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COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

VALE CANADA LIMITED,	)	Ross A. McFadyen
plaintiff,	)	Sharyne M. Hamm
	)	for the plaintiff
- and -	)	
	)	
MICHAEL JAMES SCHWARTZ, HARRY JOHN SCHWARTZ, also known as JOHN SCHWARTZ, GRANT SCHWARTZ, SCHWARTZ BROS. CONSTRUCTION LIMITED, also known as SCHWARTZ BROS. CONSTRUCTION LTD., ALEX McCARTHY, CALVIN KINSMEN, ARLEN REEME, ROGER JACOBS, MARK KOCH, URBANMINE INC., MARK CHISICK, and ADAM CHISICK, ALLAN MATECHUK, and DAVE THOMPSON,	)	Dave G. Hill Ryan Nerbas for the defendants Urbanmine Inc., Mark Chisick and Adam Chisick Kathleen A. McCandless Kara Moore for the third party
defendants.	)	
ELG METALS, INC.,	)	
	)	Judgment Delivered:
third party	)	January 26, 2024

McCARTHY J.

INTRODUCTION

[1] In decisions dated August 27, 2020, and March 4, 2021, I awarded summary judgment on liability and damages respectively, in favour of the plaintiff,

Vale Canada Limited ("Vale"), against the defendant, Urbanmine Inc. ("Urbanmine") and several individually named defendants (the "Schwartz defendants") against whom default had been noted.

[2] In a separate decision I granted Urbanmine Inc., Mark Chisick and Adam Chisick (the "Urbanmine Defendants") leave to file a third-party claim against ELG Metals, Inc. ("ELG").

[3] Both decisions were subsequently appealed and upheld by the Manitoba Court of Appeal (see ***Vale Canada Limited v. Urbanmine Inc.***, 2022 MBCA 18 ("***Vale v. Urbanmine***") and ***Urbanmine Inc. et al v. ELG Metals Inc.***, 2022 MBCA 51) (***Urbanmine v. ELG***").

[4] The remaining issues relating to the personal liability of the defendant, Adam Chisick (the claim against Mark Chisick having been discontinued), and the liability of ELG to indemnify the Urbanmine defendants proceeded to trial. The following is my decision with respect to the claim against Adam Chisick ("Chisick"). and the third-party claim against ELG ("ELG").

LIABILITY OF ADAM CHISICK

[5] It was conceded by Urbanmine at the summary judgment hearing that Urbanmine, by purchasing the nickel from the Schwartz defendants, acted in a manner inconsistent with the ownership rights of Vale and that they were therefore liable for conversion. The contested issue at that stage of the proceedings was whether the plaintiff was also contributorily negligent, which the Court found that

it was not. Judgment was granted against Urbanmine and the Schwartz defendants for the full value of the converted nickel.

THE EVIDENCE

[6] At the outset of the trial, the parties filed an Agreed Statement of Facts. The facts as they relate to the liability of Chisick are as follows:

A. On May 14, 2013, Vale conducted an inventory count on the property of its Thompson operation and discovered that four large bundles of nickel were missing. Vale immediately notified the Royal Canadian Mounted Police ("RCMP") and an investigation revealed that a Schwartz Bros. truck had removed the bundles of nickel from Vale's property.

B. The defendant, Michael James Schwartz ("Schwartz"), has admitted that over the course of several months and on his instruction, several of the individual defendants stole and sold Vale's nickel to Urbanmine.

C. The Schwartz defendants pled or were found guilty for their role in the thefts of nickel from Vale. Each of the Schwartz defendants have been ordered to pay various amounts of restitution to Vale. Schwartz was sentenced to six years in prison.

D. During the course of the investigation conducted by the RCMP, it was discovered that Schwartz sold the stolen nickel to Urbanmine. It was further discovered that between July 2012, and May 2013, Urbanmine purchased 483,396 pounds of nickel from Schwartz for the sum of $2,474,991.90.

E. The nickel was purchased by Urbanmine in 34 transactions between July 31, 2012, and March 14, 2013. The amount of nickel per transaction varied from 1,565 to 31,650 pounds.

F. All the nickel Urbanmine purchased from Schwartz was nickel that was stolen from Vale (the "Vale Nickel"). Some of the Vale Nickel was stamped with markings which referenced Vale.

G. The Vale Nickel sold to Urbanmine by Schwartz consisted of buttons, strips and FSCs or "sheets". The sheets would be provided in bundles, with each bundle weighing approximately 4,000 pounds. Prior to the interactions with Schwartz, Urbanmine had never previously purchased a bundle of nickel. The amounts of nickel received by Schwartz were drastically higher than the amount of nickel received from any other customer of Urbanmine during the same period.

H. Schwartz was not required to produce documentation to Urbanmine to verify his identity or how he came into possession of the Vale Nickel.

I. Chisick was the primary contact at Urbanmine who dealt with Schwartz in the purchase of the Vale Nickel. Chisick was aware that nickel of the nature provided to Urbanmine by Schwartz was produced in Thompson, Manitoba, by Vale.

J. Urbanmine sold a total of 483,156 pounds of Vale Nickel at a sale value of $3,418,762.42 USD. Urbanmine paid $2,474,991.90 CAD for this nickel. Urbanmine's total profit on the Vale Nickel was approximately

> $943,770.50, taking into account that the CAD and USD were trading roughly at par at the time. This amounts to a profit to Urbanmine of approximately $1.9533452 per pound of nickel (not taking into account the costs incurred by Urbanmine for freight and handling).

[7] In addition to the above, the following evidence was presented by the plaintiff in the form of Read-Ins from the examination for discovery of Adam Chisick.

[8] Michael Schwartz, who was known to Chisick as Michael Smith, dealt directly with Chisick, but from time-to-time Chisick would relay information to Mark Chisick if he needed advice or something of that nature.

[9] Chisick handled all sales of nickel to EOS metals or ELG metals.

[10] Chisick was the primary decision-maker for Urbanmine with respect to the decision to purchase and sell the nickel and to determine the purchase price.

[11] Chisick would contact ELG to determine what the nickel could be sold for prior to setting a purchase price.

[12] Michael Schwartz told Chisick that he was working up north at a mine and Chisick assumed that the mine was Vale.

[13] Bills of sale between Urbanmine and the Schwartz Bros. Construction Ltd. ("Schwartz Brothers") indicate Schwartz Brothers was in Thompson, Manitoba.

[14] Chisick did not ask Schwartz to produce any documentation. Urbanmine had documented the seller to be Mike Smith from Schwartz Brothers. Chisick had observed deliveries in a Schwartz Brother's truck and had noted the licence plate.

[15] Chisick did not request any additional identification but noted that he did not work in the scale office and he could not say what they did.

[16] Chisick spoke with Michael Schwartz by telephone prior to purchases and was told whether cash and/or a bank draft was being requested.

[17] The majority of the nickel received was in bundles of sheets.

[18] Chisick confirmed that on previous occasions with other customers, Urbanmine had determined that there were suspicious circumstances and called the police.

[19] Chisick did not ask for any documentation such as a contract indicating that Schwartz was entitled to be paid in nickel. He stated he did not want to probe too much and upset the customer.

[20] The first contact with the police in this case was when Urbanmine was contacted by the RCMP on July 8, 2013.

[21] Chisick did not make any inquiries of Vale with respect to the nickel.

[22] Urbanmine had not purchased bundles of nickel prior to their transactions with Schwartz Brothers. They had purchased nickel buttons.

[23] Urbanmine used a Nitron gun to determine the chemical composition of the metal and to determine a price.

[24] Nickel attracts a higher price per pound than other commodities purchased by Urbanmine during the same period.

[25] Adam Chisick also testified and was cross-examined at trial. Specifics of his evidence will be addressed below.

THE POSITION OF THE PARTIES

[26] The issue for determination at this stage is whether Adam Chisick, being the sole employee of Urbanmine who handled the purchase and sale of the Vale nickel, should be held personally liable to the plaintiff for its losses.

[27] In argument, the plaintiff asserted that an employee, notwithstanding that he was acting in his role as an employee, may be held liable as a joint tortfeasor for any intentional tort he committed. They argued that it was not necessary for the Court to lift the corporate veil to make this determination.

[28] The plaintiff argued that, given the strict liability nature of the tort of conversion, the findings of liability against Urbanmine with respect to the conversion of the plaintiff's property should apply equally to Chisick, as he need only be found to have committed an intentional act inconsistent with the owner's rights to be liable for conversion.

[29] The plaintiff relied upon the definition of conversion as set out in G.H.L. Fridman, *The Law of Torts in Canada,* 3rd ed. (Toronto: Carswell, 2010), at pp. 117-18:

> Conversion consists of the wrongful taking, using or destroying of goods or the exercise of dominion over them that is inconsistent with the title of the owner.
>
> ….
>
> Succinctly put, conversion is "a positive wrongful act or dealing with the goods in a manner, and with an intention, inconsistent with the owners rights".
>
> ….
>
> Such statements indicate the essential features of the tort of conversion to be: (i) a wrongful act; (ii) involving a chattel; (iii) consisting of handling, disposing or destruction of the chattel; (iv) with the intention or effect of denying or negating the title of another person to such chattel.

[30] The plaintiff argued that on the basis of that definition, Chisick should be held jointly and severally liable for the same loss determined to be payable by Urbanmine. They asserted that Chisick knew, ought to have known, or was willfully blind to the fact that the nickel purchased from Michael Schwartz was stolen and failed to take reasonable steps to ascertain the source of the nickel, causing loss and damage to Vale.

[31] The defendant Chisick argued that the plaintiff was in fact asking the Court to pierce the corporate veil and find Chisick liable as the controlling mind or alter ego of the corporation and that there was no basis for doing so in this case.

[32] Chisick also argued that he should not be found liable as a joint tortfeasor because his personal conduct in this case does not fall within the definition of conversion as set out above. He argued that at no time did Chisick personally take possession of, or sell, nickel that properly belonged to Vale. He submitted that at all times he was acting as an employee and agent of Urbanmine and that it was the separate legal entity of Urbanmine that bought and resold the nickel and profited from the sale.

ANALYSIS

[33] In order to determine this issue, I will look first at the case law provided with respect to the personal liability of officers, directors, shareholders and employees of limited liability corporations generally.

[34] Much of the case law on this issue was reviewed by the Ontario Court of Appeal in ***ADGA Systems International Ltd. v. Valcom Ltd.***, 1999 CanLII

1527 (ON CA), 43 O.R. (3d) 101, 168 D.L.R. (4th) 351, ("***ADGA***"). In that case Carthy J. writing for the Court considered what was described as "the troublesome issue of the liability of officers and directors of a corporation for acts done in pursuance of a corporate purpose."

[35] ***ADGA*** was an appeal, seeking to overturn a ruling that the plaintiff could not proceed with a claim against a director and two senior employees of a rival corporation. The original claim was for inducing breach of contract, interference with economic interests and inducing breaches of fiduciary duty. At the time of the appeal the claim was focused on inducing breaches of fiduciary duty.

[36] The Court at paragraph 10 in noting that "a company, once legally incorporated, must be treated like any other independent person, with rights and liabilities appropriate to itself" (citing ***Salomon v. Salomon & Co. Ltd.*** (1897) [1895-99] All E.R. Rep 33 (U.K.H.L.)) went on to outline two separate means by which an officer or employee of a corporation may be held personally liable. The first instance is where the Court sees fit to lift the "corporate veil" and make the principal of the corporation liable for the obligations of the corporation.

[37] The second is where the plaintiff seeks to establish an independent cause of action against the principal of the company. By way of illustration the Court at paragraph 14 pointed to the case of ***Said v. Butt***, [1920] 3 K.B. 497 (Eng. K.B.), where the Court set out the distinction between a breach of contract by the corporation and the alleged tort of an employee of inducing the breach of contract

stating at p. 506 as follows:

> I hold that if a servant acting bona fide within the scope of his authority procures or causes the breach of the contract between his employer and a third person, he does not thereby become liable to an action of tort at the suit of the person whose contract has thereby been broken.… Nothing that I have said to-day is, I hope, inconsistent with the rule that a director or a servant who actually takes part in or actually authorizes such torts as assault, trespass to property, nuisance, or the like may be liable in damages as a joint participant in one of such recognized heads of tortious wrong.

[38] The Court in ***ADGA*** concluded at para. 18 that:

> The consistent line of authority in Canada holds simply that, in all events, officers directors and employees of corporations are responsible for their tortious conduct even though that conduct was directed in a bona fide manner to the best interests of the Company, always subject to the *Said v. Butt* exception.

[39] The ***Said*** exception referred to therein is an exception for policy reasons preventing an officer or director of a corporation from being liable for inducing a breach of contract by the Corporation, unless an intentional wrongful or unlawful act by the employee is established (***ADGA*** at para. 32), or the employee is found to not have been acting *bona fide* in the best interests of the corporation (***ADGA*** at para. 35).

[40] The Court also found that the fact that an employee is acting in the interests of the employer corporation does not automatically absolve the employee of liability for his or her own tortious conduct (***ADGA*** at para. 29). After considering specific cases involving negligence, nuisance and interference with economic relations, the Court concluded at para. 26 that:

> These Canadian authorities at the appellate level confirm clearly that employees, officers and directors will be held personally liable for tortious conduct causing physical injury, property damage, or a nuisance even when their actions are pursuant to their duties to the corporation.

[41] While the ***ADGA*** decision is not binding on this Court, it is persuasive, and I find the legal analysis therein helpful and consistent with my reading of the various cases on this issue.

[42] ***ADGA*** also confirms the requirement as set out in other decisions such as the often-cited ***ScotiaMcLeod Inc. v. Peoples Jewellers Ltd.***, 1995 CanLII 1301 (Ont. CA), 26 OR (3d) 481 ("***ScotiaMcLeod***"), that in order for a defendant officer or director to be found personally liable in tort, the pleadings must assert personal tortious conduct by the individual. It is not enough to simply assert that a director or officer is liable for the tortious conduct of the company by virtue of their position alone.

[43] The Court in ***ScotiaMcLeod*** at paragraph 32 referenced ***Mentmore Manufacturing Co. v. National Merchandise Manufacturing Co.***, (1978), 89 D.L.R. (3d) 195, 22 N.R. 161 (Fed. C.A.), which looked at the personal liability of officers and directors where the corporation conceded liability for patent infringement. The test for establishing patent infringement, similar to the test for establishing the strict liability tort of conversion, does not require knowledge of the patent, an intention to infringe on the patent or intention or knowledge that harm will result to establish liability. However, the Court found that generally where personal liability had been found for participation in the acts of the corporation "there would appear to have been a knowing, deliberate, willful quality to the participation".

[44] Turning then to the tort of conversion specifically, in ***Craig* v. *North Shore Heli Logging LTD.***, 1997 CanLII 2067 (BC SC), 34 BCLR (3d) 330 ("***Craig***"), the British Columbia Supreme Court considered the personal liability of the sole officer, director and shareholder of a defendant corporation in his capacity as the alter ego, or directing mind, of the corporation. Neither the corporate defendant, nor an independent contractor hired by the corporate defendant, contested the allegations that they had logged trees without permission, thereby depriving the landowners of their property. Both the corporation and the contractor were held liable for trespass and conversion.

[45] The Court found, with respect to the sole director and shareholder, that the corporate defendant was an empty shell and that the personally-named director had always been the alter ego of the corporation. The Court held the sole director liable for what it found to be intentional conduct that amounted to fraudulent conversion, stating that it would be a hollow victory for the plaintiff if he was not held liable.

[46] With respect to personal liability for conversion the Court in ***Craig*** at paragraph 63, citing the Federal Court in ***Shibamato & Co. Ltd. v. Western Fish Producers Inc***., [1991] 3 F.C. 214 (F.C.T.D.), affirmed by the Court of Appeal (1992) 145 N.R. 91 (F.C.A.), stated as follows:

> These cases demonstrate that when an individual chooses to convert property belonging to a third party and that property is in possession of a company which he controls, the individual as well as the company is liable in tort.

[47] The Court went on to conclude at para. 64:

> In my opinion, the reasoning in these cases equally applies to the torts of trespass and conversion where the conduct of the sole officer, director and shareholder of the corporate defendant is intentional, willful and deliberate. In such a case, both the individual and the company are joint tortfeasors.

[48] The plaintiff also relied upon ***Columere Park Developments Ltd. v. Enviro Custom Homes Inc.***, 2010 BCSC 1248 (CanLII), 94 CLR (3d) 85, ("***Columere***") in which the British Columbia Supreme Court noted at para. 37 that:

> The broad proposition from *Shimbamoto* and *Craig* that "an individual chooses to convert property belonging to a third party and that property is in the possession of the company which he controls, the individual as well as the company is liable in tort" was questioned in the later case of *CIT Financial Ltd. v. 1153461 Ontario Inc.* (2004), 47 B.L.R. (3d) 269 at para. 68 (Ont. S.C.J.). In that case Sutherland J. stated that the facts surrounding the commission of the tort (including the fraudulent or deceitful actions of the personal defendants) will be important to a determination of personal liability for a tort involving company property. Sutherland J. agreed, however, that *Craig* and *Shimbamoto* were correctly decided on their particular facts. …

[49] With respect to personal liability, of an employee the plaintiff relied upon the ***AVS Transport Inc. v. Van Ravenswaay***, 2016 ONSC 3568, [2016] OJ No 27793 (QL), decision of the Ontario Superior Court for the proposition that an employee may be held jointly liable with the corporate employer for conversion resulting from his actions as an employee. In that case, the corporate defendant was a company dealing in scrap metal. The corporation did not contest that it was liable in trespass and conversion for the purchase and sale of stolen truck parts. There were also two individually named defendants. One was the sole officer and director of the company and the other was his son, who was an employee of the corporation. In that case, the Court held that the corporation and the sole director

and officer, were liable for conversion of stolen property they purchased and disposed of. The Court noted in its findings that the director had been convicted of crimes of dishonesty related to his business dealings and knew that the industry carried a risk of stolen property but did not inquire as to the ownership of the truck. The Court accepted that the director was the directing mind of the corporation and that he knew or ought to have known that the property purchased on behalf of the corporation was stolen. The director was found personally liable. With respect to the employee, the Court declined to find him liable, stating that he could not be held liable without the plaintiff proving on a balance of probabilities that he had specific knowledge of the ownership of the stolen truck part. The Court in this case distinguished between the knowledge that it imputed to the controlling mind or alter ego of the corporation and that which was attributed to an employee carrying out the duties of his employment.

[50] Another decision relied upon by the plaintiff is the ***Scott & Pichelli Ltd. v. Shaver***, 08 December 2008, Ontario 05-21425-SR (Ont Sup Crt). In that decision the Court found the defendants liable for conversion of equipment after finding that they took the equipment knowing that it did not belong to them, disposed of it, and did not pay anyone for the equipment. The Court also found that the defendants intentionally misled the plaintiff as to where the equipment was, preventing the plaintiff from recovering it.

[51] Finally, the plaintiff relied upon ***Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce***, [1996] 3 S.C.R. 727, 1996 (CanLII) SCC 149

("***Boma***") and ***Battleford's Credit Union Ltd. v. Korpan Tractor & Parts Ltd. et al.***, (1983), 28 Sask. R. 215. [1983] S.J. No. 675 ("***Battleford's***") These cases, and some of the case law referred to therein, reflect a line of conversion cases which involve banks negotiating cheques which were not endorsed, were fraudulently endorsed, or were made out to an altered payee. In those cases, the bank has often been held liable for conversion, notwithstanding that there is no allegation that the employee who accepted the cheque had any knowledge of the fraud or error. Neither of those cases, nor the cases cited therein, involved personal liability of an employee who negotiated the cheques or was otherwise involved.

[52] There were no cases provided where an employee who was not also an officer, director, or shareholder of the defendant corporation, was held liable with his or her corporate employer for the tort of conversion.

[53] Having reviewed the case law and accepted the analysis of the Ontario Court of Appeal in the ***AGDA*** decision, I find that there are two different ways in which an employee could be found liable for conduct undertaken in carrying out his or her duties as an employee of a corporation.

[54] In the first situation, the Court looks at the conduct of the individual and his role within the corporation to determine whether the Court should look behind the corporation and hold the individual responsible for the conduct of the corporation. The general rule is that officers and directors are not personally liable for the torts of the corporation, unless the individual has either directed that the

corporation carry out the tort, or the corporation is found to be a sham or alter ego set up or used to carry out the improper activities of a director, officer, or shareholder.

[55] The second situation arises where a shareholder, director or employee is held responsible, in addition to the corporation, for his or her own tortious conduct. In the second situation, the Courts have not pierced the corporate veil, but rather found the individual employee and the corporation jointly and severally liable for the tortious conduct. In these cases, liability most often relates to intentional torts such as negligence, trespass, nuisance, or battery carried out by the employee during the course of his or her employment. Such conduct is found not to be shielded by the existence of a separate corporate legal entity.

[56] In this case, the plaintiff argued that it is on the second basis that Chisick should be held liable for conversion of Vale's nickel. They argued that they were not seeking to have the Court pierce the corporate veil, but rather to have Chisick found liable for his own tortious conduct.

[57] Chisick argued that there is no basis upon which to look behind the corporation which is what the plaintiff was actually asking the Court to do. He argued that at all times he was acting *bona fide* in his capacity as an agent and representative of his employer. He argued that he was not an officer, director, or shareholder at the time and there was no evidence that he was the directing mind or alter ego of the corporation, or that the corporation was a sham.

[58] The evidence was not disputed that Urbanmine was owned and controlled by Chisick's parents and that he was an employee, albeit an experienced one with responsibility for the purchase and sale of scrap product. There is no question that he was given authority to make decisions on day-to-day transactions and that he made the decisions in that role to negotiate the purchase and sale of the Vale nickel on behalf of the company. There is no evidence, however, that he was the directing mind behind the corporate operations or that he was using the corporation as a sham for his own illegal conduct or personal gain.

[59] Given the positions of the parties on the issue of piercing the corporate veil and the evidence before the Court with respect to Chisick's role in the corporation, I find that there is no basis upon which the Court should look behind the corporation to hold Chisick personally liable for the corporation's tortious conduct.

[60] With respect to finding that Chisick should be held liable by virtue of his personal tortious conduct, the plaintiff argued that the evidence before the Court in the form of the Agreed Statement of Facts and the Read-Ins are clear evidence that Chisick converted the nickel.

[61] They argued that because conversion is a strict liability tort as stated by the Supreme Court of Canada in ***Boma*** (at para. 31), "it is no defence that the wrongful act was committed in all innocence."

[62] The facts are not disputed in this case, that all nickel was purchased from the Schwartz defendants by Chisick in his capacity as the vice president of marketing for Urbanmine. The contracts for each purchase were between

Schwartz and Urbanmine, the money to purchase the nickel was paid by Urbanmine, the contracts for sale of the nickel were between Urbanmine and ELG or EOS, and the proceeds were received by Urbanmine. There are no allegations that Chisick personally purchased, took possession of, or sold any of the plaintiff's nickel.

[63] The plaintiff's argument is that, although Chisick did not personally assert dominion over the plaintiff's nickel, he should be held liable for causing Urbanmine to do so because he was the sole agent and employee of Urbanmine who was dealing with the purchase and sale of the nickel.

[64] In my view, this is a different scenario than those outlined in cases where an employee is held liable for personally committing an intentional tort such as trespass, battery, or negligence. In those cases, the conduct of the employee is itself tortious conduct. Even if there was no corporate employer involved, the conduct would stand alone as an intentional tort. In fact, much of the case law arises to determine whether a corporate employer is liable for such intentional torts committed by its employees.

[65] The same cannot be said for the actions of Chisick in this case. His actions were to purchase the nickel on behalf of Urbanmine and to resell it on behalf of Urbanmine. If Chisick had taken the nickel personally and resold it, he would be personally liable for depriving Vale of their property. But he did not do so. At all times he was carrying out his duties as an employee and agent of Urbanmine.

[66] The question then is whether there is any basis upon which Chisick should be held liable in tort for causing Urbanmine to convert the plaintiff's nickel.

[67] In my view, this situation bears some similarity to the tort of inducing breach of contract or personal liability for causing a corporation to infringe on a patent and invokes some of the same considerations. As set out earlier, for policy reasons courts in those cases have ruled that unless an employee's conduct is intentionally wrongful or unlawful, an officer, director or employee will not be personally responsible for causing a corporate employer to breach a contract (see ***Said***). Similarly, personal liability for patent infringement has been found to require a knowing, deliberate or willful quality to the participation (see ***Mentmore*** at p. 203).

[68] While conversion is an intentional tort, in my view the strict liability nature of the tort necessitates a careful analysis of if, or when, it should be applied to an individual employee carrying out his duties on behalf of a company.

[69] First, the threshold for proving conversion is very low because the tort is intended to compensate an innocent plaintiff for loss occasioned by conversion of its assets.

[70] As stated by the Ontario Court of Appeal in ***Westboro Flooring and Décor Inc. v. Bank of Nova Scotia***, (2004) 71 O.R. (3d) 723 O.J. No. 2464 (Ont. C.A.), (at para. 14):

> … [T]he "wrongful" aspect of the tort of conversion consists of acting in a manner that is "inconsistent with the owner's right of possession" and that blameworthy conduct going beyond that is not an essential requirement…

[71] And, as stated by the Saskatchewan Court of Queen's Bench, in ***Battlefords*** (at para. 9):

> …. Any person who receives and disposes of personal property without satisfying himself as to the state of title does so at his peril.

[72] It is accepted that compensation to the innocent plaintiff may come at the expense of an innocent defendant who did not have knowledge of the plaintiff's rights or intend, or have knowledge of, the loss caused to the plaintiff (see ***Boma*** and ***McTavish v. Kellett***, (1989), 62 Man.R. (2d) 146 (Q.B.)).

[73] Further, liability for conversion may result in damages being awarded to the plaintiff for the full value of the asset lost. The result can be damages well in excess of any profit gained by the tortfeasor.

[74] In my view, it is for these reasons that it is important that the Court consider how wide a plaintiff should be permitted to cast its strict-liability net.

[75] In this case, Urbanmine conceded that it had taken possession of and sold nickel with the effect of depriving the plaintiff of their right of ownership. As a result of that admission, Urbanmine has been found liable to the plaintiff for the full value of the nickel. Judgment was also granted against the defendants who stole the nickel and fraudulently sold it to Urbanmine for the full value of the nickel.

[76] The judgment against Urbanmine in this case, however, does not automatically ground a finding of liability against the employee acting on the corporation's behalf. In order to find an employee personally liable for conversion, that employee would have to be proven to have either:

(a) taken possession of or benefited from the property personally with the effect of depriving the owner of his rights; or

(b) caused the employer to take possession of the property intending to deprive the plaintiff of its ownership rights.

[77] With respect to the first criteria, this case is similar to the facts in ***AVS*** where the Ontario Superior Court found at paragraph 41 that, because the director and employee in question never personally took possession of the vehicle parts, they could not be personally liable in conversion, unless it was proven that they knew or ought to have known that the parts were stolen.

[78] I have found here that Chisick did not personally take possession of the nickel or benefit in any way from its purchase and sale. Therefore, the only way that he could be personally liable to the plaintiff would be if he had knowledge that the nickel was stolen and engaged in conduct which was intended or understood by him to deprive the plaintiff of the nickel.

[79] In most cases, the second scenario would involve some element of intentional wrongdoing or knowledge that a fraud was being perpetrated for the employee to be held personally liable to the plaintiff. At the very minimum, actual knowledge or willful blindness would have to be proved.

[80] As stated by the British Columbia Supreme Court in ***Columere*** at paragraph 37, citing the Ontario Superior Court in ***CIT Financial Ltd. v. 1153461 Ontario Ltd.*** (2004), 47 B.L.R. (3d) 269 at para. 68:

> The facts surrounding the commission of the tort, (including the fraudulent or deceitful actions of the personal defendants) will be important to a determination of personal liability for a tort involving company property.

[81] The plaintiff argued that in this case, the Court should infer from the evidence that Chisick knew, ought to have known or was willfully blind to the fact that the nickel purchased by Urbanmine was stolen and that he is therefore liable for failing to take reasonable steps to ascertain the ownership of the nickel.

[82] The allegation is that Chisick should have been suspicious about the true origins of the nickel and taken additional steps to ascertain the truth. The plaintiff bears the onus of proving this. Chisick's evidence must be viewed in light of all of the circumstances at the time of the transactions, and the Court must be mindful that Chisick did not have the benefit of the hindsight now available to the Court, at that time.

[83] Looking at the evidence then, all parties accept that Chisick was lied to by Michael Schwartz about the origins and ownership of the nickel. There was no suggestion made that Chisick knew that Mike Smith was really Michael Schwartz or that the nickel was stolen.

[84] With respect to his testimony, I found Adam Chisick to be both credible and reliable. His evidence was given in a forthright manner, and no significant inconsistencies, or attempts to hide or skew the truth, arose out of his cross examination or other evidence.

[85] There was no evidence filed or called to contradict Chisick's evidence as to his responsibilities as a scrap metal buyer, or to suggest that he was acting

contrary to his usual dealings in his role with Urbanmine. There was no evidence of any pattern or history, of unlawful or deceitful conduct by him that would go to his credibility.

[86] This case is very different from the facts in ***Craig***, where the Court found that the sole director knew that his company did not have the right to cut the trees, but did so anyway, or ***AVS***, where the judge found that the director had little, or no, credibility and did not accept that he did not know that the truck parts were stolen. In that case the director had been convicted of theft of vehicle parts and there was ample evidence of credibility issues and wrongdoing on his part.

[87] In this case, Chisick testified that in his experience, the story he was given "checked out" because the person he was dealing with in purchasing the nickel said he worked for Schwartz Bros. Construction, was driving a company truck with Schwartz Bros. decals, was delivering the nickel on open flatbeds during normal business hours, was using an email which included the Schwartz name, and was asking that payments be issued to Schwartz Brothers by bank draft. He testified that in his experience it is not uncommon, particularly in demolition, for contractors to be paid in salvaged materials. He testified that, for instance metal may be sold as scrap or provided as compensation because it is damaged, off spec, or a contract did not go ahead as planned. Further, he did not find the fact that some of the nickel was stamped with a producer's name to be unusual because, in his experience, it is often the case that metal products are stamped when manufactured and later sold for scrap by other users or salvagers. He indicated

that he has never contacted a producer of stamped metal to check on ownership. He testified that he was not suspicious about where the nickel was coming from because he believed that he had done his due diligence in determining the name of the company that was bringing it in, their address and their vehicle licence plate number. He testified that he did not request identification because that was not a legal requirement or company policy at that time.

[88] Chisick testified that nothing in Schwartz's behaviour or the circumstances seemed suspicious at the time. He testified that the length of time that the sales went on, and the large amounts of nickel being delivered by Schwartz Brothers, only solidified his belief that the nickel was being received as payment for a contract Schwartz Brothers was working on.

[89] With respect to the evidence as to the quantities and duration of nickel delivered to Urbanmine, in my view, the fact that such large quantities were delivered on a regular basis and sold over such a long period may well have reinforced a belief that there was a legitimate contractual arrangement. One would not likely expect that theft of this magnitude and carrying on over the better part of a year would go undetected.

[90] There was also no evidence that Schwartz was desperate to offload the product, as I note that on at least one occasion he took the position in his negotiation with Chisick that the price was too low and declined to sell for the price quoted by Urbanmine.

[91] Similarly, there is no evidence that Urbanmine was anxious to offload the product. They too on at least one occasion sold to another consumer who offered more than ELG was offering for the nickel. Chisick was clearly taking the time to carry out his usual marketing duties of shopping for the best price.

[92] The evidence also established that Chisick told Al Goodman ("Goodman"), his counterpart at ELG, that the nickel was coming from a customer who was stockpiling nickel, received as payment for a contract. He conceded that Goodman inquiring as to where the large quantities of nickel were coming from likely happened more than once and was "a fair question". He testified that ELG was doing their due diligence just as he felt he had. Notably, Goodman, an experienced scrap buyer, accepted the explanation without further inquiry.

[93] And finally, when Chisick received an email from Michael Schwartz advising that nickel had been stolen from Vale, Chisick testified that he was in shock. And while the plaintiff argued that the fact that he did not call the police or Vale immediately suggests that he had known or suspected it was stolen, this in my view is not the only logical inference to be drawn. It may be, as Chisick testified that he did not know what to do but assumed that the RCMP would contact him shortly. There was no evidence that Urbanmine did not cooperate fully once contacted shortly thereafter.

[94] Also notably, when a representative of Vale contacted Chisick and advised that 16,000 pounds of nickel had been stolen from their mine and inquired as to whether they had bought any, it was Chisick who advised him that they had and

that it may have been more like 400,000 pounds. There was no evidence called to contradict the evidence of that discussion, nor suggestion made that it was not true.

[95] I find that there was no evidence which established that Chisick was doing anything other than doing his job as he normally did and acting in compliance with the policies and expectations of his employer in doing so. Buying and selling scrap metal was Chisick's role at Urbanmine and he was carrying out that role when the nickel was purchased. While I agree that the evidence suggests that as the vice president of marketing he made only cursory inquiries into the origin of the nickel, there was no evidence led that suggests that was out of the ordinary and that he had knowledge of or suspected that the nickel was stolen.

[96] I accept Chisick's evidence that he believed that he was dealing with Mike Smith who was a representative of Schwartz Bros. Construction and that he was told by Mike Smith (who was really Michael Schwartz) that Schwartz Brothers had a contract with a mine up north and was being paid in part with obsolete nickel. I accept that he assumed that their contract was with Vale, but that he had no more specific knowledge of that. And finally, I accept that he did not know or suspect that the nickel was stolen.

[97] With respect to whether he ought to have known, or was willfully blind as to whether the nickel was stolen, in my view that threshold is too low to hold an employee acting in his capacity as such, liable for his employer's conversion of property. As per my analysis of the jurisprudence above, I prefer the suggestion

that some element of actual knowledge, deceit or willfulness must be proven before holding any employee liable for conversion by his employer.

[98] However, given the lack of jurisprudence generally, and guidance from the Manitoba Courts on this issue, I will to make a finding with respect to whether Chisick ought to have known, or was willfully blind, as to whether the nickel was stolen.

[99] The evidence overall does not satisfy me that he ought to have known that it was stolen, or that he was suspicious that it may have been stolen but caused Urbanmine to purchase the nickel notwithstanding that suspicion. Based upon the information that he had at the time, and the events as they unfolded, it was not in my view unreasonable that he did not suspect that it was stolen, and I accept his evidence in that regard. He is therefore not liable on the basis of being willfully blind or reckless as to the origin of the nickel.

[100] I am, therefore, not satisfied on a balance of probabilities that Chisick personally converted the nickel, or that he unlawfully caused Urbanmine to convert the nickel.

[101] The claim against Adam Chisick is dismissed.

THIRD PARTY LIABILITY OF ELG

[102] Urbanmine, after a contested application, was granted leave to add ELG as a third party to this claim. Under their third party claim, the Urbanmine defendants seek contribution or indemnification from ELG pursuant to s. 2(1)(c) of ***The***

Tortfeasors and Contributory Negligence Act, C.C.S.M. c.T90 (the "***Tortfeasors Act***"), for any damages they are required to pay the plaintiff.

THE EVIDENCE

[103] As set out in the Agreed Statement of Facts:

A. The majority of the Vale nickel purchased by Urbanmine was sold to ELG. Of the 483,156 pounds of Vale nickel purchased by Urbanmine, 410,196 pounds was sold by Urbanmine to ELG for the sum of $2,858,211.20 USD.

B. ELG is in the business of purchasing, recycling and reprocessing scrap materials which it then sells to the stainless steel, aerospace, automotive and transportation industries.

C. Urbanmine and ELG had a business relationship dating back to Urbanmine's inception in 2007 and ELG was one of Urbanmine's biggest customers.

D. The transactions between Urbanmine and ELG were facilitated by Chisick and Goodman of ELG. On each occasion, Chisick and Goodman would negotiate an appropriate sale price for the Vale nickel. Once a price was agreed upon, ELG would send a written purchase order document to Urbanmine confirming the quantity of the material that was being provided by Urbanmine and the price to be paid by ELG.

E. Chisick and Goodman communicated by telephone and/or email to negotiate the transactions.

F. ELG produced 22 purchase order documents relating to the purchase of nickel from Urbanmine between April 11, 2012, and May 13, 2013.

G. Though ELG's purchase order document contained a blank space for Urbanmine to sign, Urbanmine never signed or returned any of ELG's purchase order documents back to ELG after the transaction was complete.

[104] In addition to the Agreed Statement of Facts, Adam Chisick, Al Goodman and Richard Jones, the current CEO of ELG, testified at the trial with respect to this issue. Their evidence will be considered below as part of my analysis.

THE POSITIONS OF THE PARTIES

[105] The Urbanmine defendants argued that pursuant to section 2 of the ***Tortfeasors Act*** any tortfeasor liable in respect of damage may recover contribution from any other tortfeasor who is, or would be if sued, liable in respect of the same damage.

[106] They argued that as part of the analysis on the third-party leave application, this Court has already determined that, *prima facie*, the Urbanmine defendants have established that ELG would, if sued by Vale, have been liable to Vale for their role in the conversion of the Vale nickel (**V*ale Canada Ltd. v. Schwartz*** 2021 MBQB 46, at paras. 14 and 17). That decision was upheld by the Manitoba Court of Appeal in ***Urbanmine v. ELG***.

[107] Urbanmine argued that based on the evidence at trial, and the facts as previously found by this Court, ELG would, if it had been sued by Vale, been liable

in conversion to Vale. They point out that the evidence is agreed to be that ELG purchased the Vale nickel from Urbanmine and subsequently sold it to North American Stainless and other customers. The evidence of Richard Jones at trial confirmed that ELG no longer had any of the Vale nickel in its possession when it learned that the material had been stolen. Based upon the strict liability nature of the tort of conversion, they argued that ELG's interference with the property of the plaintiff had been established and as such, had they been sued by Vale, ELG would have been liable to them for conversion as a joint tortfeasor.

[108] With respect to ELG's assertion that section 14 of the ***The Sale of Goods Act***, C.C.S.M. c. S10 (the "***SGA***"), creates a defence to the claim for contribution, Urbanmine argued that the right to make a claim for damages under the ***SGA*** does not constitute a right to be indemnified within the meaning of section 2(1)(c) of the ***Tortfeasor Act*** and should not preclude an order for indemnity or contribution by ELG. Further they argued that ELG did not counterclaim for such relief and could not now assert such a potential claim as a defence to contribution.

[109] In the alternative, Urbanmine argued that in the event that the Court finds that a potential claim pursuant to section 14 of the ***SGA*** can constitute a defence to contribution, the implied undertaking as to title in section 14 is not absolute and can be displaced where the circumstances of the contract show a different intention. They argued that in this case any statutorily implied warranty is displaced by the common intention of Urbanmine and ELG to buy and then re-sell the nickel. Urbanmine argued that the intention of a company in the business of

purchasing scrap to sell on to other end-users distinguishes this case from a situation where the end user has bought a product and has expectations with respect to acquiring good title to same.

[110] In response to the third-party claim, ELG did not dispute an argument that the conduct of ELG fits within the requirements for the strict liability tort of conversion, and that if they had been sued by Vale they would have been liable to Vale for conversion. However, ELG argued that if they had been sued by Vale they would have had the right to crossclaim against Urbanmine for damages for breach of the statutory warranty under section 14 of ***SGA***. They argued that the outcome of that crossclaim would have been a judgment against Urbanmine to compensate or indemnify ELG for any cost to them of having purchased nickel that the seller did not have good title to sell. That cost to ELG would have been the amount that ELG was found to owe to Vale in conversion.

[111] ELG argued that in this case, although Vale did not claim against ELG for conversion, the built in defence in section 2(1)(c) of the ***Tortfeasor Act*** applies to ensure the same end result.

[112] Specifically, ELG argued that their right to claim for damages pursuant to section 14 of the ***SGA*** creates a right of indemnification from Urbanmine and as such, precludes the Court from making an order of contribution or indemnification pursuant to section 2(1)(c).

[113] They argued that section 14 of the ***SGA*** creates a statutorily imposed warranty as to good title on every sale transaction, unless the seller can prove a

different intention. They argued that in this case there is no evidence which would support the finding of a different intention between the parties, and therefore Urbanmine was bound by the condition that it had to have the ability to pass good title to ELG.

[114] In this case, because the nickel has been established to have been stolen, and Urbanmine found liable for the tort of conversion, Urbanmine has breached that implied condition. As such, ELG would be entitled, pursuant to section 54 of the ***SGA*** to damages for any loss resulting from that breach. That right to damages they argued constitutes a "right of indemnification" and serves as a complete defence to any claim for contribution or indemnification under section 2(1)(c) of the ***Tortfeasor Act***. They argued that Urbanmine's only recourse is against the parties that sold them the nickel.

[115] Alternatively, ELG argued that if the Court is not satisfied that the right to claim damages pursuant to the ***SGA*** constitutes a right to indemnification within the meaning of section 2(1)(c), the Court should impose the "just and equitable" result pursuant to section 2(2) of the ***Tortfeasor Act*** and decline to order contribution or indemnification from ELG. ELG argued that to allow Urbanmine to successfully sue the party to which it sold stolen property creates an absurd result and a result that is different from that which would have resulted if ELG had been sued in conversion. As such they argued that the third-party claim should be denied under section 2(2) of the ***SGA.***

ANALYSIS

[116] This is a claim pursuant to section 2(1)(c) of the ***Tortfeasor Act*** which reads as follows:

> any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person is entitled to recover contribution from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.

[117] As set out by the Manitoba Court of Appeal in ***Urbanmine v. ELG***, the statutory cause of action for contribution or indemnification pursuant to section 2(1)(c) of the ***Tortfeasor Act*** has two prerequisites. First the party seeking contribution must establish that the party from whom they are seeking contribution is either liable to the plaintiff, or would have been liable to the plaintiff, if sued. Second the damage for which contribution is claimed must be the same as the damage in the original claim.

[118] Both this Court in ***Vale v. Schwartz et. al.***, 2021 MBQB 46, ("***Vale v. Schwartz***"), on the leave application to add ELG as a third party, and the Court of Appeal in ***Urbanmine v. ELG*** in upholding that decision, found that Urbanmine had established, *prima facie*, that ELG would, if sued by Vale, have been liable to Vale for their role in the conversion of the Vale nickel. The evidence at trial, which included admissions by two representatives of ELG, that ELG had purchased from Urbanmine and subsequently resold nickel that had been stolen from Vale, confirmed that the conduct of ELG constituted interference with Vale's property and amounted to conversion at law.

[119] This finding was not disputed by ELG in their argument at trial. I agree that they would have been found liable for conversion.

[120] Further, there is no question on the facts of this case that the damage for which contribution is claimed from ELG is the same damage for which Urbanmine has been found liable to the plaintiff. This finding was confirmed by the Court of Appeal in ***Urbanmine v. ELG*** and was not contested by ELG at trial.

[121] On the basis of those findings, Urbanmine has a right to seek contribution or indemnification from ELG, subject to ELG establishing that they are entitled to be indemnified by Urbanmine in respect of the same liability for which contribution is sought.

[122] The issue then is whether ELG's potential claim against Urbanmine for breach of the implied warranty as to title pursuant to sections 14 and 54 of the ***SGA*** constitutes an entitlement to be indemnified within the meaning of section 2(1)(c) of the ***Tortfeasor Act***.

[123] With respect to this issue, Urbanmine argued that the right to make a claim for damages under the ***SGA*** does not constitute a right to be indemnified within the meaning of section 2(1)(c) of the ***Tortfeasor Act*** and should not preclude an order for indemnity or contribution by ELG. Further they argued that ELG did not counterclaim for such relief, and as such, they cannot now assert a potential claim they chose not to bring, as a defence to the claim for contribution currently before the Court.

[124] While I have some sympathy for the argument that the Court is being asked in the circumstances of this case to adjudicate the merit of a claim that is not formally before the Court, I am of the view that it is both necessary and advisable to do so for the following reasons.

[125] First, ascertaining whether the person seeking contribution has an offsetting obligation to the party from whom they are seeking contribution is an integral part of the provision under which Urbanmine has applied to Court for relief.

[126] Second, the wording of that provision states that no person is entitled to recover contribution from any person "entitled" to be indemnified by him. The meaning of entitled to be indemnified is not defined and suggests to me that the Court must consider evidence of any entitlement which may serve to offset the applicant's right to contribution. An example given by the Court of Appeal in ***Urbanmine v. ELG*** was the existence of a contractual indemnification between the parties. Whether any such purported contractual provision entitled the party to be indemnified is an issue that presumably would have been decided by the Court in assessing the merit of that defence to a claim for contribution.

[127] Third, the Court has an obligation to apply the law and manage the proceedings in a manner proportionate to the issues before the Court and the interests of the parties. In my view, ELG is correct in asserting that if they had been sued and found liable to the plaintiff in this action, or if Urbanmine was granted an order of contribution or indemnification from ELG, ELG would then be entitled to claim against Urbanmine for breach of warranty as to title pursuant to

the provisions of the ***SGA*** and recoup their losses. In this case, rather than waiting until ELG is subject to a contribution or indemnification order against them with respect to their role in the purchase and sale of Vale nickel, ELG has chosen to assert their right to claim damages in the event that an order is made against them, as a defence to that claim. That seems to me to be consistent with the intention behind the provision contained in section 2(1)(c) of the ***Tortfeasor Act.***

[128] The evidence upon which the Court's determination will be made in any of the above scenarios is the same and is currently before the Court. Further, Urbanmine has been aware that ELG was asserting this defence to the third-party claim since prior to the Court granting leave for filing of the claim. There is no prejudice to Urbanmine in considering the merits of the defence put forward by ELG.

[129] I therefore interpret section 2(1)(c) of the ***Tortfeasor Act*** to include any valid claim for indemnification established on evidence before the Court by the third party from whom contribution is sought.

[130] The next issue is then to consider whether ELG has established to the satisfaction of the Court that it is "entitled to be indemnified" by Urbanmine in respect of the liability for which contribution is sought, or whether Urbanmine is entitled to its relief sought under the same provision.

[131] The question is then, has ELG established that it has a claim pursuant to sections 14 and 54 of the ***SGA***, which if brought would be successful?

[132] Section 14 of the ***SGA*** reads as follows:

> In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is
>
> (a) an implied condition on the part of the seller that, in the case of a sale, he has a right to sell the goods, and that, in the case of an agreement to sell, he will have a right to sell the goods at the time when the property is to pass;
>
> (b) an implied warranty that the buyer shall have and enjoy quiet possession of the goods; and
>
> (c) an implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made.

[133] In the cases filed with the Court, a provision similar or identical to the provision in Manitoba imposing an implied warranty as to title was relied upon by buyers of property who suffered a loss because the seller did not have title which could lawfully be transferred to the buyer. These cases involved property, which was later determined to have been stolen or illegally imported. Where the buyer was not entitled to keep the property or was required to compensate another party for their loss, the buyer then claimed compensation from the seller for breach of the implied warranty as to title.

[134] Urbanmine argued that because these cases did not involve the tort of conversion, or a third-party claim, they do not stand as precedent for the matter before the Court.

[135] While it is true that none of the cases provided by either party were on all fours with the facts before this Court the findings were instructive in some respects.

[136] First, Section 14 of the ***SGA,*** or the identical provision in other provinces, has been interpreted by the Courts to create a statutory warranty as to good title

on sale transactions, unless the seller can prove a different intention existed between the parties to the sale (See ***McCallum v. Goldman***, [1982] O.J. No. 3438 (Ont. Co. Ct.) ("***McCallum***") and ***Jen-Zam Enterprises Inc. (c.o.b. Richmond Hill Subaru) v. Mehrabian***, [2006] O.J. No. 2130 (Ont. S.C.J.) ("***Jen-Zam***").

[137] This interpretation in my view is consistent with the plain wording of this section.

[138] Second, the case law has established that when a seller does not have good title to pass to the buyer, the burden is on the seller to establish that the intention of the parties was not to have the implied warranty apply. (***McCallum*** at para. 43 and ***Smith v. Goral***, 1952 CanLII 294 (ON SC) [1952] OWN 421 — [1952] 3 DLR 328 at para. 7).

[139] And finally, whether or not there was an intention other than to have the implied warranty apply, is a factual finding to be made on the specific facts of each case. (***J.D. McArthur Co. v. Alberta & Great Waterways Railway,*** 1924 CarswellAlta 11 (Alta. Sup. Ct. App. Div.).

[140] Even where the seller is also innocent and had no knowledge that the goods were stolen, the Court has found that the seller's recourse is against the person who sold them the property (***Jen-Zam*** at para. 20).

[141] In this case, Urbanmine argued that based on the nature of the relationship between the parties and the nature of the businesses involved the implied condition as to title should be found to have been displaced by the common

intention of Urbanmine and ELG to buy and resell the Vale nickel. The argument seems to be that, because this is a conversion case, both Urbanmine and ELG as buyers and sellers of scrap metal, were equally involved and, therefore, equally liable in the conversion of the plaintiff's property. Urbanmine urged the Court to distinguish this situation from one where an end user is, and should be, entitled to rely upon the implied warranty that they are receiving good title to an asset they intend to use and benefit from.

[142] The implication is that based upon the ongoing business relationship involving the buying and selling of salvaged product between Urbanmine and ELG, and by virtue of ELG being a commercial party in the business of buying and selling scrap, the Court should impute an understanding or agreement between the parties that there would be no warranty as to title.

[143] Conversely ELG argued that the onus is on Urbanmine to establish a different intention and that there is no evidence before the Court in this case which would support such a finding.

[144] With respect to this issue, I agree with ELG that Urbanmine has been unable to point to any specific evidence that is sufficient to displace the statutorily imposed condition that the seller would have good title to sell the property. There was no evidence of any discussions, documentation, or prior dealings between Urbanmine and ELG from which the court could infer a different intention.

[145] In fact, ELG pointed to evidence arising out of the testimony of Goodman and Jones which supported a finding that ELG took steps to avoid purchasing

stolen material, including dealing only with dealers and having policies in place to vet all new customers and to question dealers if anything raised concerns.

[146] ELG also pointed to the evidence of both Goodman and Chisick that Goodman made inquiries in this case with respect to the source of the nickel. Chisick testified that Urbanmine did not want to sell stolen nickel and that he believed Goodman's inquiries about the origin of the nickel to be a fair inquiries.

[147] The only possible evidence before the Court which in my view could suggest an alternate intention between the parties was the evidence that ELG maintains a fund to deal with problems relating to stolen property, and that Goodman himself described his inquiry into the origin of the nickel as "facetious", suggesting that these were not serious concerns, but were perhaps considered the inevitable cost of doing business. The existence of a reserve fund, however, is equally consistent with prudent business practices in an industry where despite best efforts, the potential to buy stolen property exists.

[148] The evidence is not, in my view, sufficient to meet Urbanmine's onus of establishing an intention that displaces the warranty.

[149] On the basis of the above findings, I conclude that ELG would be entitled to compensation from Urbanmine for breach of the implied warranty as to title if any loss was suffered by ELG as a result. Such a loss would include any order of contribution or indemnity to Urbanmine. As such, ELG has established that it is entitled to be indemnified by Urbanmine in respect of the liability for which their contribution is sought.

[150] In other words, I am satisfied that ELG has established that it has an offsetting claim for indemnification from Urbanmine and as such I decline to order any contribution or indemnification from ELG toward the judgment against Urbanmine.

[151] Given my finding pursuant to section 2(1)(c) of the ***Tortfeasor Act*** it is not necessary to consider section 2(2).

[152] The third-party claim against ELG is dismissed.

COSTS

[153] If the parties are unable to agree on costs, time may be set back before me with respect to same.

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McCarthy J.