is no situation more fraught with potential injustice and abuse of the Court's powers than an application for an *ex parte* injunction.

(*Watson v. Slavik*, August 23rd, 1996, paragraph 10.)

27 For that reason, the law imposes an exceptional duty on the party who seeks *ex parte* relief. That party is not entitled to present only its side of the case in the best possible light, as it would if the other side were present. Rather, it is incumbent on the moving party to make a balanced presentation of the facts in law. The moving party must state its own case fairly and must inform the Court of any points of fact or law known to it which favour the other side. The duty of full and frank disclosure is required to mitigate the obvious risk of injustice inherent in any situation where a Judge is asked to grant an order without hearing from the other side.

28 If the party seeking *ex parte* relief fails to abide by this duty to make full and frank disclosure by omitting or misrepresenting material facts, the opposite party is entitled to have the injunction set aside. That is the price the Plaintiff must pay for failure to live up to the duty imposed by the law. Were it otherwise, the duty would be empty and the law would be powerless to protect the absent party.

29 These principles are so well established in the law that it is hardly necessary to cite supporting authority. They find expression in the Rules of Court. Rule 39.01(6) provides:

> Where a motion or application is made without notice, the moving party or applicant shall make full and fair disclosure of all material facts, and failure to do so is in itself sufficient ground for setting aside any order obtained on the motion or application.

30 The principle has been affirmed and reaffirmed by judicial decision. In the leading Ontario case on *Mareva* injunctions, *Chitel v. Rothbart* (1982) 39 OR 2d 513, a judgment of the Court of Appeal, Associate Chief Justice MacKinnon stated, at page 519:

> There is no necessity for citation of any authority to state the obvious that the plaintiff must, in securing an *ex parte* interim injunction, make full and frank disclosure of the relevant facts, including facts which may explain the defendant's position if known to the plaintiff. If there is less than this full and accurate disclosure in a material way or if there is a misleading of the court on material facts in the original application, the court will not exercise its discretion in favour of the plaintiff and continue the injunction.

31 The duty of full and frank disclosure is, however, not to be imposed in a formal or mechanical manner. *Ex parte* applications are almost by definition brought quickly and with little time for preparation of material. A plaintiff should not be deprived of a remedy because there are mere imperfections in the affidavit or because inconsequential facts have not been disclosed. There must be some latitude and the defects complained of must be relevant and material to the discretion to be exercised by the Court. (See *Mooney v. Orr*, (1994) 100 B.C. L.R 2d 335; *Rust Check v. Buchowski* (1994) 58 CPR 3d 324.

32 On the other hand, a *Mareva* injunction is far from a routine remedy. It is an exception to the basic rule that the Defendant is entitled to its day in court before being called upon to satisfy the Plaintiff's claim or to offer security for the judgment. This is clear from the decision in *Chitel v. Rothbart*, *supra*. It was emphasized by the decision of the Supreme Court of Canada in *Aetna Financial Services v. Feigelman*, [1985] 1 S.C.R. 2, where Justice Estey referred to what he described as "the simple proposition that in our jurisprudence, execution cannot be obtained prior to judgment and judgment cannot be obtained prior to trial".

33 Justice Estey went on to say:

> There is still ... a profound unfairness in a rule that sees one's assets tied up indefinitely pending a trail of an action which may not succeed, and even it does succeed, which may result in an award far less than the caged assets.

34 Justice Estey stated as well:

> A plaintiff with an apparent claim, without ultimate substance, may, by the *Mareva* exception to the *Lister* rule, tie up the assets of the defendant, not for the purpose of their preservation until judgment, but to force, by litigious blackmail, a settlement on the defendant who, for any one of many reasons cannot afford to await the ultimate vindication after trial.

35 For this reason, it has been said that respect for the duty of full and frank disclosure is especially important with respect to *Mareva* injunctions because, by their very nature, they are liable to cause substantial prejudice to the defendant. (See the leading English text, *Gee, Mareva Injunctions and Anton Piller Relief* (3d Edition 1995 at p. 97).

36 It is also clear from the authorities that the test of materiality is an objective one. Again to quote the *Gee* text at page 98:

> ...The duty extends to placing before the court all matters which are relevant to the court's assessment of the application, and it is no answer to a complaint of non-disclosure that if the relevant matters had been placed before the court, the decision would have been the same. The test as to materiality is an objective one, and it is not for the applicant or his advisers to

> decide the question; hence it is no excuse for the applicant subsequently to say that he was genuinely unaware, or did not believe, that the facts were relevant or important. All matters which are relevant to the 'weighing operation' that the court has to make in deciding whether or not to grant the order must be disclosed.

37 This principle is affirmed by decisions in Canada. (See *Leung v. Leung*, [1993] 77 B.C.L.R. (2d) 305 at 313; *Canadian Pacific Railway v. United Transportation Union* [1970] 14 DLR (3d) at 497; and *Panzer v. The Queen*, [1990] 74 OR (2d) 130.

38 I turn then to consider the material that was before Justice Borins when he was asked to give the order.

39 The principal affidavit filed by the United States of America was that of Nancy Mangone. She is described as a member of the Bars of New York, Colorado and the District of Columbia. She is currently an enforcement attorney in the Legal Enforcement Program of the United States Environmental Protection Agency, Regional Office in Denver. She has extensive experience in the area of environmental law and she describes herself as the EPA's lead counsel in relation to the Summitville site.

40 The affidavit of Nancy Mangone attaches, as exhibits, the record of the *ex parte* proceedings before Judge Nottingham. This includes another affidavit from Mangone and supporting affidavits and four volumes consisting of hundreds of pages of documents gathered by the EPA in its investigative efforts.

41 There are also various other exhibits including an affidavit of another lawyer, Lisa Friedman, which had been prepared for another Ontario case dealing with the *CERCLA* statute and liability.

42 There are also attached press releases issued by the Defendant Friedland and a newspaper article purporting to set out his position, and the INCO proxy circular which described the INCO/Diamond Fields transaction.

43 Those are the principal items.

44 In addition, there were two factums before Judge Borins, summarizing the Plaintiff's position on the evidence and the law. The first factum was filed originally in May and consisted of some 30 pages. The second factum was filed for the August hearing and it was longer, 37 pages, and focused on the legal point regarding the jurisdiction of the Court.

45 The Mangone affidavit is some 33 pages and it sets out what purport to be various factual assertions concerning the site, the operations, the alleged problems, the alleged environmental harms that have resulted, the alleged involvement of Friedland in those problems and in those

companies, the basis for the injunction including the whereabouts of Friedland, and certain details regarding the INCO/Diamond Fields transaction.

46 Ms Mangone also offers her legal opinion. As the U.S. law applicable to this case is foreign law it had to be proved as a matter of fact. She offers the opinion that the United States has a strong *prima facie* case against the Defendant Friedland. I will be considering in some detail the Mangone affidavit but note here that the propositions asserted in the affidavit purport to be supported by references to tabs in the U.S. record and, in many cases, these references are general in nature, offering a long list of documents in that record.

47 The Deponent Nancy Mangone was cross-examined, and on her cross-examination certain claims of privilege were raised with respect to background documents that had not been included in the record. Those claims of privilege were based on solicitor/client privilege, litigation privilege and administrative deliberative privilege under U.S. law.

48 A motion was brought before me to determine the validity of that claim of privilege. In written reasons delivered on September 30, 1996, I found that the U.S.A. had waived privilege and I made an order, which in these proceedings has been called the "privilege order", declaring that Nancy Mangone cannot claim any privilege with respect to any documents that she has seen or reviewed respecting the matters at issue. On the motion before me to continue the injunction, a significant amount of time was spent on documents which were disclosed pursuant to that order.

49 For the purpose of analyzing the non-disclosure contentions of the Defendant, I will review the complaints made under the following headings:

1. The explanation of applicable foreign law.

2. The factual case against Robert Friedland.

3. Quantum of the claim and availability of other remedies.

4. "Flight Risk".

5. Use and description of the proceedings before Judge Nottingham under the *Federal Debt Collection Procedure Act*.

6. Facts relating to the need for proceeding *ex parte*.

Explanation of applicable foreign law.

50 The Mangone affidavit refers to the affidavit of Lisa Friedman, filed in another case, and attached as an exhibit. Mangone then sets out the criteria for liability that I have already described. She deposes that, in her view, Friedland falls within one of the four classes of responsible persons. She says that in addition to reviewing the Friedman affidavit, she has conducted certain of her

own legal research and on the basis of that, she deposes there exists a strong *prima facie* case that Friedland is an operator of the site.

51 While Mangone gives a long list of case citations, she provides no detail as to how she arrived at that opinion. The Friedman affidavit that she refers to gives somewhat more detail regarding the appropriate legal standard applicable to someone in the position of Friedland. Friedman's affidavit states as follows:

> U.S. Courts have also repeatedly held that *CERCLA* liability as an "owner or operator" may attach to individuals or corporations who exercise control over a site, even if title to the site is nominally held by a different corporate entity. Courts have imposed such liability as a matter of statutory construction distinct from "veil piercing" or other derivative liability theories.

52 On May 17th, 1996, a few days before Mangone swore the affidavit relied upon for the *ex parte* injunction, a document she had prepared, known as the "Referral Document", was sent by her supervisor to the U.S. Department of Justice. This is one of the documents produced following my order that privilege had been waived. It is clear from Mangone's cross-examination that the purpose of this document was to provide the Department of Justice with a candid assessment of the case against Robert Friedland so that the Department of Justice could determine whether it was appropriate to take the recommended proceedings against him. The Referral Document consisted of some 57 single-spaced typed pages and contains Mangone's detailed assessment of the relevant facts and law relating to the liability of Friedland.

53 In the Referral Document, Mangone is much more specific in her analysis of the applicable legal principles. She notes, significantly, as follows:

> Since this theory of liability will be a case of first impression in the Tenth Circuit, the standard the district court will adopt in determining an individual corporate officer's, director's or shareholder's liability is unknown.

54 I note that the U.S. District Court in Colorado is subject to the jurisdiction of the Tenth Circuit.

55 She then goes on to set out four tests that have been evolved by the Courts of the United States:

> 1. Piercing the corporate veil.
>
> 2. The capacity or authority to control corporate conduct.
>
> 3. The prevention test; and
>
> 4. Direct control over participation in wrongful conduct.

56 After reviewing those tests, she says of the fourth test, as follows:

> A variety of other courts, however, have adopted the fourth and final test of individual corporate officer, director or shareholder liability. This final test requires that the person actually participate in the operations or management of the facility or its hazardous waste disposal practices.

57 Then, again significantly in my view, she states that although the Tenth Circuit has yet explicitly to select one of these tests, a decision, *Colorado v. Idarado Mining Company* (18 Environmental Law Reports 20578) may be instructive on the Court's leaning. In that case, Mangone says:

> The Court held that a parent corporation would be liable for the acts of its subsidiary due to its "intimate involvement" with the subsidiary's business activities. This suggests this district may require some level of active involvement, rather than the mere authority to control the business activities of the company or to prevent the environmental harm in question.

58 Mangone then goes on to state that whatever test the Court applies, the approach the Courts have taken is a "heavily fact-specific inquiry". She then lists a number of criteria that the Courts have examined, which are as follows: the person's position in the company: degree of authority; percentage of ownership; role in decision-making and daily management; knowledge of and responsibility for waste disposal policies; and personal involvement with, neglect of, and ability to control hazardous waste matters.

59 It is difficult to understand why, if in order to provide the U.S. Department of Justice with a candid assessment of the case, it was necessary to explain these various legal theories that might apply and to explain that the Tenth Circuit might well adopt the strictest test, it was not also necessary to provide this Court with the same information. That strict test is surely stricter than that suggested by the Friedman affidavit, namely, that liability "may attach to individuals or corporations who exercise control over a site".

60 A subsequent affidavit from Friedman filed after the *ex parte* proceedings confirms that the final test requires that the person actually participate in the operations or management of the facility or its hazardous waste disposal practices.

61 In my view, there is a material difference between the description of the applicable legal test contained in the material before the *ex parte* Judge and the candid opinions offered in the Referral Document. The *ex parte* material describes a general control test. The candid opinion describes a more precise, more stringent test requiring proof of actual participation in the operations or management of the facility or its hazardous waste disposal practices.

62 A review of the cases cited in support of the stricter test have led me to the conclusion that it is far from evident that the U.S.A. will be able to bring Robert Friedland within that standard.

In my view, it is no answer for the U.S.A. now to say that it thinks that Robert Friedland will be liable on any of these four tests.

63 In my view, it was incumbent on Mangone to give a fair and balanced statement of the applicable legal test, just as she did for the Department of Justice, so that this Court could assess for itself whether, on the facts she hoped to prove, the U.S.A. had a strong *prima facie* case. I find that this was a material fact which went to the heart of the case and that the failure to disclose her opinion that the District Court in Colorado could well apply the stricter test constituted a failure to disclose a material fact bearing upon the entitlement of the U.S.A. to the injunction it sought.

The factual case against Robert Friedland.

64 I note at the outset here that objection was taken to the admissibility of significant portions of the Mangone affidavit and attachments. It is clear that she is relating in her affidavit hearsay evidence and there is an issue as to the admissibility of that evidence. While that contention was raised during argument, I reserved ruling and permitted counsel for the U.S.A. to address the full and frank disclosure issue on the basis of all documentary evidence attached to the Mangone affidavit, as I felt that was only fair. I will turn to this point later in these reasons.

65 In the Mangone affidavit, she states that it is the contention of the United States of America that the Defendant Friedland personally made various decisions or instructed on-site personnel to conduct various practices that caused or contributed to the release of hazardous substances upon and from the site.

66 She goes on to depose to a plea bargain entered into by SCMCI on May 2nd, 1996 in which she states the company pleaded guilty to 40 felony counts, including one count of conspiracy and 30 counts of knowing unauthorized discharges of pollutants into the waters of the United States, and she attaches a copy of that plea bargain to her affidavit, indicating that the company agreed to pay $20 million for these criminal violations.

67 She further deposes to the bankruptcy of SCMCI on December 4, 1992; to the fact that the company indicated it would leave the site on December 15, 1992; that it was ordered not to abandon the site but that it did, in the event, abandon the site.

68 Then, in paragraph 37, which occupied a great amount of time during the argument, she sets out her factual contentions with relation to Mr. Friedland. She deposes that he:

> 1. held leadership positions in Galactic Ltd. as Chairman and CEO, and was president of SCMCI.
>
> 2. negotiated and executed the contract with the Anaconda Mining Company, under which Galactic Ltd. acquired the right to mine certain mining claims within the site and

all of Anaconda's data regarding mining reserves, existing environmental conditions and potential environmental liabilities.

3. negotiated sources of financing for SCMCI, including the financial arrangements with the Bank of America.

4. had personal knowledge of potential environmental problems and liabilities that could result in going forward with the Summitville project.

5. had a primary role in decision-making for the design and installation of the leach pad liner.

6. negotiated numerous engineering and consulting contracts on behalf of the GRL-related corporate entitles. In particular, Friedland negotiated the contract for civil engineering and construction oversight services of Bechtel Civil Engineering & Minerals, Inc.

7. had the largest percentage of stock in Galactic owned by a private individual; Friedland controlled a large block of common stock in Galactic Ltd., particularly between 1983 and 1986, when the Summitville project was being financed, built, and brought into production. Friedland's percentage of the company amounted to 21.17 per cent at the end of 1983, 26 per cent in 1985, 17 per cent in 1985, and 10 per cent in 1986.

8. exerted substantial authority within and over Galactic Ltd./SCMCI corporate affairs. Executive Committee memoranda question whether Galactic Ltd. would be able to attract a new president to work "under the thumb" of Friedland and whether Friedland could "stop being involved with all aspects of operations". Friedland was also described as one of the "key personnel" in Galactic Ltd.'s filings with the United States Securities & Exchange Commission.

9. had personal knowledge of permit violations at the site.

69 The factum filed on the *ex parte* motion summarizes these factual contentions as follows:

Friedland had pervasive control of, and influence over, Summitville. The Summitville project was primarily his idea and he promoted it vigorously. He negotiated and executed the contract with Anaconda through which Galactic acquired the rights to mine at the site. He negotiated sources of financing including arrangements with Bank of America. He had personal knowledge of potential environmental problems and liability that could result from going forward with the project. Indeed, he had a primary role in decision-making relating to the design and installation of the leach pad liner and, available evidence suggests, he well knew of problems yet pressed ahead despite the risks in order to meet production deadlines imposed under loans he had negotiated.

70 As I have noted, Justice Borins of this Court adopted the reasons reached by Justice Spencer and it is before me that the material before Justice Spencer was essentially the same material as before Justice Borins.

71 In his reasons for judgment, Justice Spencer in British Columbia concluded as follows:

> There is evidence put before me which raises in a substantial way the allegation that Summitville, Galactic, and the Plaintiff —

there he clearly meant "the Defendant" —

> as a directing mind of both, were aware from the beginning that the construction of the mine and its operation were done in so careless a manner that it posed the very threats to the environment that are now said to have materialized.

72 Ms Mangone has been subjected to several days of cross-examination; cross-examination which I have read. We have now had disclosure of the documents in the possession of the EPA, produced pursuant to the privilege order, and eight days of extensive argument.

73 On the basis of what I have read and heard, I am satisfied that Justice Spencer could not have come to that conclusion had he been given a fair statement of the evidence regarding Robert Friedland's involvement. Many of the facts, so-called, in the Mangone affidavit are little more than an expression of what she hopes to be able to persuade the Court. A careful review of the documents that she relies on indicates that she takes an excessively optimistic view of the case. They are far from facts; they are mere inferences that she purports to draw from this record.

74 In my view, the picture painted by this material offered by the United States was a misleading one. It suggests that Robert Friedland was effectively a one-man operation making all crucial decisions relating to the mine and its operations, and that is plainly not the case.

75 I am going to turn to the allegations that I have referred to from paragraph 37. The first significant contention relates to the leadership positions that Mr. Friedland held, and it is clear that much of the United States' case is based upon the simple fact that he exercised positions of authority in the companies concerned. What the Mangone affidavit did not disclose and what, in my view, were relevant facts, are the following:

76 First of all, GRL was a publicly traded company with the usual governing structure. It was not a one-man operation. The memorandum referred to in subparagraph 8 of 37, relating to Friedland's extensive and apparently unwarranted control of the company, was written not at the relevant period when the mine was being constructed but long after in March of 1990. Moreover, it is clearly an inadmissible hearsay document. The circumstances in which it was written are

unknown and there is no indication that when the author said what he said, it had any direct bearing on the issues that are before this court.

77 Secondly, Mangone failed to make it clear in her affidavit that for the critical period 1984 to 1987, an experienced mining executive, Ed Roper, was the president of GRL and that the Defendant's position is that Mr. Roper had authority over all aspects of the construction.

78 Thirdly, Mangone failed to make it clear that Robert Friedland had left Summitville and these companies by 1990, two years prior to the bankruptcy and six years prior to the plea upon which she relied. It is clear that Friedland had nothing to do with the bankruptcy, had nothing to do with the abandonment of the site and was in no way involved in the plea of guilty entered by SCMCI in 1996. Indeed, during the hearing, I ruled that that evidence was inadmissible against Friedland and excluded it. In my view, these facts should have been made clear, particularly as, when one looks to the reasons of Justice Spencer, it is apparent that he paid heed to the plea bargain in particular as evidence against Friedland.

79 The suggestion in the material of the United States is that Mr. Friedland had personal knowledge of the potential environmental problems and liabilities that could result from going forward with the Summitville project before they occurred but then went ahead in a careless manner without regard to the environment.

80 If I am incorrect in taking the inference from the material, so too was Justice Spencer because Justice Spencer, as I have noted, clearly found that. The reasons of Justice Spencer were put before Justice Borins without reservation. In my view, the allegation contained in paragraph 37(4) in this regard is grossly over-stated. It is clear that Mr. Friedland did know that heap leach mining did pose certain risks — this is apparent from the Securities documents that were filed — but there is nothing in the evidence to suggest that he carelessly went ahead with operations or participated in decisions to that effect, as suggested by the reasons of Justice Spencer.

81 The Plaintiff relies on the fact that he attended on behalf of the company before the Colorado Mined Land Reclamation Division, and on that occasion expressed a concern regarding environmental problems and undertook, on behalf of the company, to have them resolved. In my view, that is evidence that he did participate in dealing with a problem after it occurred but it does not support what is the clear insinuation of the Mangone affidavit that he knew of these problems before they occurred and went ahead anyway in a careless manner.

82 A vital allegation against Friedland is that of paragraph 37(5) "that he had a primary role in decision-making for the design and installation of the leach pad liner". It is vital because of the importance attached by the United States to the design and installation of the leach pad liner in its case. In that paragraph, Ms Mangone cites some 39 documents in support of that contention. She was subjected to an extensive cross-examination and was unable to show that any of those documents supported the specific proposition she advanced.

83 The proposition was argued again at some considerable length before me and I have concluded that there is simply nothing in evidence to justify a statement of that kind. The Plaintiff's theory is put in its written factum as follows:

84 It is the Plaintiff's case that the statement of fact advanced by Mangone that Friedland had a primary role in decision-making with respect to the design and installation of the leach pad liner is made out by the following:

85 That Friedland was at the top of the corporate structure, with authority over others involved in the company and that those people collectively made a decision to proceed with winter construction, notwithstanding the risks.

86 That Friedland arranged financing for the project which required gold production in 1986 which, in turn, required winter construction.

87 That Friedland and other SCMCI personnel insisted to Klohn Leonoff and others that winter construction must proceed. (I note here that that is a highly contentious and disputed proposition which is not, in my view, borne out by the facts.)

88 That Friedland visited the site, called on-site personnel for updates, received progress and environmental reports, and attended the MLRB meeting that I have just referred to.

89 In my view, one need only state that theory to show that there plainly is no evidence of the specific and crucial assertion that Friedland had a primary role in decision-making for the design and installation of the leach pad liner. To state the Plaintiff's theory is to expose the fact that the evidence simply does not support a statement of that specificity. Given the significance of the Mangone affidavit and the case that the United States attaches to the problems with the leach pad liner, this is a central and critical allegation against Robert Friedland and, in my view, constituted a material misstatement of the facts.

90 Moreover, there is evidence to the contrary on this point that was not revealed by the Plaintiff and by Ms Mangone. In an investigative memo prepared by Mr. Broste in March of 1995, he notes that Roger Leonard, who was the general manager at Summitville from 1984 to 1986 or 1987, claimed that he took orders from Ed Roper and that he was fired by Roper. Broste says that Leonard says that Roper instructed him to proceed with the winter installation of the leach pad lining in spite of very adverse conditions. Leonard did not know if Friedland was involved in that decision. He reported to Roper and did not know to what extent Friedland was directing Roper but Leonard described Friedland as a financier who did not understand mining.

91 In Roper's response to a demand issued by the EPA pursuant to section 104(e) of the Statute, a procedure by which parties potentially responsible may be compelled to provide answers to questions, a document to which I will return later, Mr. Roper states as follows:

> KL (which is Klohn Leonoff, the engineer) performed or subcontracted all engineering, design, geotechnical, construction, supervision permitting (anything and everything) related to the leach pad. No part of the leach pad was constructed or put into use without KL's written approval of it having passed all engineering and construction requirements. KL was also responsible for the slope stability, engineering work for the open pit design. KL was also responsible for Summitville's water balance engineering requirements. KL was working for GRI and/or SCMCI when I left the employment of the companies. KL had total professional engineering independence.

92 Ms Mangone, on cross-examination, accepted that statement as being truthful. On that basis, I have no hesitation in agreeing with the submission of the Defendant that a possible reading of Mr. Roper's 104(e) response is that in fact it exonerates Mr. Friedland from involvement in the design and construction of the leach pad liner and it indicates the degree of reliance placed by SCMCI on experts such as Klohn Leonoff and other engineers to make these crucial decisions.

93 In addition to those misstatements, there is, in my view, a failure on the part of Mangone to disclose certain contrary evidence in her possession regarding the nature of Mr. Friedland's involvement at Summitville. Again, this emerges from the privileged documents which have been produced. As late as March 1985, it is clear from these documents that the investigators of the EPA had some difficulty in establishing a case against Mr. Friedland. In his memo of March 29th, 1995, Mr. Broste states that, after reviewing a large quantity of documents:

> ...I think it is clear that Friedland had virtually no direct involvement in the day to day operations of Summitville.

94 Ms Mangone, in a memo written a few days later, stated:

> ...Dave Broste and I are at a loss to figure out what else we can be doing now to develop the liability case against Friedland.

95 Now, it is clear that following those memos, a number of further documents were obtained. Those documents include a transcript of Roper's examination for discovery in the KL litigation, Roper's section 104(e) response, certain engineering notes from KL, the plea agreement that I've referred to, and the internal Galactic documents. These documents essentially show that on some occasions Mr. Friedland was present or is listed as being present when discussions of site operations, including environmental questions, were discussed. But they go no further than that.

96 In her referral document, Ms Mangone set out, in a detailed manner, certain contrary evidence that was not disclosed to this Court. She states:

> It should be noted that the evidence shows that Friedland did not have a high profile role in decision-making for the day-to-day operations at the facility.

97 She then goes on to relate that information:

> Steven Enders was chief geologist for SCMCI starting in 1984. His role expanded to include exploration manager for GRL. ... Enders said that mine operation decisions were made by the mine manager and "ultimate mine operation decisions" were made in Vancouver by Ed Roper, Robert Cook and Victor Hollister. Enders knew that Friedland was Roper's boss but did not know what his involvement was in decisions. Enders said that Friedland visited the mine periodically in connection with promotional activities.
>
> Pritchard Crowell was the controller for the Summitville Mine from 1984 to 1987. In 1987, he transferred to the GRL offices in Vancouver and worked there as assistant secretary and accountant until 1991. Crowell recalled that Friedland met with the mine's engineers, but did not seem to be involved in daily operations. He said that Ed Roper managed the company.
>
> Daniel Blakeman was process superintendent at the Summitville Mine from 1984 to 1987. Blakeman said that he saw Friedland once or twice a year and said that Friedland was unaware of day-to-day mining operations.
>
> Milton Hood was mine superintendent from August to December 1985. He said Friedland visited the mine about once a month to show the mine to his investors. Hood said Friedland never directed mine operations. Hood said that Ed Roper visited the mine about twice a month and that Roper did direct operations at the mine.
>
> Roger Leonard was hired to be the plant manager at Summitville in 1984 and was promoted to general manager shortly thereafter. He was employed at the mine until Ed Roper fired him in 1987. Leonard reported to Roper and did not know to what extent Friedland was directing Roper. Leonard described Friedland as a financier who did not understand mining.
>
> Mark Coolbaugh was hired to work as a geologist at the mine in June, 1984 and continued to work at Summitville until February, 1991. he was the general manager during his last month at Summitville. He said that the mine's general manager made operational decisions at the mine. Coolbaugh never saw Friedland direct operations at the mine and said that Friedland did not have technical expertise.
>
> Jim Burchett was employed at the mine as senior mine engineer in July 1988 and worked there until SCMCI went bankrupt in 1992. He has continued to work at the mine for one of the contractors performing response actions at the site. He was only aware of Friedland being

at the site one time during his employment there. He was not aware of Friedland directing operations at the mine.

98 Now, the United States submits that, in view of the theory of liability it advances, facts relating to day-to-day management and control are not relevant. The United States submits that *CERCLA* is very broad and that it will be enough for it to show Friedland's decisions at a more general level; specifically, that his decisions regarding the financing and the effect that decision had on winter construction will be sufficient.

99 I find the excuse offered for not revealing this material to the Court to be wholly unpersuasive, for several reasons.

100 First of all, if that is the theory the U.S.A is relying on, it should have put that theory squarely before Justice Spencer, Justice Borins and Judge Nottingham in the United States. It is clear from the Mangone affidavit and the factum that that is plainly not what those Judges were told. The Plaintiff is now in effect shifting the theory of its case. In my view, the Plaintiff cannot have it both ways.

101 Secondly, the relevance of this information is, in my view, directly contradicted by the fact that Mangone deemed the evidence to be relevant when she was offering her candid opinion to the Department of Justice. One can readily see why she would have formed that conclusion. She had advised the Department of Justice that the Court in Colorado might well apply a strict test requiring active participation in the wrongful act. She had told the Department of Justice that, on the cases, the test for determining liability of an operator was a fact-specific inquiry. One of the criteria listed in that fact-specific inquiry was the role in decision-making and daily management.

102 In my view, on the legal test, as described by Mangone in the Referral Document, the evidence that was not disclosed, described as contrary evidence, clearly was relevant to the decision the Department of Justice would have to make and also was relevant to the decision this Court was asked to make. In my view, Ms Mangone was obliged to set out the facts for and against and she did not do so. Her failure to disclose contrary evidence, I find constitutes a failure to disclose material facts.

103 I note here that the United States also advances the proposition that it made adequate disclosure of Mr. Friedland's position by attaching press releases and newspaper interviews he gave in relation to the problems at Summitville. In my view, that disclosure does not mitigate the non-disclosure and misrepresentations of fact that I have just described. Those articles and releases amount to a far from complete account of Mr. Friedland's position and the very fact that that method was used to disclose his position suggests to the judge hearing the *ex parte* application that the EPA had nothing in its files that would sustain that position.

104 I note as well that in those articles Mr. Friedland questions the propriety of the actions of the EPA and that there is another internal memorandum disclosed as a result of the privilege order in which Mr. Muller, Mangone's predecessor on the file, expressed a very strong view that the EPA, in proceeding in the way it was proceeding, by way of interim action rather than final remedial action, was jeopardizing the claim that it would seek to advance against responsible parties. He stated specifically:

> It is my opinion that proceeding with the FFS's interim actions instead of as final remedial actions will be inconsistent with *CERCLA* and the NCP and will seriously jeopardize our cost recovery case.

105 That, too, was not disclosed to the *ex parte* judge.

Quantum of the claim and availability of other remedies.

106 In paragraphs 35 and 36 of Mangone's affidavit, she deposes that the EPA's response costs to date are $95,750,872 and, relying on an affidavit from another official, she states that the total of the expended and currently planned response costs was estimated to be $152.5 million. What Ms Mangone did not disclose was certain inconsistencies and figures offered within the Referral Document.

107 In the Referral Document, sent, as I have noted, days before she swore this affidavit, the response costs are estimated to be $120-140 million. In a notice filed in the public Federal Register on August 7, 1996, in an attempt to justify certain settlements that were proposed with so-called *de minimis* PRPs, a notice authored by Mangone, the costs were stated to be estimated at $120 million, some $32 million less than this Court was told.

108 Further, Mangone did not disclose to the Court that certain settlements were underway, in particular the *de minimis* settlement that I have just mentioned which would produce $700,000. She did not disclose that other settlements were possible which, at one point at least, she estimated might bring as much as $10 million.

109 She further failed to disclose that the State of Colorado was legally obliged to contribute ten per cent of the costs — on her figures, this would be $15 million — and it is clear that the United States' claim would be reduced by that amount.

110 In defence, it is submitted by the United States that the U.S.A. and the State of Colorado are both Plaintiffs in the District Court action and hence the total of $152 million could still be recovered against the Defendant Friedland. It is submitted that this is merely a technical point and that the U.S.A. should be entitled to an injunction for the whole amount.

111 In my view, this is far from a technical point and the facts should have been disclosed to the Court. It is surely relevant to the exercise of this Court's discretion that a significant part of the assets to be frozen, in this case some U.S.$15 million, were in fact to be recovered by another party not before the Court. It is by no means clear to me that, apprised of that fact, a Judge would have granted an injunction for the full $152 million.

112 All of these facts relevant to the quantum of the claim, in my view, should have been disclosed. They represent a discrepancy of up to as much as $50 million.

113 It may be that the United States could offer an answer as to why the injunction should still be granted for that amount but it was obliged to give that answer to the Judge; it was not entitled to deprive the *ex parte* Judge of information that was, in my view, plainly relevant to the exercise of the discretion.

114 Another related area bearing on the right of the United States to an injunctive relief relates to the other potentially responsible parties (PRPs). The privileged documents reveal that since 1993 the United States has had in mind pursuing a long list of PRPs, including three other significant institutional parties of substantial means who were involved in the construction and operation of the mine. Those parties are:

115 The Bank of America which financed the project. The theory apparently to be advanced against the Bank is similar to that advanced against Friedland, namely that the Bank pressured SCMCI and GRL to construct the heap leach pad within a specified time frame, requiring winter construction so as to get early production. It is also alleged against the Bank that it had an active day-to-day management and operation role, given the terms of its lending agreement.

116 A second party potentially responsible is International Constructors Corporation. This was an independent contractor which operated the mine for several years and was involved directly in mining and transporting material at the mine.

117 Thirdly is Bechtel Civil & Minerals Inc., the engineering firm responsible for overseeing construction of the mine.

118 On October 3rd, 1995, Ms Mangone was asked to provide answers to certain questions regarding her Region's enforcement strategy. In this letter, which was produced as a result of the privilege order, she states as follows:

> The Region does have an enforcement cost recovery strategy for pursuing PRPs for the Summitville site. While we are currently developing evidence on a number of fronts, the basic approach is to file a *CERCLA* section 107 cost recovery action against all Tier I PRPs jointly and severally.

119 There is nothing in the evidence before me to suggest the EPA has abandoned that strategy.

120 In the same memorandum, Mangone describes briefly the case against these parties, and she states as follows:

> A number of these parties, such as Robert Friedland, Bank of America, Bechtel and ICC are sufficiently capitalized to pay the bulk, if not all, of the United States' response costs for the site. While there may be some litigative risks associated with recovering response costs from Friedland and Bank of America, we should have a strong case against ICC and Bechtel.

121 All of these parties are also listed as potentially responsible parties in the Referral Document.

122 The justification for non-disclosure of this information offered by the United States is, first of all, that it was referred to in the affidavit filed in the U.S. proceedings, where Mangone indicated that boxes of material had been collected, with reference to these PRPs. In my view, that was totally insufficient by way of disclosure.

123 It is further argued that the case against these PRPs has not been fully developed and that, in any event, it is not a defence to Mr. Friedland to show that other parties might be responsible. In my view, neither these contentions justify the failure to disclose the possibility of pursuing these other parties.

124 I find that the facts relating to the possibility of pursuing other parties, parties of substance, was clearly relevant to the exercise of the Court's discretion to grant a *Mareva* injunction. One gains the distinct impression from the material filed by the Plaintiff that Robert Friedland is the culprit and that if there is no recovery from Robert Friedland, there is a significant risk that environmental costs will fall to be borne by the taxpayers of the United States.

125 The fact that the United States sees Mr. Friedland as its main target does not obscure the fact that he is not the only target and indeed, as Mangone in her letter of October 1995 stated, she thought that while there were certain risks of proceeding against him, there was a strong case against certain other parties.

126 As I have already noted, the *Mareva* injunction is an exceptional and extraordinary remedy which is available to plaintiffs whose rights will be defeated if something is not done on an urgent basis.

127 Even assuming the Plaintiff were able to show a strong *prima facie* case against Mr. Friedland, it is my view that in assessing and in balancing the burden the injunction would impose on Mr. Friedland, with the risk that the Plaintiff's lawful claims might be defeated, the Court was entitled to know about the other possible available avenues of recourse available to the Plaintiff. It is possible that apprised of all of these facts relating to the other parties, the Court might still

have granted the injunction but it is by no means, in my view, self-evident, given the exceptional nature of *Mareva* relief.

128 In any event, that was a decision for the Court not for the United States of America, and the material presented by the United States of America deprived the Court of the opportunity to make that assessment.

"Flight Risk".

129 The Notice of Motion filed before this Court stated, as grounds for the *Mareva* injunction, the following:

> There is a real and substantial risk that the Defendant, a resident of Singapore and/or Australia, if given notice of this motion, will remove or dispose of the securities, which are the Defendant's only known assets in the United States or Canada, from the jurisdiction before a judgment of the District Court or the B.C.S.C., which would be enforceable in this Court, can be rendered or satisfied, thereby causing Plaintiff irreparable harm.

130 The Mangone affidavit deposes to certain facts relevant to this point, namely that certain attempts to serve Friedland under *CERCLA* with 104 (e) requests were met with rebuff. She deposes that Friedland has disposed of certain real property he owned in the United States. She indicates his move from Vancouver to Singapore and Sydney. And she relates that he has asserted privilege claims in relation to documents the EPA wishes to obtain which are held by the solicitors for Galactic.

131 In the factum filed in support of the *ex parte* order, this evidence is summarized in the following fashion:

> ...based upon Friedland's *modus operandi* in relation to other assets, such as the California and Colorado real estate properties, there is a risk that Friedland could transfer the shares into the possession of, or register them in the name of, other persons. Furthermore, based on his avoidance of service of information requests made by EPA, the misstatements as to his address in *Insider Report* filings, and other factors in his background ... there is ample reason to conclude that Friedland can and may well take steps to avoid the jurisdiction of this court, thereby rendering any judgement of this court nugatory.

132 The factum concludes with a citation to a case which is put in the following manner. The citation is to the decision of *Mooney v. Orr*, which I have already referred to, and the following quotation is included:

> The English Court of Appeal devised the *Mareva* injunction for marauding charterers. It is equally well-suited to marauding deal-makers to ensure that those B.C. residents who

> structure their business and personal lives to preserve assets out of sight and attack, may be enjoined from dealing with those assets except under the court's supervision during litigation.

133 The factum concludes with the statement:

> This case, it is submitted, falls squarely within this principle.

134 Justice Spencer was clearly persuaded by this. In his reasons, he states:

> There is a real risk that the defendant may remove assets from this jurisdiction to defeat any judgment against him.

135 He states further, after reviewing the evidence in the Mangone affidavit:

> All of that shows a desire to pick and choose places of residence and to avoid jurisdictions where he might be exposed to claims against him. All of that suggests a real risk that he will remove assets from any jurisdiction where a judgment may be had or enforced including this jurisdiction.

136 It is significant, in my view, that the United States of America more or less abandoned this allegation, by implication, in that it argued strenuously that nefarious, fraudulent or deliberate intent to defeat the process of the court was not required, as a matter of law, to justify a *Mareva* injunction and that it was enough to show that the effect of Mr. Friedland's actions would be to put his assets out of reach.

137 On cross-examination, Ms Mangone admitted that she had nothing to show that the real estate transfers were other than *bona fide*.

138 The characterization of Mr. Friedland's resistance to the 104(e) demands as evasion was, in my view, completely unwarranted. The position he took, or his counsel took, which so far as I can tell has not been refuted or at least not shown to be without *bona fides*, were that these demands were unlawful and that he did not, in law, have to respond.

139 The most serious non-disclosure and misrepresentation, in my view, of Mr. Friedland's position as an alleged "flight risk" arises with respect to a possible settlement of the claim. This comes again from the affidavit of Ms Mangone. Ms Mangone states in her affidavit, as follows:

> Although I have not personally spoken with Friedland, his local counsel, Mr. John D. Fognani of the Denver firm, Gibson, Dunn & Crutcher, has told me that both he and Friedland believe that Friedland is not liable under *CERCLA* for the conditions at the site.

140 This statement was based upon a meeting between Ms Mangone and Mr. Fognani, the details of which are not explained in the affidavit. However, again as a result of the privilege order,

a draft letter that Ms Mangone authored to Mr. Fognani was produced. Although the letter was apparently not sent, Ms Mangone did not dispute that it set out accurately what had been discussed at the meeting from which Ms Mangone asserted the Friedland was denying liability. She states in this draft letter, as follows:

> As I understand your proposal, your client, Mr. Robert M. Friedland, is now interested in settling any potential civil and criminal liabilities he may have for the Summitville Mine Superfund Site. He also wishes to include other potentially responsible parties in his settlement proposal, although those parties are yet to be defined. The basic tenets of the proposal are that Mr. Friedland and/or this PRP group undertake "reasonable" response actions to complete the cleanup of the site, as well as providing a "substantial" or "significant" cash contribution to extinguish civil liability for past response costs.

141 The draft letter goes on to explore certain information that the EPA would require.

142 It has been acknowledged, and I refer here again to the English text *Gee* at page 103, that where the plaintiff has been engaged in open negotiations with the defendant, that that is a matter relevant to the exercise of the court's discretion as it bears upon whether the plaintiff needs urgent *ex parte* relief. Mr. Gee states, as follows:

> If the defendant is willing to attend an open meeting to discuss the claim, this may indicate a measure of responsibility in relation to his legal obligations which would cast doubt on whether the case was suitable for *Mareva* relief.

143 I find the excuse offered for not disclosing this or for, more importantly, misdescribing it by Ms Mangone, unpersuasive. It is submitted that this was a privileged discussion and that it would be contrary to EPA policy for her to discuss it in any way.

144 It is difficult for me to imagine how that justification could, in any way, permit Ms Mangone to use the part of the discussion that suited her purposes, namely, that Friedland maintained that he was not legally responsible for these costs, while omitting the part that didn't suit her purposes.

145 I note, moreover, that these discussions were in one sense open discussions, in that they arose as a result of a newspaper article in which Mr. Friedland had indicated a willingness to discuss the situation with the EPA and, moreover, that there is some evidence that, following the discussion, Ms Mangone did tell a reporter that she had had this discussion but that confidentiality precluded her from giving the details.

146 The *ex parte* judge, in my view, could have been told that while Mr. Friedland was unwilling to admit legal liability, there had been some preliminary discussion indicating his willingness to resolve the problem himself and in cooperation with other parties. In my view, it was a serious distortion to characterize this exchange as simply a denial of liability, suggesting that Mr. Friedland

was totally unwilling to cooperate in any way with the EPA in resolving the problems that had arisen.

147 The insinuation of the United States that Mr. Friedland has arranged his affairs to avoid his legal obligations is, in my view, totally unsupported by the evidence. The record does indicate that he is fully prepared to assert his legal rights to the demands of the EPA and that he has advanced claims of privilege in relation to material sought by the EPA. However, there is no suggestion that this assertion of rights or claims is unwarranted in the sense of being spurious or lacking in good faith.

148 Mr. Friedland's wide range of business activity has meant that he travels extensively and that the focus of his business interests now lies in Asia. He has moved from North America. As might be expected of a successful international entrepreneur, he moves his assets according to the opportunities and ventures that attract him. In all of this, however, there is simply no evidence before me, nor was there any evidence, in my view, available to the United States, to suggest that he has disposed of property, moved or dealt with assets so as to avoid or evade his creditors. The United States presented that as a fact to the *ex parte* judge and I find that that was a material misrepresentation of the facts.

Use and description of the proceedings before Judge Nottingham under the Federal Debt Collection Procedure Act.

149 The statutory procedure under the *Federal Debt Collection Procedure Act* permitted the U.S.A to obtain a garnishment order. In Mangone's affidavit, that order was described as a temporary restraining order. In the factum filed on the *ex parte* application, it is described as follows:

> A temporary restraining order (TRO) in the District Court preventing Friedland from dealing with U.S.$152 million (the total reasonably projected cost of dealing with the cleanup) pending disposition of the Complaint.

150 At a later point in the factum, it is, I must note, referred to as a "garnishment order".

151 It is clear from the transcript of the hearing before Judge Nottingham, which was produced after the *ex parte* order was granted, and clear from the cross-examination of Ms Mangone, that the United States knew at the time it brought the motion before Judge Nottingham that Mr. Friedland had no assets that could be the subject of a garnishment order. The purpose of the motion, it is apparent, was to show the Canadian courts that relief similar to that being sought from those courts had been sought and obtained in the United States and that the principle of comity might extend to persuade the Canadian court to grant similar relief.

152 It is clear from the reasons of Judge Spencer that he was impressed by the fact that Judge Nottingham had given the order that he gave. The order was not a temporary restraining order and this was a misdescription of that order. It is submitted that this was not significant or merely inadvertent. Again, I find this unpersuasive. The major purpose of going to Judge Nottingham was, as I have just said, to show an Ontario Court that the Plaintiff had sought and obtained similar relief in the United States Court. The Ontario Court was being asked to respect the principle of comity. In my view, in those circumstances, it was not asking too much to insist that the Plaintiff provide a fair and accurate description of the precise nature of the remedy it sought and obtained from Judge Nottingham.

153 When one turns to the brief that was filed in the United States Court before Judge Nottingham, one finds similar allegations of direct involvement by Mr. Friedland and allegations that he is a "flight risk". It is stated the Friedland controlled mining operations at Summitville; that he exercised pervasive control over the actions of these corporations with respect to the site; that he exercised extreme control over the operations at the site. It is further stated:

> It is clear that Defendant Friedland's direct authority and control over the mine site, and his direct authority and control over the activities at the mine site leading to the release of hazardous substances, makes him a liable operator under *CERCLA*. ...
>
> Defendant was intimately involved in all major decisions associated with the mining operations at the Summitville site...

154 It is further stated significant decisions related to design and construction of the site were his.

155 And it concludes:

> As a result of the formal positions he held, his close involvement with major decisions affecting the mining operations, and as well as a result of his extensive influence within these corporations, Mr. Friedland had the actual authority to control and in fact did control the operations at the Summitville mine.

156 Ms Mangone's affidavit deposes that she was fortified in her conclusion of the strong *prima facie* case by virtue of the findings of Judge Nottingham and, as I have noted, this impressed Judge Spencer in British Columbia and Judge Borins in this Court.

157 The transcript of the proceedings before Judge Nottingham make it clear, first, that Ms Mangone was present and, secondly, that there was virtually no consideration of any kind of the merits of the case. Judge Nottingham was concerned by procedural issues: When the order would be served on Mr. Friedland? Should the file be sealed? He also posed questions regarding the jurisdiction of the case and was told by counsel for the United States, as follows:

> The heart of the case is that he is very very very much involved with the site of Colorado and the Summitville mining operations at least.

158 Judge Nottingham's response to that was, as follows:

> Well, I guess he can appear and contest jurisdiction if the asserted basis for jurisdiction is incorrect.

159 It is clear that the order given by Judge Nottingham was made on the basis of similar or perhaps even more exaggerated representations than those made to the British Columbia and Ontario Courts and that it is entitled to little or no weight. Judge Nottingham does not appear to have given any consideration to the merits or strength of the United States' case, perhaps because of the statutory regime under which he was operating, and yet the impression was given to the Canadian Courts that a United States Court had given its considered opinion on this matter.

Facts relating to the need for proceeding ex parte.

160 As I have indicated, the motion originally brought in May was adjourned when it was learned by the United States that the Diamond Fields/INCO transaction had been postponed. What was not disclosed at any time was that the INCO securities filing made it clear that Mr. Friedland was irrevocably committed to the Diamond Fields/INCO transaction. It is my view that that clearly might have had an important bearing on whether a court would permit this matter to proceed *ex parte*. The justification for proceeding *ex parte* is urgency. Here, almost three months expired from the time the matter was originally brought in May.

161 The other justification for an *ex parte* order is that there is a risk that, if given notice, the Defendant might remove assets or dispose of assets so as to defeat the rights of the Plaintiff.

162 The simple fact is that Mr. Friedland was legally bound to complete the transaction and that that, accordingly, had a direct bearing on whether an *ex parte* proceeding was justified.

163 There were three months between May, when the application was first brought, and August, and Mr. Friedland could have been served during that time. In my view, this was plainly a matter that should have been raised before Justice Borins.

164 The United States submits that notice of these proceedings might have affected the INCO transaction and the interests of third parties. It is difficult to understand this submission because the injunction had nothing to do with INCO but, rather, was to enjoin Mr. Friedland after the transaction had been completed and could take no priority over any right INCO or any third party might have had.

165 In any event, even if there was such a risk, it is my view that that was a matter for the Court to assess in determining whether this matter should proceed *ex parte* or not. By not disclosing this important term of the INCO agreement, the United States of America deprived this Court of the opportunity to make that assessment.

166 I note here that, with respect to this and certain other points regarding non-disclosure, the fact that the INCO circular was before the Court and that it might have been argued, although, in fairness, the United States did not make this argument, that the information had therefore been disclosed.

167 In my view, the fact that a document is before the Court, given the volume of exhibits and the time which an *ex parte* judge has to deal with such matters, does not relieve the moving party of its duty to make full and fair disclosure. It is apparent that a judge cannot read all of that material and that the judge will necessarily focus on the lead affidavit, the factum and the representations of counsel, and that it is up to the parties and counsel to bring relevant matters to the attention of the Court.

168 I refer for that proposition to the *Gee* text at page 99 and 100.

169 For these reasons, I have no hesitation in finding that the United States of America failed to make full and frank disclosure of the case of Justice Borins when it sought an *ex parte Mareva* injunction.

170 In my view, the material submitted contained material statements of fact which are misleading; statements of fact which are wholly unsupported by evidence; that there was a failure to disclose material facts in relation to the liability of the Defendant; that there was a failure to disclose material facts relevant to the exercise of this Court in its discretion to grant a *Mareva* injunction.

171 In my view, this is not imposing upon the Plaintiff an unrealistically high standard of disclosure. The United States of America has been preparing its case against Mr. Friedland for a number of years. It had, even if it was rushing to file material in May, another three months before the matter was returned to the Court.

172 Moreover, Ms Mangone had at hand readily a full and detailed analysis of the case, her Referral Document.

173 This is not a situation where there are just one or two instances but, rather, a pervasive failure to live up to the duty in all areas of the case.

174 I have concluded that the United States of America made no serious effort or attempt to take an objective view of its case and present it in a frank, fair and balanced way to the *ex parte* judge.

175 What are the consequences of this failure? I am referred to two decisions of the English Court of Appeal, *Brink's Mat Ltd. v. Elcombe*, [1988] 1 W.L.R. 1350, and *Lloyd's Bowmaker v. Britannia Arrow Holdings*, [1988] 1 W.L.R. 1337, where the English Court of Appeal has held that despite non-disclosure or failure to live up to this duty, there is a discretion to continue an injunction.

176 In my view, the authorities applicable in Ontario establish that these cases do not state the law in this jurisdiction. Those authorities establish that where there has been a finding of material non-disclosure or misstatement, the injunction must be set aside as a matter of right, without regard to whether the injunction might be sustainable on the basis of a corrected record, and that a litigant who fails to make full and frank disclosure forfeits whatever right it might have had to a *Mareva* injunction.

177 I refer here to the passage I have already quoted from the judgment of Associate Chief Justice Mackinnon in *Chitel v. Rothbart*; and to the following Ontario authorities: *BBM Bureau of Measurement v. Cybernauts Ltd.*, [1992] 8 C.P.C. (3d) 294 at 301, where Justice Davidson expressly declines to follow the *Brinks v. Mat* case; *Lynian Ltd. v. Dubois*, [1990] 45 C.P.C. (2d) 231; and *Bardeau Ltd v. Crown Food Services Equipment Ltd.*, [1982] 38 OR (2d) 411 at 413.

178 Moreover, even if I were of the view that there did exist a residual discretion to continue the injunction, I would not exercise that discretion in this case. In my view, the extent of non-disclosure and misstatement by the United States of America was serious and fundamental. It represents conduct which deserves to be sanctioned by this Court and, in my view, a party guilty of such conduct has abandoned any claim to have the equitable discretion of this Court exercised in its favour.

179 In view of the conclusion I have reached regarding the United States of America's failure to make full and frank disclosure, it is not strictly necessary for me to consider the three other issues that have been raised. While I do not think it appropriate in these circumstances to deal with the legal issues concerning the jurisdiction of this Court to make the order, or the need to show intention to evade the process of the Court, I do propose briefly to deal with the other issue.

Has the Plaintiff established a strong prima facie case?

180 It is agreed by all parties that that is the appropriate standard required of a party who seeks a *Mareva* injunction. In my view, there are serious shortcomings in the case of the United States of America on this standard.

181 First of all, there is the question of admissibility of evidence. During the hearing, as I have indicated, I excluded certain evidence, namely, the plea bargain and extracts from discovery of Mr. Roper in another action, and notes of counsel preparing for that discovery. I reserved on the

question of whether the Mangone affidavit, or substantial portions thereof, should be struck out. Rule 39.01(4) does permit hearsay evidence on motions of this kind. It provides:

> An affidavit for use on a motion may contain a statement of a deponent's information and belief if the source of the information and the fact of the belief are specified in the affidavit.

182 While I would not apply this rule in a formalistic manner, and while I recognize that to some extent perhaps practice has become relatively lax in this area, even by those lax standards it is clear that the Mangone affidavit exceeds anything approaching what is acceptable. The documents attached to the affidavit are plainly hearsay. The references given in the tabs are so general that it is difficult, if not impossible, to identify what document is relied upon for a specific statement.

183 Indeed, as I have noted, on significant matters Ms Mangone herself was unable to do this on cross-examination. Accordingly, had it been strictly necessary to do so, I would have had no hesitation in striking out substantial portions of her affidavit and, in particular, paragraph 37 which contains the key allegations against Mr. Friedland.

184 I note as well that there are other serious deficiencies in the Plaintiff's evidence against Mr. Friedland. The Plaintiff's case is essentially that Mr. Friedland's role as a key decision-maker in arranging financing, negotiating engineering contracts, and hurrying the project through winter construction, had a dire environmental impact.

185 A careful review of the documents and, in particular, the Referral Document, indicates that this contention, while possible, is anything but clear. There is a very revealing statement in the Referral Document where Ms Mangone states, after reviewing the relationship between various individuals and their participation or what the EPA knew of their participation in decisions:

> Given this loose chain of command, Ed Roper may be the only person in a position to know the extent of Friedland's involvement in decision-making in the liner issue and on-site construction and operational matters as a whole. In depositions taking for the KL lawsuit, Roper implicated Friedland as having shared the decision-making responsibility over bringing the project into production, stating that he and Friedland made all decisions together.

186 It is telling, in my view, that the Plaintiff United States has offered no affidavit from Ed Roper nor did it summons Mr. Roper as a witness. Counsel indicated the Mr. Roper was unwilling to come forward for various reasons, including, apparently, his own fear of personal liability and a falling out he had had with Mr. Friedland.

187 In my view, based on what I have, it is by no means clear precisely what Mr. Roper would say. We know what the United States hopes he will say but it is not clear what in fact he will say. As I have already noted, his 104(e) response does not unambiguously favour the case of the United States.

188 Other so-called evidence relied upon by the United States to show that his authority was undermined was a lawyer's letter written in relation to a constructive dismissal action, stating that in 1987 Mr. Roper's authority had been undercut. What was not referred to was the fact that in the same letter, the lawyer asserted that for the crucial period for the purposes of this lawsuit, 1984 to 1987, Mr. Roper had plenary authority and control of president of the company.

189 The absence of any direct evidence from Mr. Roper is, as I have said, telling. But we are not dealing with a case with a total vacuum of evidence because, of course, we have the affidavit of Robert Friedland. I am going to quote a significant paragraph in his affidavit as it sets out his position in a clear way:

> To state the matter simply, during the material period I was the chief executive officer, not the chief operating officer, for Galactic Resources Ltd. I am not a geologist or an engineer. I am a financier and venture capitalist. In planning the Summitville Mine, GRI hired Ed Roper, whom we believed was one of the best mining persons available and at the time was by reputation one of the leading experts in the emerging field of heap leach mining technology, that is, the extraction of precious metals from ore by heap leach mining technology using cyanide. Second, GRL retained one of the largest and most respected civil engineering firms in the world, Bechtel Civil & Minerals Ltd, to design the mine and related facilities at the Summitville mine site, all encompassed within an integrated, bankable Feasibility Study of such a stand to support non-recourse project finance. Further project financing was thereafter provided by the Bank of America in reliance upon the Bechtel design. It was a condition of the financing that the Bank of America had to approve the technology and the design of the Summitville mine by its own independent mining consultants. I relied upon the professionals to design the Summitville mine and make operational decisions as any responsible executive would have done.

190 Mr. Friedland in his affidavit goes on to point out that GRL was a publicly held company; that all decisions to proceed with construction, development and operation of the mine were authorized by the board of directors, as a whole, and based upon the recommendation of mining and other professional engineers; that he had no prior knowledge, as suggested by the reasons of Justice Spencer, of the environmental problems. He recites at length the role played by Bechtel and other experts in design of the mine. He deposes, "I maintained no material responsibility for design, construction or day-to-day operation of the mine" and he states, "I was not involved in SCMCI at an operational level and I was not even an officer or director of SCMCI for about 85 per cent of the period between 1986 and 1992". GRL had many other mining ventures beyond Summitville in progress in various parts of the world, and that these other projects occupied a great deal of his time.

191 He deposes that he "was constantly travelling around the world, seeking out new mining venture opportunities, raising substantial financing, and promoting various ventures".

192 He categorically denies that he had "a primary role in decision-making for the design and installation of the leach pad liner".

193 Mr. Friedland was cross-examined for some ten hours on this affidavit, and again I have carefully read that cross-examination. No significant challenge was made to his version of his role and responsibility at the mine. Indeed, having reviewed the documents, it appears to me that his version is in fact closer to what is suggested by the documents than that relied upon by the United States of America.

194 The United States produced, after the *ex parte* order had been given, an affidavit from a junior level engineer with Klohn Leonoff, Tom Krasovec. I note here that there was a dispute between SCMCI relating to Klohn Leonoff which resulted in litigation and which was ultimately settled in SCMCI favour.

195 Mr. Krasovec produced notes that he had made at the time regarding problems with the leach pad liner and which indicate that Mr. Friedland was made aware of some of these problems. Mr. Krasovec goes on to describe a tour that he conducted with Mr. Friedland, allegedly in June or July of 1986. He states that he advised Mr. Friedland of certain problems with repairs to the liner, and he states that he recommended to Mr. Friedland that the remainder of the existing pad be ripped down and reconstructed.

196 It is hardly surprising, in my view, that Mr. Friedland did not immediately accept the advice of this junior engineer, given the structure that was in place for this project.

197 Mr. Krasovec further deposes that in August there was another tour with Mr. Friedland and that Mr. Friedland shared his thoughts about the cost of the production, the need for gold production. He states that Mr. Friedland admitted to an assembled group of project employees that he had made a mistake by promising to build the mine under adverse working conditions.

198 If accepted, this evidence could well be significant in the case against Mr. Friedland. However, I note certain important facts that have to be taken into account.

199 First, it is categorically denied by Mr. Friedland that he made any of these admissions that are alleged by Mr. Krasovec.

200 Secondly, as I have already noted, Mr. Krasovec was a very junior level engineer. It is to me surprising that if the United States of America has such an overwhelming case against Robert Friedland, that he exerted pervasive influence over this project apparently influencing and ordering engineers to do things that shouldn't have been done, that it is only able to produce as a witness, as proof of those facts, a person at this level of the operations.

201 The evidence presented has led me to the conclusion that the liability of Robert Friedland under *CERCLA* is anything but clear. It certainly falls very well short of the standard of a strong *prima facie* case that would be required to support a *Mareva* injunction.

202 Accordingly, even if I had dismissed the various contentions advanced by the Defendant that the United States of America failed to satisfy its obligation of full and frank disclosure, I would have had no hesitation in setting the injunction aside and refusing to continue the injunction on the ground that a strong *prima facie* case of liability was not demonstrated.

203 For those reasons, I have endorsed the record as follows:

204 For oral reasons given today, the *ex parte* order of Borins, J. of August 21, 1996, continued by the orders of August 28, 1996 and September 6, 1996, is set aside and the Plaintiff's motion is dismissed. (Submissions by counsel follow)

205 — LUNCHEON ADJOURNMENT

206 — UPON RESUMING AT 2.40 P.M.

207 HIS HONOUR: I have added the following to my endorsement:

208 In my view, the findings I have made amply warrant an order requiring the Plaintiff to pay the Defendant's costs on a solicitor-and-client basis. While party-and-party costs are the rule, my reasons for judgment make it clear that I consider the Plaintiff to have been guilty of conduct which merits the censure of this Court.

209 The conduct of the Plaintiff was, in my view, a serious departure from a fundamental rule important to the integrity of the judicial process. It falls within the principles recently enunciated by the Manitoba Court of appeal in *Pulse Microsystems Ltd v. SafeSoft Systems Inc.*, [1996] 134 D.L.R. (4th) 701 at 715. I order that those costs be assessed and paid forthwith.

210 I am asked to stay my order until the end of Friday to permit the Plaintiff to consider an appeal and, if so advised, to seek a stay of my order dissolving the injunction from the appropriate appellate court.

211 In view of the findings I have made on non-disclosure and misrepresentation, it is my view that apart from one point the Plaintiff is not entitled to the exercise of the Court's discretion. In my view, the sole point that deserves any consideration is the contention that its rights of appeal could be rendered nugatory if no stay is granted. This has been recognized as a valid basis for granting a stay. (*Van Brugge v. Arthur Fromer International Ltd.* [1982 35 OR (2d) 333; *Erinford Properties Ltd. v. Cheshire Country Council*, [1974] 1 Chancery 261)

212 In my reasons for judgment, I dismissed as unfounded the contention that the Defendant has demonstrated any intent to defeat the process of this Court or any other Court. Obviously, there was nothing before me to cause me to alter my view on that point in any way.

213 The difficulty I face is that that point is the very ground relied upon for granting the stay and a potential ground of appeal, namely, that if the stay is not granted the Defendant may defeat the process of the Court.

214 A litigant in our system does have the right to appeal and to challenge findings that have been made and, as noted, a stay may be granted to protect the right of appeal.

215 In the circumstances, and with some considerable hesitation, I grant a short stay until 4.30 p.m. Friday, November 8th, 1996 on the narrow ground outlined herein, to afford the Plaintiff the opportunity to consider an appeal and present an application for a stay to a judge of the appropriate appellate court.

216 (Submissions by counsel follow)

217 HIS HONOUR: What I've done is I've endorsed a draft copy of your order, as follows,

218 Upon reading my endorsement relating to the stay, Mr. Lenczner made the undertaking that the shares would be held until 4.30 p.m., November 8, 1996, subject to any order, as per this draft order.

219 In my view, it is appropriate to dispose of this matter on the basis of Mr. Lenczner's undertaking, as reflected by this draft order, a copy of which I have signed.

220 THE REGISTRAR: Court is now adjourned.

221 — HEARING ADJOURNED AT 2.50 P.M

IN THE MATTER OF THE BANKRUPTCY OF CREATIVE WEALTH MEDIA FINANCE CORP.
OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO

Court File No.: BK-24-03003083-0031
Estate File No.: 31-3003083

ONTARIO
SUPERIOR COURT OF JUSTICE
(In Bankruptcy and Insolvency)

Proceedings Commenced in Toronto

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